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ARTICLE

How MAR/CS MAD changed the EU's view on market abuse

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Abstract The regulation of financial markets has always been a cornerstone of the European Union's strategy in order to improve the investment services and ensure the protection of investors. In the last few years, the EU has decided to develop the regulatory framework of market abuse. This article demonstrates the key differences between the previous and present regulation and provide a few practical answers to the questions of the market participants concerning legitimate behaviour, practice in the Member States, and duplication of sanctions.

Keywords MAR · CS MAD · Financial market · Market abuse · Criminal sanctions

1 Introduction

The regulation of financial markets has always been a cornerstone of the European Union's (henceforth EU) strategy in order to improve the investment services and ensure the protection of investors across the EU. In the past decades, the financial market has changed in several aspects. New trading venues have appeared on the market and by now, not only regulated markets are operated in the EU but also multilateral trading facilities (also known as MTF) and organised trading facilities (also known as OTF) have started operating their systems. IT development has also changed the types of financial instruments that make it possible to trade with for example options, futures, swaps, forwards and any other derivative contracts if settled or may be settled in cash.

For this reason, realising the recent improvements in the financial markets, in 2011 the European Commission (henceforth Commission) decided to revise the regulatory

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framework provided by the Markets in Financial Instruments Directive (2004/39/EC, henceforth MiFID[1]). Almost three years later, the European Parliament (henceforth Parliament) and the Council of the European Union (henceforth Council) adopted the new Directive on Markets in Financial Investments (2014/65/EU, henceforth MiFID II[2]) and the Regulation on Markets in Financial Investments (Regulation (EU) 600/2014, henceforth MiFIR[3]) which could be applied from 3 January 2018. With the development of the financial markets, the range of unlawful behaviours in the financial markets has also widened. The legislative framework of the Market Abuse Directive (2003/6/EC, henceforth MAD[4]) was no longer satisfactory to combat unlawful behaviours on the financial markets, therefore the legislatives of the EU decided to make a regulation harmonising the rules for market abuse and issue a directive on the criminal sanctions for market abuse. As a result, the Market Abuse Regulation (Regulation (EU) 596/2014, henceforth MAR[5]) and the new Market Abuse Directive (2014/57/EU, henceforth CS MAD[6]) have been adopted by the Parliament and the Council. Both have been applicable since 3 July 2016.

The purpose of this article is to take a closer look at the legislative framework of market abuse, with particular reference to criminal law and to prove that the criminal perception of market abuse has been strengthened in the EU.

2 Fight against market abuse in the EU

Legislation concerning market abuse does not have a great past. The first case can be detected from the early 60's in the United States,[7] where a broker sold his securities in two parts after a phone conversation about dividend reduction, but before the disclosure of this inside information. The Securities and Exchange Commission (henceforth SEC) decided to initiate proceedings against this broker based on the fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. In the 60 years since then, the regulation has been improved not just in the Unites States but also in the EU – which leads us to MAR and CS MAD.

[1]Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2004] OJ L 145/1 [9].

[2]Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L 173/349 [11].

[3]Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 [2014] OJ L 173/84 [21].

[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 [8].

[5]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 [20].

[6]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 [12].

[7]Cady, Roberts & Co., 40 S.E.C.907 (1961) [1].

To understand the criminal aspects of market abuse, it is essential to know more about the provisions of MAR. MAR provides all the definitions, legitimate behaviours and unlawful behaviours that are of relevance in criminal cases. Moreover, MAR regulates the administrative sanctions and other administrative measures that can be taken in relation to different infringements. There are several developments introduced by MAR for an up-to-date regulation. Some of these developments are new, but mostly further developments of MAD provisions.

2.1 Key definitions

First of all, Art. 7 MAR defines the key element of the regulation: *inside information*. The definition is based on that created by MAD, but it needed to be extended to the new trading venues and financial instruments regulated in MiFIR/MiFID II. To clarify the definition, Art. 7 (2) MAR defines *information of a precise nature* as follows: "*. . . information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instrument, the related spot commodity contracts, or the auctioned products based on the emission allowances*." The information has a *significant effect on the prices* if "*. . . a reasonable investor would be likely to use as part of the basis of his or her investment decision*." (Art. 7 (4) MAR).

It is of importance as well, to be able to identify those who have access to inside information. Although MAD also obliged the issuers to draw up an *insider list*, MAR has harmonised the provisions. The aim of the insider lists is to make it easier for the competent authority to investigate possible market abuse (Recital 56 of MAR). Thus, the competent authority has the right to be sent the insider list upon request (Art. 18 (19 (c) MAR). These lists are useful for controlling the flow of inside information as well as making it possible for issuers to manage their confidentiality duties (Recital 57 of MAR). At the same time, there are issuers which also include those who potentially have accessed insider information on their insider lists, even if they have not. This may cause the "*inflation in the number of persons included*" which would have the result of useless insider lists.[8] The European Securities Markets Authority (henceforth ESMA) also states that it leads to the same "*inflation*" if the issuers use the permanent insider section for all insiders even if the event-based insider list had been used. The permanent insider section has to be used for those who "*have access all times to all inside information*."[9] The proper usage of insider lists is therefore a premise of a successful investigation.

2.2 Unlawful behaviour – what is allowed and what is not?

The types of unlawful behaviours have not changed since MAD, but the definition of *insider dealing* has been clarified. Accordingly, Art. 8 (1) MAR stipulates that "*the*

[8] ESMA [17], p. 49-50.

[9] ESMA [17], p. 52-53.

use of inside information by cancelling or amending an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information, shall also be considered to be insider dealing." It is also to be recognised that there are policies on the markets which are accepted and used by several issuers, yet which can be considered insider dealing. Thinking of the *blanket order cancellation policy*, we can see that there are issuers which, upon coming into possession of inside information, immediately cancel all of their orders relating to this information. Although this practice is against MAR provisions, it must be noted that the presumption of insider dealing is rebuttable under Recital (25) MAR and the constitution of insider dealing has to be assessed on case-by-case basis.[10] There are behaviours that may be considered insider dealing on the basis of using inside information, but MAR defines them as legitimate behaviour for being a 'coincidence' (Art. 9 MAR).

The prohibition of *unlawful disclosure of inside information* still exists under MAR. However, market soundings are useful tools to increase investors' confidence in financial markets and "*important for the proper functioning of financial markets*." (Recital (35) of MAR). There is a chance that during market soundings, inside information is disclosed, but not necessarily while violating the prohibition. In some cases, the disclosing market participant benefits from protection.[11] Disclosing the inside information is not prohibited under Art. 11 (3) MAR if the disclosing market participant, "*prior to conducting a market sounding, specifically consider whether the market sounding will involve the disclosure of inside information. The disclosing market participant shall make a written record of its conclusion and the reasons therefore. It shall provide such written records to the competent authority upon request*."

There has been some uncertainty concerning *public disclosure of inside information* since MAR came into force. It is clear that issuers remain obliged to disclose all inside information relating to the issuer and their financial situation and that this disclosure cannot be combined with its marketing activity. Inside information shall be posted and maintained on the issuer's website for at least five years. (Art. 17 (1) MAR) However, at first sight, collective investment undertakings without legal personality do not absolutely fit the definition of "issuer" as in Art. 3 (19) (21) MAR. For this reason, the question arises of whether these collective investment undertakings are obliged to disclose inside information or not. According to ESMA's statement, it is the collective investment undertakings' obligation to disclose inside information regardless of if they have a legal personality or not. This is namely because if the collective investment undertaking does not have a legal personality, the asset manager is considered to be held responsible for any infringement of the obligation.[12] ESMA also provides collective investment undertakings with a list of potential cases of inside information. The followings should be highlighted from the list: "*any situation with significant impact* (*appreciation or depreciation*) *on the valuation of the collective investment undertaking assets and, as a result, on the value of the collective invest-*

[10] ESMA [16], p. 10-11.

[11] ESMA [17], p. 44.

[12] ESMA [16], p. 16-17.

ment undertaking's units; cases where the collective investment undertaking has been affected by fraud theft or adverse tax ruling" or any events that directly affects the issue or redemption of units. This list is not complete.[13]

The opportunity to *delay disclosure of inside information* to the public is still provided by MAR if the "*immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant*." The delay should not cause the misleading of the public, and the confidentiality of the information is to be ensured. After disclosing the delayed information, the issuer or emission allowance market participant has to inform the competent authority that the disclosure was delayed and provide a written explanation (Art. 17 (4) MAR). The disclosure of the inside information may be delayed, but later it turns out that the information has lost its inside nature. In this case, the issuer or emission allowance market participant is not obliged to disclose the information, but still has to update the insider list accordingly.[14]

A new opportunity, established under MAR, is to delay the disclosure of inside information in order to preserve the stability of the financial system if the issuer is a credit institution or a financial institution. This opportunity to delay inside information is only applicable to delays based on *public interest* and the issuer has to ensure the confidentiality of that information and notify the competent authority. The competent authority shall consent to the delay of disclosure of the information. If not, the issuer is obliged to disclose the information immediately (Art. 17 (5)-(6) MAR). "*When assessing the public interest, the credit/financial institution should attempt to identify different entities or groups who could be directly or indirectly affected by the decision to delay the disclosure of the inside information and whose interests may be understood as a public interest. During the assessment of the public interest, it is important to consider interests beyond the direct economic impacts and other financial interests of the public*."[15] It is also not to be forgotten that ESMA is consulting market participants on including a list of issuers which are not a credit or financial institution, but which are controlling credit or financial institutions. The reason behind this extension of definition could be that significant issuers could also have an effect on the stability of the financial system.[16] It also has to be clarified that if the competent authority does not consent to the delay of disclosure of the inside information under Art. 17 (5) MAR, the issuer does not have the opportunity to resort to the delay of disclosure under Art. 17 (4) MAR.

An additional question arises concerning the disclosure of information related to credit institutions' Minimum Requirement of own funds and Eligible Liabilities (henceforth MREL). As we know, the EU also harmonised the regulatory background of credit institutions' requirements in the Bank Recovery and Resolution Directive

[13] ESMA [16], p. 17-18.

[14] ESMA [16], p. 13-14.

[15] ESMA [16], p. 15.

[16] ESMA [17], p. 42.

(henceforth BRRD)[17] and the MREL Regulation[18] in order to help the *financial stability* of these institutions. BRRD requires recovery plans to be prepared to overcome financial distress and sets up a national resolution fund. The rules of BRRD and MREL Regulation ensure the protection of credit institutions' and creditors' assets and are always developed to increase the resilience of EU institutions and support the EU economy.[19] The financial situation of credit institutions is continuously changing and for this reason it would be reasonable not to disclose certain information in order to protect the assets of creditors. Yet, ESMA considers this information to be disclosed under Art. 17 (1) MAR, which does not mean that the requirements for a delayed disclosure could not be applied under Art. 17 (4) or (5) MAR. It is to be evaluated on a case-by-case basis whether the conditions are met or not.[20]

Concerning *manager's transactions*, MAR established a closed period of 30 calendar days before the announcement of an interim financial report or a year-end report. This means that "*a person discharging managerial responsibilities within an issuer shall not conduct any transactions on its own account or for the account of a third party, directly or indirectly, relating to the shares or debt instruments of the issuer or to derivatives or other financial instruments linked to them*" during the closed period (Art. 19 (11) MAR). This is to ensure that the investors are not misled in this sensitive period.

Special rules apply to investment recommendations concerning disclosure of inside information. Investment recommendations "*means information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public*." (Art. 3 (1)(35) MAR). Investment recommendations should be objectively presented and all interests or indications of conflicts have to be disclosed (Art. 20 (1) MAR). The Commission created detailed requirements in its Investment Recommendations Regulation (henceforth IRR)[21] to avoid misleading recommendations. The IRR requires, among others, the following: producers of investment recommendations shall be easily identified; facts shall be clearly distinguished from opinions and estimates; the source of information shall be drawn up and there is a general obligation in relation to disclosure of interests or of conflicts of interest. The infringement

[17] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council [2014] OJ L 173/190 [10].

[18] Commission Delegated Regulation (EU) 2016/1450 of 23 May 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodology for setting the minimum requirement for own funds and eligible liabilities [2016] OJ L 237/1 [6].

[19] European Commission Press Release [13], 2016.

[20] ESMA [16], p. 13.

[21] Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest [2016] OJ L 160/15 [5].

of these requirements may easily lead to the violation of prohibition of unlawful disclosure of inside information.

Art. 15 MAR still prohibits *market manipulation* defined under Art. 12 MAR. The key element of market manipulation, which is to give the market participants false or misleading signals, has not changed since MAD. Measures are provided "*that are capable of being adapted to new forms of trading or new strategies that may be abusive*." (Recital (38) MAR). There are transactions or orders to trade that may be deemed to violate the prohibition, but the reason behind the financial decision was legitimate or was conform with accepted market practice. These *accepted market practices* can rebut the presumption only if they were established by the competent authority. Yet, an illegitimate reason can be behind accepted market practices established by the competent authority (Recital (42) MAR).

2.3 Role of the national competent authority and ESMA

To support the enforcement of rules mentioned above, MAR established a two-level authority system including the *national competent authority* and *ESMA*. The national competent authority has specific supervisory and investigatory powers (e.g. can access any document and data, request the freeing or sequestration of assets, refer matters for criminal investigation) under Art. 23 (2) MAR. ESMA was established in 2010 by the ESMA Regulation[22] to support the stability of the financial system and ensure "*the integrity, transparency, efficiency, and orderly functioning of financial markets*." (Art. 1 (5) (b) of ESMA Regulation). There is a strict cooperation between the national competent authorities and ESMA including exchange of information to help with the enforcement of MAR.

2.4 Sanctions

The opportunity to take administrative sanctions and criminal sanctions is not a new regulatory solution. MAD had also established both administrative and criminal sanctions to fight market abuse. The novelty that was developed by MAR and CS MAD was that the requirement of criminal sanctions was unified under CS MAD. The reason behind the harmonisation was to "*ensure the effective implementation of Union policy on fighting market abuse*." (Recital 8 CS MAD).

2.4.1 Administrative sanctions

According to Art. 30 (1) MAR, appropriate administrative sanctions and other administrative measures can be taken by the competent authority in relation to at least the following infringements:

- insider dealing (including recommending or inducing to engage in inside dealing and unlawful disclosure of inside information) (Art. 14 MAR)

[22]Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L 331/84 [19].

- market manipulation (Art. 15 MAR)
- establishment and maintenance of arrangements, systems and procedures for prevention and detection of market abuse (Art. 16 (1), (2) MAR)
- failure to inform the public about inside information (Art. 17 (1), (2), (4), (5), (8) MAR)
- failure to draw up, update or provide the insider list (Art. 18 (1), (6) MAR)
- infringement of the rules laid down concerning managers' transactions (Art. 19 (1), (2), (3), (5), (6), (7) MAR)
- infringement of the rules of investment recommendations and statistics (Art. 20 (1) MAR)
- failure to cooperate or to comply with an investigation (Art. 23 (2) MAR)

The competent authority has the power to impose at least the sanctions or to at least take measures established under Art. 30. (2) MAR. These sanctions and measures can be, among others:

- an order requiring to cease the conduct and to desist from repetition
- the disgorgement of the profits gained or losses avoided
- a public warning including the name of the person responsible
- withdrawal or suspension of authorisation of an investment firm
- an administrative pecuniary sanction that is maximised differently in respect of a natural person (highest administrative pecuniary sanction is EUR 5 000 000 for infringements of Art. 14 and 15 MAR) or a legal person (highest administrative pecuniary sanction is EUR 15 000 000 or 15 % of the total annual turnover of the legal person for infringement of Art. 14 and 15 MAR)

The competent authority has to take into account all relevant circumstances when determining the type and level of administrative sanctions or measures. Art. 31. (1) MAR gives the competent authority examples of these relevant circumstances (e.g. gravity and duration of infringement, financial strength of the responsible person, previous infringement or measures taken by the responsible person to prevent its repetition).

It is also of importance that MAR prescribes that administrative sanctions and measures can only be taken without prejudice to any criminal sanctions and without prejudice to the supervisory powers of competent authorities (Art. 30 (1) MAR). The reason behind this provision is to ensure the supremacy of the criminal authorities and courts which leads Member States to shift the proportions of sanctions in favour of criminal sanctions for some infringements. This provision is consistent with the adoption of CS MAD. Furthermore, before MAR came into force, Member States had the chance to decide not to lay down rules for administrative sanctions if there were already criminal sanctions in their national law (Art. 30 (1) second subparagraph MAR). The priority of criminal sanctions is also reflected in this provision but there were merely five Member States that decided not to lay down rules for administrative sanctions for a few infringements. These Member States were *Denmark* (all infringements under MAR), *Finland* (infringements under Art. 14, 15 and 17 MAR), *Germany* (infringements under Art. 14 and 15 MAR), *Ireland* (infringement under

Art. 30 (1) first subparagraph, (b) MAR) and *Poland* (infringements under 14, 15, 17 (1), 17 (4) and 30 (1) first subparagraph, (b) MAR).[23]

2.4.2 Criminal sanctions

As mentioned above, criminal sanctions have been harmonised by CS MAD since 3 July 2016. The main aim of the harmonisation was to ensure that the most serious market abuse offences were punishable by criminal law, helping the effective implementation of the EU's policy on fighting market abuse (Recital (8) CS MAD). Accordingly, CS MAD "*establishes minimum rules for criminal sanctions for insider dealing, for unlawful disclosure of inside information and for market manipulation to ensure the integrity of financial markets in the Union and to enhance investor protection and confidence in those markets*." (Art. 1 (1) CS MAD).

The provisions of CS MAD order Member States to ensure that insider dealing, recommending or inducing another person to engage in insider dealing; unlawful disclosure of inside information and market manipulation "*constitute criminal offences at least in serious cases and when committed intentionally*." (Art. 3 (1), 4 (1) and 5 (1) CS MAD).

The definition of insider dealing as a criminal offence is given according to Art. 8 (1) MAR as: "*insider dealing arises where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates*." (Art. 3 (2) CS MAD). Cancelling or amending an order concerning a financial instrument is also considered to be insider dealing if the cancellation or amendment was based on inside information (Art. 3 (4) CS MAD). The definition of unlawful disclosure of inside information is the same as stated in Art. 10 MAR excluding also where the "*disclosure qualifies as a market sounding made in compliance with Art. 11 (1) to (8) MAR*." (Art. 4 (2) CS MAD). The definition of market manipulation was stated according to Art. 12 MAR and includes every entering into a transaction, placing an order to trade, or behaviour that causes the appearance of false or misleading signals on the market or has an effect on the price of a financial instrument (Art. 5 (2) MAR).

The perpetrator of the insider dealing or unlawful disclosure of inside information can be any person who possesses inside information relating to any financial instrument if the person knows that it is inside information. There are specified circumstances that may in particular result in the possession of inside information. If a person is closely related to an issuer or emission allowance market participant (e.g. members of administrative, management or supervisory bodies; having a holding in the capital, accessing information as an employee) or being involved in criminal activity is likely to be able to become a person who possesses inside information (Art. 3 (3) and 4 (3) MAR).

Recommending or inducing another person to engage in insider dealing is considered a criminal offence *sui generis*, but the use of recommendations or inducements

[23] ESMA [15], p. 4.

"*amounts to insider dealing where the person using the recommendation or inducement knows it is based upon inside information*." (Art. 3 (6) and (7) MAR). In accordance with the provisions of Art. 6 CS MAD, Member States are obliged to ensure that inciting, aiding and abetting the offences and the attempt to commit any of the offences mentioned above is also punishable as a criminal offence.

CS MAD also legitimates some behaviours according to Art. 9 MAR, which indicates that possessing and using the inside information is not a crime in itself.

Member States are also obliged to ensure that effective, proportionate and dissuasive criminal penalties are imposed when the criminal offences referred to in Art. 3 to 6 CS MAD are committed. Natural persons shall be subject to a maximum term of imprisonment of *at least four years* when committing insider dealing (Art. 3 CS MAD) or market manipulation (Art. 5 CS MAD), while a maximum term of imprisonment of *at least two years* applies when committing unlawful disclosure of inside information (Art. 4 CS MAD). Legal persons shall also be liable for criminal offences "*committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person*." This position can be based on "*a power of representation of the legal person; an authority to take decisions on behalf of the legal person; or an authority to exercise control within the legal person*." (Art. 8 (1) CS MAD). The sanctions that legal persons can be subject to shall also be effective, proportionate and dissuasive, including criminal or non-criminal fines and sanctions such as exclusion from entitlement to public benefits or aid (Art. 9 (a) CS MAD), placing under judicial supervision (Art. 9 (c) CS MAD), judicial winding-up (Art. 9 (d) CS MAD) or temporary or permanent closure of establishments which have been used for committing the offence (Art. 9 (e) CS MAD) etc.

2.4.3 Administrative and criminal sanctions and other administrative measures taken by Member States

In accordance with Art. 33 (1) MAR, ESMA prepares its annual report on administrative and criminal sanctions and other administrative measures taken by Member States during the previous year. This report was first prepared in 2018, considering only the sanctions issued on the basis of MAR between 3 July 2016 and 31 December 2017. In this period of time, there were still ongoing cases and investigations carried out under MAD. For this reason, the report "*does not allow to observe trends or tendencies in the imposition of sanctions, and does not provide a fair representation of the market abuse activities*." As can be seen, no sanctions were imposed in 2016, but the number of imposed sanctions increased in 2017.[24]

In Germany, seven criminal offences were sanctioned by criminal pecuniary sanctions (a total amount of EUR 12 450), and all of the cases were related to market manipulation.[25] Regarding administrative sanctions in 2017, in two cases (one in Slovenia and one in Lithuania) measures other than pecuniary sanctions were imposed for the infringement of insider dealing and unlawful disclosure of inside information.

[24] ESMA [15], p. 6.

[25] Ibid.

For the infringement of market manipulation, 35 pecuniary sanctions and seven other than pecuniary measures were imposed all over the EU, the most active Member State was Sweden with 29 pecuniary sanctions. For other infringements of MAR, 107 pecuniary sanctions and 111 other than pecuniary measures were imposed altogether. Regarding the pecuniary sanctions, the most active Member State was Sweden in this regard as well, but the most other than pecuniary measures were taken by Portugal.[26]

In its second report, ESMA stated again that "*the identification of trends or practices among national competent authorities would still be premature"* for the reasons mentioned above "*since MAR has been applied only for two years and a half"* and investigations on the basis of the previous legislation are still on-going.[27]

Criminal sanctions were only imposed in Germany again, 15 cases relating to market manipulation ended up with pecuniary sanctions (a total amount of EUR 65 650).[28] However, the number of administrative sanctions was more than the previous year. 10 pecuniary sanctions and 3 other than pecuniary measures were imposed by Member States for infringement of insider dealing or unlawful disclosure of inside information, the most pecuniary sanctions were imposed in Belgium with a total of 7 sanctions. [29] For infringements of market manipulation, 71 sanctions were imposed altogether. The most active Member State was still Sweden with 29 pecuniary sanctions.[30] Concerning other infringements of MAR, there was the total number of 373 sanctions and still Sweden was the most active with 164 pecuniary sanctions,[31] but the number of other than pecuniary measures was the highest in Portugal with 115 sanctions.[32]

Going along with ESMA's position regarding the trends and tendencies that cannot be identified yet after such a short period of time, it can be seen that the number of criminal sanctions imposed is very low: only Germany seemed to be active by the end of the year 2018. There are also many differences among Member States regarding the number of administrative sanctions imposed, since although there were countries imposing over 100 sanctions, there were also countries that had not imposed any sanctions yet.

Although my intention was to prove that according to MAR and CS MAD the criminal perception of market abuse has been strengthened in the EU, this seems to be rebutted. Regarding the rules of MAR and CS MAD, the criminal sanctions are preferred for the most serious infringements, but so far criminal sanctions are rarely imposed by Member States. Of course, this short period of time does not necessarily indicate what the coming years will show, since one of the reasons could be that court proceedings usually take more time until a judgment is made. The developments of the following years will be more indicative and informative concerning the role of criminal law in this area of EU law.

[26]ESMA [15], p. 6-8.

[27]ESMA [18], p. 6.

[28]ESMA [18], p. 10.

[29]ESMA [18], p. 7.

[30]EMSA [18], p. 16.

[31]Ibid.

[32]ESMA [18], p. 15.

2.4.4 How to apply sanctions without the infringement of the principle ne bis in idem

Being able to impose both administrative and criminal sanctions leads to the question: how could a Member State apply both sanctions without the infringement of the principle *ne bis in idem*? Although according to the reports of ESMA, no Member States have imposed both sanctions at the same time yet, most of them have the opportunity to do so and this is not a new question, since under MAD both administrative and criminal sanctions were imposed as well—which could lead to the same problem.

According to Art. 50 of the Charter of Fundamental Rights of the European Union (henceforth Charter),[33] "*no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law*." In addition, Art. 4 Protocol No 7 European Convention on Human Rights (henceforth Convention)[34] also states that "*no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State*." Yet persons who were responsible, for example, for the infringement of insider dealing under MAD might subject both administrative and criminal sanctions as well without the infringement of these provisions by their Member States.

Although *ne bis in idem* is applied generally in criminal cases, there was some uncertainty concerning the sanctions, for the nature of them was alike, namely to punish the infringements. MAD also required Member States to take measures to ensure that effective, proportionate and dissuasive administrative sanctions and measures are taken in case of infringement of rules under MAD, without prejudice to any criminal sanctions. However, this does not provide a solution for how to impose both sanctions at the same time.

The Court of Justice of the European Union (henceforth CJEU) faced the same question when it stated that the "*provision cannot be interpreted as imposing on the competent national authorities the obligation to take into consideration, when determining an administrative financial sanction, the possibility of imposing a subsequent criminal financial sanction. The assessment of how effective, proportionate and dissuasive the administrative sanctions laid down in Directive 2003/6 are cannot depend on a hypothetical criminal sanction which may subsequently be imposed*."[35]

On the other hand, the CJEU found in 2018 that "*Article 14*(1) *of Directive 2003*/6 [establishment of administrative sanctions without prejudice to the right of Member States to impose criminal sanctions], *read in the light of Article 50 of the Charter, must be interpreted as not precluding national legislation in accordance with which proceedings for an administrative fine of a criminal nature may not be brought following a final criminal judgment of acquittal ruling that the acts capable of constituting a violation of the legislation relating to insider dealing, on the basis of which those*

[33] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 [4].

[34] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 [7].

[35] CJEU [2], para. 76.

proceedings had also been initiated, were not established."[36] The CJEU also decreed that in order to protect financial markets and the public confidence in financial investments, a duplication of proceedings and sanctions can be justified, but the *res iudicata* effect of criminal judgments can affect the end result of an administrative proceedings.[37]

The European Court of Human Rights' (henceforth ECHR) case law adjusts to the CJEU's when it stated that a Member State "*can only impose a double penalty* (*fiscal and criminal*) *in respect of the same facts if the first penalty is not criminal in nature*."[38] Therefore the ECHR confirmed that there are possible cases where the duplication of sanctions imposed by the Member States can be acceptable and these cases shall never be seen as the infringement of the principle *ne bis in idem*.

3 Conclusion

When successfully applying the rules of criminal law relating to market abuse, it is of importance to know the rules laid down under MAR and MiFIR/MiFID II as well. The harmonised regulatory framework of market abuse created a unified system and it is indispensable to know how financial markets work legally. According to the provisions established under MAR, the EU decided to prefer the instruments of criminal law when fighting against market abuse. For this reason, CS MAD requires Member States to ensure the most serious offences are punished by criminal sanctions.

Although there are many differences among Member States concerning the number of and the type of sanctions imposed, it is to be noted that criminal sanctions are not preferred (yet?) by the Member States. The results of the next few years will show whether the number of criminal sanctions imposed increases or not.

Though duplication of sanctions is not seen as a violation of *ne bis in idem* from a criminal law perspective, we should not forget that the CJEU declared that criminal judgments can result in factual constraints (especially when no crime was committed according to the conviction of the criminal court). The two type of sanctions do affect one another, even though the nature and the purpose of the sanctions are different. This difference was confirmed by the ECHR as well, and according to its judgment the purpose of the two sanctions (fiscal and criminal) can make it possible that a person faces both administrative and criminal sanctions without violating the Convention.

Overall, the conclusion of the developments in the field of market abuse is that with the new trading venues and trading facilities, the protection of investors has become more and more important. For this reason, the priority of criminal law cannot be avoided.

[36] CJEU [3], para. 46.

[37] CJEU [3], para. 42-44.

[38] ECHR [14], para. 92 and 229.

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