# MARKET ABUSE: THE EU LEGAL FRAMEWORK

*This work intends to briefly describe the European legal framework in the field of market a economic and historical reasons behind the most recent legislative acts.*

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**The economic background: the link between fairness and economic growth** The financi
USA in 2007-2008 warned policy makers about the importance of trustworthiness and
banking and financial law. These elements are essential for the development of a market
especially retail investors, can operate safely, being aware of the risks they might face an
gain.

Notions as transparency and fairness are imprinted on the mind of regulators, in Europe as
of the world. They lead to an increase in investments and, broadly speaking, to a better fi
Investors need to reacquire trust in the market in order to establish a new situation of stabilit

The efforts made to favour the wished improvement in terms of integrity and transparenc
evident. The analysis of the latest legislation allows to better understand this tendency. In p
of the abovementioned policy are the recent rules concerning the banking union (Reg. 1024
UE, and the single rulebook), the patrimonial requirements for banks (the so-called CRD
ADR systems (Dir. 2013/11 UE). In the American system, the major reform regarding ba
consumer protection is the Frank-Dodd Act, dated 2010.

**Market abuse: the legal sources in EU law. From harmonization to uniformity** Ho
concern for our purposes is financial market legislation and how legislators intend to ach
transparency, fairness of markets, in the interests of all the operating subjects. In this pe
market abuse regulation, its evolution and its objectives is necessary.

Firstly, it is crucial to underline the economic idea on which this specific regulatory frame
decade, an ultra-liberal point of view was abandoned in favour of a more realistic app
investors cannot simply rely on good faith and cooperation from issuers and their manage
and severe regulation is necessary if the regulator wants to pursue a smooth and fair functio

Integrity and transparency are the main ideas conveyed by the market abuse regulation
legislator. The European institutions' first intervention in the field of market abuse can be
the Directive 2003/6 CE on insider dealing and market manipulation ("MA Directive").

Nevertheless, it was immediately clear that, to function properly, this regulatory framework
implementation and enforcement. This aspect was also emphasized in the "de Larosière R
This paper underlined that, in order to have a more efficient regulation, it is necessary to ac
remove the distortion of competition between one member State and another. Furthermor
using the legislative instrument of the Directive might leave too much space to a wide va
moreover, to delays in effective implementation of legislation.

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For these reasons, EU regulators decided to change the legislative technique and the 2003 by Regulation 596/2014 EU (“MAR”) and Directive 2014/57 EU (“New MA Directive”). approach, a greater level of harmonization should be achieved. Consequently, it is possible European legislator in this field is to obtain uniformity through the use of the Regulatio to all the member States. Certainly, this is not unusual in EU law, since this kind of approa the last years, especially when the protection of a weaker part is needed, as in the case of re the Regulation has recently been supplemented by the Commission Delegated Regulation 2(

The illustrated regulatory framework is not only made of legislative acts, but it also standards issued by ESMA in July 2016, which implement the MAR as regards administrati adopted by national competent authorities (NCAs) and the submission of information fr according to articles 30,31,32 of MAR[3].

Moving to a deeper analysis of the scope and the text of the abovementioned legislative t that the main objectives pursued by the legislator with the MAR are not different from th This clearly emerges from the words used in the Recital 2 of MAR, which state the f efficient and transparent financial market requires market integrity. The smooth functioning public confidence in markets are prerequisites for economic growth and wealth. Market abu financial markets and public confidence in securities and derivatives».

Even though the keywords used are the same when stressing out the relationship betw smooth functioning and economic growth, MA Regulation represents a significant step for regulation. Not only does MAR reflect the changes in the structure of financial markets re 2014[4], but it also tries to solve some of the already mentioned difficulties, which made i purposes pursued by the legislator[5]. In particular, it aims to reduce differences in pun States, through the cooperation between ESMA and National Authorities, and to simplify ru businesses[6].

**The three typical conducts of market abuse** There are three kinds of conduct that typic regime: “insider dealing” (art. 8 MAR), “unlawful disclosure of inside information” (art. manipulation” (art. 12 MAR).

**Insider dealing** According to art. 8, par. 1, MAR, insider dealing arises when «a person pos and uses that information by acquiring or disposing of, for its own account or for the accour or indirectly, financial instruments to which that information relates». The Regulation al consisting in delating or modifying an order related to the relevant financial instrument as the European law does not allow to convince or recommend another person to engage in ins

Therefore, it can be noticed that the aim of the article in question is wide enough to in conducts. In particular, the legislator focuses on all the possible manifestations of insid

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happens indirectly or through the influence exercised over another individual. The mai
clarified to understand if an action falls within MAR regime are, from an objective
information" (art. 7 MAR) and, from a subjective point of view, "person who possesses i
other words, "the insider" (art. 8, par. 4, MAR). Those are the elements which define the sp
can be applied.

On the one hand, inside information is «information of a precise nature, which has not be
directly or indirectly, to one or more issuers or to one or more financial instruments, an
public, would be likely to have a significant effect on the prices of those financial instru
related derivative financial instruments»[7]. The choice of the legislator is to exclude gene
scope of the considered provisions.

Furthermore, to decide whether a conduct is illegal, it is decisive to establish if the infor
affect the price of the related financial instruments. This issue probably constitutes the
related to the effective application of the regulation concerning insider dealing, especial
controversy. The most appropriate method of evaluation that could be adopted is the "r
Accordingly, the information is price-sensitive if a reasonable investor could use it as the l
taking into account the ex ante situation, the reliability of the source, and all the market vari

On the other hand, art. 8, par. 4, MAR, clarifies that the provision applies to every per
relationship with the issuer of the involved instruments, the so-called "primary insiders"[9].
also takes into consideration the situation of the "secondary insider", a person who «pos
under circumstances other than those referred to in the first subparagraph where that person
that it is inside information»[10].

In order to make the Regulation applicable to the conduct, it is also necessary that the insid
used by the insider and that, thanks to this, he takes an unlawful advantage. As regards the
nexus of causality between the possession of the information and its use, art. 9 MAR establ
some relevant exceptions[11].

As for causality, it could be useful to consider the decision of EUCJ in the Spector photo
statement clarifies that «the fact that a person possesses inside information which he knows
constitutes inside information and acquires or disposes of financial instruments to which
relates as a rule signifies in itself that he "makes use" of the information. In situations whe
inside information does not influence the action of a person, mere knowledge of inside info
imply use of that information»[13]. The principle ruled by EUCJ responds to the need to fin
an efficient application of the legislation on market abuse, which has the main aim to defen
and the right to defence, according to which a person should have the actual possibility t
Therefore, there must be proven consequentiality between the possession of the information
which shall consist in the use of this information.

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**Unlawful disclosure of inside information** The second category of conduct which consti MAR's regime is "unlawful disclosure of inside information". According to art. 10 MAR, possesses inside information and discloses that information to any other person», exc constitutes a normal exercise of an employment, profession or duty.

The most interesting and innovative aspect of the Regulation, with regards to this type of co of market sounding (art. 11 MAR) within the case of «normal exercise». This is an effo based upon the consideration that this specific conduct can be useful, when not essentia especially in a time characterised by lack of confidence towards the market[14]. Nevertheless order to warn about the importance of such a disclosure, stipulates that «a disclosing market conducting a market sounding, specifically consider whether the market sounding will i inside information». In this case, a record shall be written and it could be transmitted, upon authority. It can be noticed, again, how the legislator tries to properly balance the investors of market and its efficiency.

**Market manipulation** To conclude with the description of the three kinds of market abuse "market manipulation", has to be examined. In this case, the legislator opts for a quadr specific conduct, also introducing a new concept, not previously contemplated by MA Direc

The first category of market manipulation is defined by art. 12, par.1, (a), MAR and activities in a particular context. The provision stipulates that «market manipulation shal activities: (a) entering into a transaction, placing an order to trade or any other behaviour wh to give, false or misleading signals as to the supply of, demand for, or price of, a financial commodity contract or an auctioned product based on emission allowances; (ii) secures, price of one or several financial instruments, a related spot commodity contract or an au emission allowances at an abnormal or artificial level». Therefore, the article applies to a trade, and aims to avoid that the market could receive misleading information and cons instrument might be changed. An exemption is provided if the activity could be defined practice", under art. 13 MAR[15].

The second category, defined by art. 12, par.1, (b), MAR, applies to the conduct cons transaction, which affects the price of one or several financial instruments that employs other form of deception or contrivance.

In addition, the third concept of market manipulation is the information dissemination t determine false or misleading information to the supply or the price of a financial instrumen

Finally, as already mentioned, the Regulation has introduced a new hypothesis of m provision of art. 12, par.1, (c), MAR, refers to disseminating false or misleading informati

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so that the calculation on the benchmark can be manipulated. It must be noticed that th
benchmark, contrary to the other hypothesis which generally refers to the supply or pric
instrument. The reason for this new category of market manipulation is probably to prever
the capability of some Eurozone States to repay their sovereign debt, a very common phe
years of crisis[17].

**Prohibitions and exemptions** In conclusion, in order to have a complete overview abo
abuse, the system of prohibitions and exemptions provided by MAR has to be examined.
and 15 MAR firmly forbid to engage, or even attempt to engage, in insider dealing, unlav
manipulation.

However, the legislator leaves a certain margin of flexibility. Firstly, the prohibition of ir
manipulation does not apply in case of trading in own shares, buy-back programs, and tra
stabilization of securities, if conditions indicated in MAR recur. Moreover, the Regulation
authorities in pursuit of monetary, exchange rate or public debt management policy[18]. It is
and political reasons must justify exemption to a regime that otherwise would become too
the purposes pursued by policy makers.

In addition, to favour the smooth functioning of the market, art. 13 MAR provides exe
«accepted market practice», so that operators could finalize the transactions which fit
conduct is not likely to alter the market's equilibrium, but might rather have a positive
efficiency or liquidity, then it should be permitted. In this case, the role of NCAs is very ir
declare whether the exemption applies or not, after consultations with ESMA and the r
financial service providers and consumers[19].

**The importance of prevention** Nevertheless, the European regulator was conscious that
exemptions is not enough to assure the proper effectiveness of MAR. As for the banking
prevention is crucial to stop illegal conducts happening before they can actually produce the
irreversible with an ex post intervention.

On the one hand, market operators and investment firms must have an efficient system of ir
and detect market abuse. If a person is aware of a transaction which might be prohibited
must be reported «without delay» to the competent authority[20].

**Public disclosure of inside information** On the other hand, the most important aspect of tl
the one referring to disclosure of inside information. Not only are companies and firms su
negative obligations, but they are also placed in a situation of transparency towards public
speaking, the market itself. This means that they must make some key information public,
abuse.

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The challenge for policy makers is to determine when information must be disclosed and From one point of view, disclosure is a high cost for companies that go public, probably into account. From another point of view, transparency in a transaction means that parti Moreover, information are essential for investors, as they could be convinced to invest market[21].

The aim of art. 17 MAR, which regulates disclosure, is to preserve market integrity, therefo the public as soon as possible of inside information that directly concerns the issuer». It something must be revealed to the public, the notion of "inside information" is again cruci most recent statements by the EUCJ. It is useful to underline that not all the inside informati of the disclosure but only those which directly concern the issuer. The provision also establi must be disclosed, in a way that permits «fast access and complete, correct and timely asse by the public»[22].

Therefore, European companies are subject to a continuous, constant flux of information th this respect, the Regulation differs from the USA, where the duty to disclose arises only in and companies are generally allowed to stay silent. Nevertheless, US firms must update, c the information given are true, which makes the two regimes quite similar indeed.

The most problematic aspect that MAR must solve about the specific issue of disclosure the information must be made public is essential, in order to avoid that the announcemen could rely on misleading or false information, which could lead to an even worse effect fo pricing and, consequently, the investors' protection.

Therefore, the choice made by the legislator after a long debate in the European Institution "tie-in approach", according to which the disclosure must start when the information is qu is a right to delay disclosure in certain circumstances, which is broader in case of a p approach is reflected by art. 17, par. 4, MAR. The provision allows issuers, under their ow disclosure where: «(a) immediate disclosure might prejudice the legitimate interest of th delay of disclosure is not likely to mislead the public, (c) the issuer is able to ensu information». The rationale behind this allowance is to avoid a serious danger to the viab giving misleading information to the public.

In addition, and this represents the element that the Regulation adds to the classica subparagraph of art. 17 MAR rules the case of protracted process, which occurs in stag accepts the idea that delay should be allowed in case of multi-stage ongoing process, beca might jeopardise the prospect of actually concluding the transaction[24]. Furthermore, an inf a complicated process is not concluded yet, could mislead the public. Nevertheless, art. market participant that has used the right to delay informs the competent authority about the delay, explaining which of the conditions set by MAR were fulfilled.

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Furthermore, art. 17 MAR allows delay also where financial stability is at risk (art. 17, par
obligation of notification to the national competent authority described above.

As regards "selective disclosure", art. 17, par. 8, MAR states that if the information is disc
the normal course of exercise of an employment, profession or duty, they must make com
disclosure of that information». Consequently, the obligation that arises from art. 17
significant use of selective disclosure. As a result, only information that cannot be defined
selectively.

In conclusion, art. 18 MAR, with the same purpose to prevent and detect market abuse conc
provisions that force market participants to be in a condition of transparency, makes issuers
This list should contain the names of all the people who might have access to inside
promptly updated and transmitted to competent authority[25]. This is an important instrum
makes the authority aware of the individuals who are more likely to manage inside informat
control and detection should be easier. For this reason, art. 18, par. 2 MAR states that «iss
on their behalf, shall take reasonable steps to ensure that any person on the insider li
applicable to insider dealing and unlawful disclosure of inside information».

**Conclusion: the importance of enforcement** This brief analysis of the main provisions
how complex the market abuse regime is. Regulating such an issue requires choices that h
financial system and, indirectly, on real economy. The legislator should respond to dif
contrasting interests.

From this point of view, the Regulation that has just come into force represents an importa
regulator, which takes place in a wider context of economic reforms tending to economic sta

Nevertheless, it must be underlined that the real effectiveness of a set of rules can
enforcement, both public and private.

As far as public enforcement is concerned, the MAR aims to a strict cooperation betwe
National authorities shall ensure the application of the Regulation within their territory
ESMA, and issue the administrative sanctions set by national laws, in accordance with the
the European legislator[27]. Criminal sanctions are provided by the New MAD, which mus
member States in their Codes.

ESMA's task is to develop draft regulatory technical standards (RTS) and imple
(ITS) regarding the main points of the Regulation. In addition, ESMA received two man
Commission to provide technical advice to assist the Commission in drafting the delega

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help a coherent and effective application of market abuse legislation throughout all the EU.

As for private enforcement, MAR represents a guarantee for all the protagonists of financ for investors. The importance of both national and EUCJ jurisprudence is relevant in Regulation.

However, real confidence in the effectiveness of MAR relies on the possibility to obtain ac Courts. For this purpose, it essential to allow fast and cheap access to justice, otherwise t substantially neutralized. Therefore, it is really important to favour the development of alter (ADR), which allows quick and not expansive resolution of disputes. In this respect, Institution for the implementation of ADR in all the member States must be underlined, 11/13 EU. In addition, the development of ADR is also mentioned by art. 81, par.2, (g), Arbitro Bancario Finanziario (ABF), in the banking sector, and the recently introduced A finanziarie (ACF), in the financial sector, are two examples of this legislative tendency.

In conclusion, it can be said that the improvement of private enforcement and the clar among the public national authorities are the two keys to ensure the good functioning of fina to reach financial stability and economic growth[28].

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[1] M. Haentjens, P. De Gioia, European banking and financial law, Routledge, 2015, p. 42.

[2] For more details on the Report, see http://ec.europa.eu/internal_market/finances/docs/de_l

[3]The full text of ESMA standards can b https://www.esma.europa.eu/sites/default/files/library/2016-1171_final_report_mar_its_sanc

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[4] For instance, it also applies to MTF and OTC markets. In addition, the MAR appl instruments not covered by point (a), (b) or (c), the price or value of which depends on or or value of a financial instrument referred to in those points, including, but not limited to, contracts for difference», see art. 2, par.1, let. d) of MAR. This is a way to make oblig regulated and non- regulated markets symmetrical.

[5] M. Haentjens, P. De Gioia, European banking and financial law, cit., p. 43.

[6] M. Sepe, Abusi di mercato, in F. Capriglione, Manuale di diritto bancario e finanziario, C

[7] art. 7, par.1, (a), MAR. The same article, at (b) and (c), provides a definition of inside commodities, derivatives and emission allowances and auctioned products.

[8] For a clarification about the concepts of "inside information" and "price-sensitive inform the ruling EUCJ (C 9/11), Markus Geltl v Dai https://curia.europa.eu/juris/document/document.jsf?docid=12466&doclan=EN. For a more 628/13), Lafonta v AMF.

[9] In particular, the provision mentions people involved in the management of the company, the company, individuals who know the inside information because they are employed by t in criminal activities.

[10] art. 8, par. 4, MAR.

[11] art. 9 MAR individuates two groups of exceptions from the presumption, one for the l individuals. The most relevant of them are those regarding market makers, transaction r agreement or regulatory obligation and having place in a context of public takeover.

[12] EUCJ (C 45/08), Spector photo v CBFA.

[13] Ibid.

[14] M. Haentjens, P. De Gioia, European banking and financial law, cit., p. 48.

[15] art. 13, par.2, MAR establishes the criteria that must be used by the Authority to dete shall be defined as an accepted market practice: «competent authority may establish an a taking into account the following criteria: (a) whether the market practice provides f transparency to the market; (b) whether the market practice ensures a high degree of safeg

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market forces and the proper interplay of the forces of supply and demand; (c) whether t positive impact on market liquidity and efficiency; (d) whether the market practice takes mechanism of the relevant market and enables market participants to react properly and i new market situation created by that practice; (e) whether the market practice does not cre of, directly or indirectly, related markets, whether regulated or not, in the relevant financ Union; (f) the outcome of any investigation of the relevant market practice by any compete authority, in particular whether the relevant market practice infringed rules or regulations de abuse, or codes of conduct, irrespective of whether it concerns the relevant market or dir markets within the Union; and (g) the structural characteristics of the relevant market, regulated or not, the types of financial instruments traded and the type of market participan retail-investor participation in the relevant market».

[16] art. 12, par. 1, (c), MAR.

[17] M. Haentjens, P. De Gioia, European banking and financial law, cit., p. 48.

[18] art. 5 and 6 MAR. Other exemptions are provided, for instance, in the framework agricultural policy. For more detailed analysis about exem see https://www.esma.europa.eu/regulation/trading/market-abuse.

[19] art. 13, par. 2, MAR lists some of the elements that shall be taken intp consideration decision. Mainly, they refer to the actual structure of the market where transaction and its li

[20] art. 16, par. 1, MAR.

[21]J.L. Hansen, Say when: when must an issuer disclose inside information?, Nordic & E LSN Research Paper Series, June2016, p.2, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795993

[22] art. 17, par.1, 1st subparagraph, MAR

[23] For a detailed analysis of the issue, see: J.L. Hansen, Say when: when must an issuer dis Nordic & European Company Law - LSN Research Paper Series, Ju http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795993

[24] Ibid., p. 27.

[25] art. 18, par. 1, MAR.

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[26] Chapter 4 of MAR.

[27] Chapter 5 of MAR.

[28] Clarification of competences and powers between public authorities is the main task recently came into force throughout Europe and USA as well. The most relevant ones are t Dodd Act and the 2012 Financial Service Act, enacted in the UK.

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