



EUROPEAN COMMISSION

MEMO

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Directive on criminal sanctions for market abuse – Frequently Asked Questions

1. Why are criminal sanctions needed for market abuse?

In recent years financial markets have become increasingly global, giving rise to new trading platforms and technologies. This unfortunately has also led to new possibilities to manipulate these markets. During the LIBOR (London Interbank Offered Rate) scandal, serious concerns were raised about the manipulation of benchmarks which can result in significant losses for consumers and investors or distortion of the real economy. As part of its work to make financial markets sounder and more transparent, the European Commission proposed in 2011 (with amendments in 2012) revised legislation to better tackle market abuse. This included a draft Regulation on insider dealing and market manipulation (market abuse) to update and strengthen the existing rules and a draft Directive to ensure minimum criminal sanctions for market abuse (see [IP/11/1217](#), [IP/11/1218](#) and [IP/12/846](#)).

The new EU rules for dealing with market abuse, consisting of the Directive on criminal sanctions for market abuse (adopted by the European Parliament today – [MEMO/14/77](#)), together with the Market Abuse Regulation (political agreement endorsed by the European Parliament on 10 September 2013 – [MEMO/13/773](#) and [MEMO/13/774](#)), strengthens and replaces the existing framework, provided by the Market Abuse Directive ([2003/6/EC](#)), to ensure market integrity and investor protection.

The new framework will ensure regulation keeps pace with market developments. It will be adapted to the new market reality, notably by extending the scope to include all financial instruments which are traded on organised platforms and over the counter (OTC), and adapting rules to new technology. It will strengthen the fight against market abuse across commodity and related derivative markets, explicitly ban the manipulation of benchmarks, such as EURIBOR and LIBOR, and reinforce the cooperation between financial and commodity regulators. Since the sanctions currently available to supervisors often lack a deterrent effect, sanctions will be tougher and more harmonised.

2. How are criminal offences defined at EU level?

Insider dealing occurs when a person who has price-sensitive inside information trades in related financial instruments. Market manipulation takes place when a person artificially manipulates the price of financial instruments through practices such as the spreading of false or misleading information and conducting trades in related instruments to profit from this. Together these practices are known as market abuse.

Investors who trade on insider information and manipulate markets by spreading false or misleading information can currently avoid sanctions by taking advantage of differences in laws between the EU Member States. Some countries' authorities lack effective sanctioning powers while in others criminal sanctions are not available for certain insider dealing and market manipulation offences. Effective sanctions can have a strong deterrent effect and reinforce the integrity of the EU's financial markets.

This is the first legislative proposal based on the new Article 83 paragraph 2 of the Treaty on the Functioning of the European Union, which provides for the adoption of common minimum rules on criminal law when this proves essential to ensure the effective implementation of a harmonised EU policy. Current sanction regimes applied in the Member States for market abuse offences have proven not to be sufficiently effective. They do not always use the same definitions of these crimes and are too divergent, allowing perpetrators to benefit from loopholes.

The Directive on criminal sanctions for market abuse follows the approach set out in the Commission's Communication "Towards an EU criminal policy – Ensuring the effective implementation of EU policies through criminal law" of 20 September 2011 (see [IP/11/1049](#)). This included an assessment, based on clear factual evidence, of the national enforcement regimes in place and the added value of common EU minimum criminal law standards, taking into account the principles of necessity, proportionality and subsidiarity.

The Directive on criminal sanctions for market abuse is also part of the follow-up to the Commission's Communication on "Reinforcing sanctioning regimes in the financial services sector" of 8 December 2010 (see [IP/10/1678](#)). This envisaged the introduction of criminal sanctions for the most serious violations of financial services legislation if and where this would prove essential to ensure the effective implementation of such legislation.

3. Why was the existing Market Abuse Directive (MAD) reviewed?

The Market Abuse Directive ([2003/6/EC](#)) introduced a framework to harmonise core concepts and rules on market abuse and strengthen cooperation between regulators. However, a number of problems were identified by the Commission and these can be broadly categorised in five groups:

- gaps in regulation of new markets, platforms and over-the-counter (OTC) trading in financial instruments;
- gaps in regulation of commodities and commodity derivatives;
- regulators cannot effectively enforce the MAD;

- lack of legal certainty undermines the effectiveness of the MAD; and
- administrative burdens, especially for small and medium-sized companies (SMEs).

The regulatory framework provided by the original Market Abuse Directive ([2003/6/EC](#)) had been outpaced by the growth of new trading platforms, OTC trading and new technology such as high frequency trading (HFT). The new Market Abuse Regulation (MAR) and the Directive on criminal sanctions for market abuse keep pace with market developments and extend the scope of existing EU legislation to financial instruments only traded on multilateral trading facilities (MTFs), other organised trading facilities (OTFs) and when traded OTC so that trading on all platforms and of all financial instruments which can impact on them will now be covered by market abuse legislation. It also provides an indicative list of HFT strategies which shall be considered as market manipulation, such as placing orders which has the effect of disrupting or delaying the functioning of a trading system ("quote stuffing"). Commodity markets have become increasingly global and interconnected with derivative markets, leading to new possibilities for cross-border and cross-market abuse. The scope of the legislation is therefore extended to market abuse occurring across both commodity and related derivative markets.

4. Why is there a separate Directive on Criminal Sanctions for Market Abuse?

Minimum rules on criminal offences and on criminal sanctions for market abuse are essential for ensuring the effectiveness of the EU policy on market integrity. Criminal sanctions demonstrate social disapproval of a qualitatively different nature compared to administrative sanctions or compensation mechanisms under civil law. Common minimum rules on the definition of criminal offences for the most serious market abuse offences also facilitate the cooperation of law enforcement and judicial authorities in the Union, especially considering that the offences are in many cases committed across borders.

5. Which offences will be subject to criminal sanctions?

The Directive defines the offences: insider dealing, recommending or inducing another person to engage in insider dealing, unlawful disclosure and market manipulation, which should be regarded by Member States as criminal offences at least when they are serious and committed intentionally. In line with the scope of the Market Abuse Regulation, transactions for certain purposes are excluded from the scope: buy-backs and stabilisation programmes, if certain conditions and procedures are complied with, transactions, orders or behaviours carried out in the pursuit of monetary, exchange rate and debt management policy, as well as activities in the pursuit of the Union's Climate Policy, the Union's Common Agricultural and the Union's Common Fisheries Policies.

The market abuse offences shall be deemed serious in cases such as those where the impact on the integrity of the market, the actual or potential profit derived or loss avoided or the level of damage caused to the market is high. Other circumstances that might be taken into account are, for instance, if the offence has been committed within the framework of a criminal organisation or if the person has already committed such an offence before, or, for market manipulation, if the level of alteration of the value of the financial instrument or spot commodity contract or the amount of funds originally used is high or whether the manipulation is performed by a person employed or working in the financial sector or in a supervisory or regulatory authority.

The Directive also requires Member States to criminalise inciting, aiding and abetting insider dealing, unlawful disclosure of inside information and market manipulation, as well as attempts of insider dealing and market manipulation. Liability will also be extended to legal persons, which will be punishable by effective proportionate and dissuasive criminal or non-criminal sanctions.

6. What are the levels and types of criminal sanctions required?

The Directive requires Member States to ensure that the criminal offences defined in the Directive are punishable by criminal penalties and sanctions which are effective, proportionate and dissuasive when they are committed intentionally and at least in serious cases. In order for the sanctions for the offences to be effective and dissuasive, maximum sanction levels of at least four years' imprisonment for market manipulation, insider dealing and recommending or inducing another person to engage in insider dealing and two years for the unlawful disclosure of inside information, are provided.

Legal persons will also be punishable by effective proportionate and dissuasive criminal or non-criminal fines, which may include other sanctions such as exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from carrying out of commercial activities, placing under judicial supervision, judicial winding up or temporary or permanent closure of establishments which have been used for committing the offence.

A review clause requires the Commission to report to the European Parliament and Council, within four years of the Directive's entry into application, on its functioning and, if necessary, on the need to amend it. If appropriate, the report shall be accompanied by a legislative proposal.

7. When would a market abuse offence be sanctioned by criminal law and when by administrative law sanctions?

It is the purpose of the Commission to oblige Member States to have, in their national law, a 'tool-box' for both administrative and criminal sanctions, more harmonised than today. The Market Abuse Regulation provides, e.g., for the offences of insider dealing and market manipulation a maximum fine of €5 million for natural persons, and fines of €1 million and €500 000 for the remaining offences. Member States are free to impose even higher maximum administrative fines.

It is essential that insider dealing and market manipulation is criminalised in all Member States when committed intentionally. A corresponding offence should figure in each national law at least for serious cases as it is now foreseen in the Directive.

Depending on their national law, Member States should then have the possibility to decide which type of sanction to impose, using, for example, the general principle of opportunity.

8. How does the market abuse legislation tackle the abuse of benchmarks, such as LIBOR?

Since March 2011, investigations have been taking place in relation to possible manipulation of the EURIBOR and LIBOR benchmarks for interbank lending rates by a number of banks. The suspicion was that banks had provided estimates of the interest rate at which they would accept offers of funding which were different from the rate they would have accepted in practice. As a result, the integrity of the rates has been called into question – rates which are used as benchmarks for borrowing and as references for the pricing of many financial instruments such as interest rate swaps and consumer contracts such as mortgages, loans and credit cards. Furthermore, the individual contributor banks' estimates provided misleading information to the market about their likely costs of funding.

In order to capture unequivocally the manipulation of benchmarks and in order to ensure that such manipulation of benchmarks is an offence, the Market Abuse Regulation and the Directive on criminal sanctions for market abuse explicitly prohibits this and subjects such manipulation to administrative and criminal sanctions.

9. What are benchmarks and how are they dealt with in the directive on criminal sanctions against market abuse?

A benchmark is any rate, index or figure made available to the public or published that is periodically or regularly determined by the application of a formula to, or on the basis of the value of one or more underlying assets, or prices, including estimated prices, actual or estimated interest rates or other values, or surveys and by reference to which the amount payable under a financial instrument or the value of a financial instrument is determined. Underlying assets or prices referenced in benchmarks can include equities (e.g. the FTSE 100 index), bonds (e.g. NASDAQ OMX fixed income), interest rates (e.g. LIBOR or EURIBOR), or commodities such as agricultural products (e.g. cocoa LIFFE London), metals (e.g. Gold COMEX) or oil (e.g. Brent oil ICE). All benchmarks are included in the Directive, provided that these determine the amount payable under a financial instrument. The Directive on criminal sanctions against Market Abuse will, for example, require Member States to provide for sanctions for natural or legal persons transmitting false or misleading information, providing false or misleading inputs, or any action which manipulates the calculation of a benchmark, including the manipulation of benchmarks' methodologies.

10. Why is the manipulation of benchmarks a cause for concern?

Many financial instruments are priced by reference to benchmarks. Any actual or attempted manipulation of important benchmarks can have a serious impact on market confidence and could result in significant losses to investors or distort the real economy. It is therefore essential to prohibit manipulation of benchmarks unequivocally, and to clarify that judicial authorities could impose criminal sanctions for the offence of market manipulation in serious cases. It is also essential that all necessary steps be taken to facilitate the detection of such manipulation by competent authorities so that they can impose sanctions; this is dealt with in the Market Abuse Regulation. A stringent legal framework will act as a credible deterrent to such behaviour, thereby protecting investors and restoring market confidence. As a complement to the Regulation and Directive on market abuse, the Commission adopted in September 2013 a proposal for a Regulation on Benchmarks to ensure that benchmarks are provided in a robust and transparent way based on sufficient and reliable data ([IP/13/841](#)). This proposal will ensure high standards of governance in the provision of benchmarks, notably by tackling conflicts of interest, to reduce the opportunities and incentives for manipulation.

11. What are the next steps in the adoption of the proposal for a Directive?

The Directive on criminal sanctions for market abuse is subject to revisions by legal linguists and revisers, including where necessary alignment with the final political agreement on the Directive for Markets in Financial Instruments (MiFID II). Member States will have two years after the entry into force of the Directive to transpose the Directive on Criminal Sanctions for Market Abuse into national law.

More information

Market Abuse Regulation – Frequently Asked Questions:

[MEMO/14/78](#); [MEMO/13/774](#)

European Commission - Market Abuse

http://ec.europa.eu/internal_market/securities/abuse/index_en.htm

European Commission – criminal law policy:

<http://ec.europa.eu/justice/criminal/criminal-law-policy>

Homepage of Vice-President Viviane Reding, EU Justice Commissioner:

<http://ec.europa.eu/reding>

Homepage of Commissioner Michel Barnier, EU Internal Market and Services Commissioner

http://ec.europa.eu/commission_2010-2014/barnier/index_en.htm

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