

# HOW NOT TO ABUSE THE MARKET

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## **Abstract**

This contribution deals with market abuse as one of the most important regulation of the capital market. Market abuse has been and still is one of the biggest threats of the capital market, because activities like insider trading makes capital market not fair investing area. It's basically information asymmetry all around and moral hazard for insiders, considering using inside information in their own benefit. The main aim of the contribution is to challenge the importance of market abuse regulation and supervision to maintain correct function of the capital market. The question how not to abuse the market could be answered only with good set of regulation and well maintained supervision.

## **Key words**

Financial law; Non fiscal; Capital Market; Market abuse

**JEL Classification:** K 20 Regulation and Business Law

## **1 Introduction**

Market abuse has been and still is one of the biggest threats of the capital market, because activities like insider trading makes capital market not fair investing area. It's basically information asymmetry all around and moral hazard for insiders, considering using inside information in their own benefit. The role of capital market regulation and supervision is to reduce such a risks and temptation for those insiders. The future of fair investment environment is the question of good regulation, precious supervision and effective law enforcement in cases of infringement. There are some other threats for the capital market, but I declare market abuse as a biggest of them, not only because its connected with consumer protection but mainly because of its universality for all areas of the capital market. The new and popular instruments like virtual currencies or tokens needs market abuse regulation and supervision clear and safe as well. The challenges for the future of the capital market are mostly connected with information asymmetry even more when the role of capital market grows in modern economy and that's why this article analyses market abuse fight as one of the main challenges for the whole capital market.

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## 2 Market Abuse

Generally, market abuse is a forbidden and intolerable activity in the financial market. Such activities are banned as a way of ensuring a level playing field for all economic entities that enter the business. While it is certain that an absolute equality is imaginary, it is desirable to make every effort to get as close to this imaginary ideal as possible.

Market abuse legislation applies in particular to issuers of financial instruments, including new investment instruments regulated under MiFID II, i.e. emission allowances, commodity derivatives, investment instruments traded on over-the-counter markets and the use of benchmarks - reference rates indicators (Husták, 2016).

Market abuse is dealt with in two ways.

- The first way deals with the treatment of inside information about people whom the information concerns (issuers). This way is, as a matter of fact, preventive in its character.
- The second way deals with actual market abuse by someone who has or could have access to inside information.<sup>1</sup>

Today, market abuse is regulated by MAR, which has modified the legal framework in particular by repealing the MAD (Directive 2003/6/EC). A directive on market abuse (Directive 2014/57/EU) was published and approved together with MAR—it harmonises criminal law in connection with market abuse (hereinafter also as the Market Abuse Directive). This legislation including implementing measures has been in effect since 3<sup>rd</sup> July 2016 (Capital Market Undertakings Act). In the Czech legal regulation, we find the appropriate legal regulation in the Capital Market Undertakings Act, Part IX, Title IV.

There are generally three conditions that constitute market abuse. We can talk about market abuse if someone directly or indirectly inflicts damage on investors. It is someone who:

- used inside information (i.e. information that is not publicly available)—it is a case of insider dealing with insiders being people who have access to inside information
- manipulated the mechanisms of price setting of financial instruments

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<sup>1</sup> According to Art. 7 of Regulation (EU) No 596/2014 (here and after “MAR”): Inside information is 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 or on the price of related derivative financial instruments.

- spread incorrect or misleading information

Such behaviour can undoubtedly ruin the general level playing field principle for investors. It goes without saying that investors in possession of inside information have a much better starting position than the others, hence the need to use public instruments to redress the imbalance, even though a complete equilibrium remains purely theoretical.

Market abuse can be divided into several areas:

Insider dealing – it is a situation when an insider<sup>2</sup> (a person in the know) has a piece of inside information that is not known to the public (e.g. before a big acquisition is made with which only the company management are familiar, and it is more than likely that such an acquisition will increase the price of the company's shares because it solidifies its financial position; a member of the management then uses the information to their own benefit and buys, for instance, a significant number of shares). This person uses such an information and gains a certain advantage by negotiating a transaction (purchase or sale) with a financial instrument on his / her own account or someone else's. This also applies to the situation where an insider has already issued an instruction for a market transaction and has changed or cancelled the instruction as soon as he has learned the inside information. The special regulation of insider trading deals with the trading of persons with managerial authority (who are also supposed to be consecrated persons), which is discussed below.

Market manipulation – again, it is a situation when an insider spreads untrue or misleading information about, for example, the financial situation of a company while (s)he is in such a position that other people treat the information as completely reliable (it is, for instance, a member of the company's management); the insider can thus influence the share price of the company to their own benefit. These include the closing of transactions and related negotiations, the dissemination of false information through mass media, and the transmission of false or misleading information to benchmarks.<sup>3</sup> The MAR appendix lists indicators that suggest manipulative behaviour associated with false or misleading signals, pricing, use of fictitious means and other forms of

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<sup>2</sup> According to art. 8 of MAR an insider person possessing inside information is presumed as a member of the administrative, management or supervisory bodies of the issuer, or has a share of the issuer's capital, or has access to inside information in connection with the performance of a job or in connection with the performance of duties. It could also be a person involved in crime.

<sup>3</sup> A list of activities that are understood to be market manipulation is given in Article 12 MAR

misleading or misleading behaviour (Commission Regulation (EU) 2016/522).

Illegal disclosure of inside information - This is a situation, where a person with inside information makes this information available to others if it is not a job or fulfilling the duties. This is regulated by Articles 10 and 14 c) MAR. It can also be a recommendation or guidance by an insider.

In all examples of market abuse people seek their own benefit. They use information that is true but unavailable to others or it is untrue information but from a person who could have access to it.

The fundamental point of the ban on information abuse is at least partial redress of the inequality of access to information; it should help an 'ordinary investor' to improve their position (i.e. their access to relevant information). It is not really possible to forbid employees as well as executives from companies that issue financial instruments to trade in financial instruments; nonetheless, since they could have (and often certainly do have) inside information, their business should be transparent by making it public.

Market abuse refers to an advantage gained because of better access to inside information. EU regulations and legal regulations in member countries attempt to redress this imbalance—there are rules for using, handling and treating inside or misleading information, which constitutes the first legislative way to tackle market abuse, as was stated above.

As far as the proper treatment of information about issuers of financial instruments is concerned<sup>4</sup>, they must, without delay<sup>5</sup>, disclose information about themselves.<sup>6</sup>

In addition to such information, the issuer prepares and regularly updates the list of insiders, which it provides to the relevant authority (in our case, the CNB). The reason for this obligation is quite clear and serves in particular to trace and investigate individual violations of MAR, as it contributes to the identification of persons with access to internal information and the time from which they have access to such information. Using this tool, issuers can also generally control the flow of internal information, and thus streamline internal processes such as communication.

Each person on the list confirms in writing his / her familiarity with the duties he / she has through access to inside information, including the acceptance of possible sanctions resulting from violations related to insider trading, or the unauthorized disclosure of inside information (MAR, Art. 18/2).

The European Securities and Market Authority (here and after “ESMA”) publishes implementing and recommending technical standards also in relation to the publication of insiders' lists in order to ensure that acts adopted by the European Commission are applied under the same conditions.<sup>7</sup>

Given that only some persons come into contact with inside information, the rationale for the existence of the obligation to publish lists of such persons is quite clear.

If an issuer shares inside information with a third party while performing the usual business related to the job, this information must

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<sup>4</sup> A financial instrument is according to Article 124, par. 1 of the Capital Market Undertakings Act defined as an investment instrument admitted to trading on a regulated market of a Member State of the European Union or the admission of which to trading on a regulated market of a Member State of the European Union has been applied for.

<sup>5</sup>‘Without delay’ is according to the accepted interpretation by the courts seen as a sufficient period of time in which the issuer of a financial instrument is able to announce the inside information under the given circumstances and while remaining operational. ( See Constitutional Court of the Czech republic: IV. US 314/05 and Supreme Administrative Court of the Czech republic: 3 As 2/2008-152).

<sup>6</sup> Publication is mainly on the issuer's website. Then, certainly, the requirement of Article 17 (1) MAR will be a rapid approach to correct and timely assessment of information by the public.

<sup>7</sup> The format of the Insider List and its update was prepared by ESMA (ESMA 2015: Final Report).

be disclosed to the public. The requirement for immediate disclosure of inside information significantly reduces the risk of its abuse; there might, however, be a delay before the information available to someone is announced publicly—that is why there is a legal regulation for insiders regarding inside information.

The regulation says that each person in possession of inside information

- is forbidden on insider trading or attempting to do so
- is strictly forbidden to share the inside information with someone else unless it is part of the person's practice of profession.
- is forbidden to recommend the acquisition or disposal of financial instruments related to the information,
- is also forbidden to manipulate the market or attempting to do so.

These bans do not apply to trading own shares within buy-back schemes, nor do they apply to measures aimed to stabilise financial instruments.

Every member country is asked to nominate one regulatory and supervisory authority with a common minimum set of obligations. These authorities apply convergent methods to fight market abuse and they should be able to help one another with adoption of preventive measures, especially in cross-border cases. Subsequent administrative co-operation could represent a positive contribution to the fight against terrorism. These authorities are also supposed to co-operate with ESMA (Europa.eu<sup>8</sup>)

It is important to mention here also sanctions that can be imposed for market abuse. The European Union attempts to enforce equal sanctions in all its member countries; therefore, in 2014 was adopted a market abuse directive.

By accepting MAR and market abuse directive, the EU laid down a common definition of *actus reus* of crime related to market abuse, e.g. insider dealing, market manipulation and illicit disclosure of information. A new set of criminal sanctions is being created: heavy fines and imprisonment for at least four years are possible sanctions for insider dealing or market manipulation while imprisonment for two years is the punishment for illicit disclosure of confidential information. Furthermore, legal persons are fully liable for market abuse. Member countries are also required to conduct the judicial proceedings for these crimes if the crime is committed inside their borders or if the offender is their citizen.<sup>9</sup>

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<sup>8</sup> Europa.eu. *Market abuse* [online].

<sup>9</sup> První zpráva. *EU stanoví trestní sankce za zneužívání trhu, a může to bolet!* [online]. Prvnizpravy.cz [qtd. 22<sup>nd</sup> November 2017] Available at

### **3 Director's dealing – dealing of managing persons**

The term directors dealing with so-called managerial deals are terms that the current European regulation does not use, but I believe that they still express what the MAR is referring to as a trading of the managing persons, and for this reason I will use these terms for the purposes of this chapter. This adjustment is based on Article 19 of the MAR and was implemented in 2017 do the Czech legal system, as well as in the law of other EU countries.

No one would surely like to trade in securities if the trading could be influenced from the inside. Equal treatment of capital market participants is, therefore, an inevitable condition for its successful operation. The legal regulation of directors dealing notification duty is a specific adjustment in the context of anti-market abuse measures, because in many cases, insider trading is just about the director's dealing. The difference is that insiders are those who have the inside information, whereas the directors/managers are only very likely to receive inside information. Director's dealing without inside information is therefore not insider trading and is subject to certain obligations.

Legal regulation regarding director's dealing primarily attempts to do away with unfair dealing in the capital market. This unfair activity consists in using (or rather misusing) inside information that is not available to all capital market participants. Director's dealing refers to an obligation that applies to people with a specific relation to the issuer of securities, who must notify others of dealings related to the issuer and their securities, including details thereof. Information that people with managing power,<sup>10</sup> as amended are required to make public, supplement the notification and information duties that issuers have in general.

Regulation regarding director's dealing is supposed to ensure availability of information about transactions with securities and their derivatives made by people related to a securities issuer. These people have access to inside information about the issuer that is not freely available. While they do not necessarily have to use the information they have got to get some benefit in the securities market, they do have an advantage that can potentially be used in investment dealings.

#### **3.1 Roots of regulation abroad**

The director's dealing regulation comes from the United States (Securities Exchange Act: Sec. 16a ). Managers or other employees of

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<<http://www.prvnizpravy.cz/zpravy/byznys/eu-stanovi-trestni-sankce-za-zneuzivani-trhu-a-muze-to-bolet/>>.

<sup>10</sup> In the Czech legislation, the group of persons with managerial authority is mentioned in § 2 par. b) Capital Market Undertakings Act

the issuer that also possess at least 10% of the issuer's shares are required to register their name and their position at the issuer with the Securities and Exchange Commission. In case they make any securities transaction, they must report it by the end of the second working day following the day of the transaction. They report the transaction to the Commission and the relevant stock market. The report includes, among other things, the type of transaction, the number of traded securities, the price at which the transaction was realised, and the number of securities that remain in the possession of the person who files the report. Both the report and its subsequent announcement are done electronically. Any profit made from the purchase or the sale of securities—if they have been in possession of the director, the officer or the major stockholder for less than six months—belongs to the company, regardless of the reason behind the transaction. There is one exception, though: if the transaction is made in *bona fide*, i.e. in good faith (Goldstein, 1952).

In the EU law was director's dealing regulated within directive 2003/6/EC (cf. art. 6, par. 4), which has since been replaced by MAR (cf. art. 19) and the market abuse directive. Persons with managerial powers at an issuer and persons closely associated with them are supposed to notify the competent authority of transactions on their own account relating to the securities of that issuer. Individual states must announce this information and make it accessible as quickly and as easily as possible.

### **3.2 Obligated Persons**

Notification duty applies to the managing persons listed in § 2 par. 1 b) of Capital Market Undertakings Act:

- A managing person, defined in § 2 par. 1 a) as a member of the statutory body, statutory body itself, executive director of the company or other person actually directing the activities of the legal entity. When the statutory body or member of statutory body is a legal person, then managing person is the person, representing the legal person at statutory body.
- supervisory body or member of the supervisory body;
- member of the statutory body, statutory body itself, executive director of the company or other person actually directing the activities of the legal entity. When the statutory body or member of statutory body is a legal person, then managing person is the person, representing the legal person at statutory body;
- a person who, within the issuer, makes a decision that may affect the issuer's future development and business strategy and who has the access to inside information



Before the CNB took over supervision of the capital market<sup>11</sup>, this area had been under control of the Czech Securities Commission (hereinafter the CSC), which was heavily involved in these activities at that time. The classification of persons who have the notification duty (according to art. 125, par. 5 of the Capital Market Undertakings Act) was dealt with by the CSC in its statement no. 12/2005. The statement followed Article 6, Section 4 of the 2003/6/EC directive<sup>12</sup>, which maintains that the notification duty applies to persons discharging managerial responsibilities within an issuer of financial instruments and persons closely associated with them.

Persons discharging managerial powers are specified in MAR (Art. 3 par. 1, pt. 25):

- a member of the administrative, management or supervisory bodies of the issuer;
- a senior executive who is not a member of the bodies referred to in previous point, who has regular access to inside information relating directly or indirectly to the issuer and power to take managerial decisions affecting the future developments and business prospects of this issuer.

Persons discharging managerial powers have also notification duty for their closely associated persons. According to MAR (Art. 3 (1), pt. 26) are persons closely associated with persons discharging managerial powers:

- the spouse of the person discharging managerial responsibilities, or any partner of that person considered by national law as equivalent to the spouse;
- dependent child in accordance with national law;<sup>13</sup>
- other relatives of the person discharging managerial responsibilities, who have shared the same household for at least one year on the date of the transaction concerned;
- a legal person, trust or partnership the managerial responsibilities of which are discharged by a person discharging managerial responsibilities. It could be also the case, when these entities are set up for the benefit of such a person, or whose economic interests are

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<sup>11</sup> The Czech National Bank took over the agenda of the Securities Commission on the 1<sup>st</sup> April 2006.

<sup>12</sup> The Securities Commission followed the European legislation in view of Article 1 of the Capital Market Undertakings Act, which says that law regulates capital markets in harmony with Union norms.

<sup>13</sup> The term ‘dependent children’ should be interpreted according to Act on pension insurance, Art. 20/4. The dependent child is defined here until the end of compulsory education and after, not exceeding 26 years of age, if the person is continually preparing for their future profession, or cannot prepare for their future profession or cannot perform employment activities due to a disease or an injury, or due to an unfavourable long-term state of health.

substantially equivalent to those of such persons. The provisions also apply to persons referred to previous points

### **3.3 Which transactions must be made public and how?**

Obligated persons according to art. 19 of MAR shall notify to the issuer or the emission allowance market participant, and to the competent authority at the same time, every transaction conducted on their own account relating to the issuer's shares or debt instruments or derivatives or other financial instruments linked thereto; It is also an obligation to notify the suspension or lending of investment instruments.

Previous mentioned shall apply to any subsequent transaction once a total amount of EUR 5 000 has been reached within a calendar year.<sup>14</sup> This amount includes all the trades of a person with managerial powers, including trades of closely associated persons. Such notifications shall be made promptly and no later than three business days after the date of the transaction. This obligation is also extended to the suspension or lending of financial instruments by a person with a managerial powers or by a closely associated person.<sup>15</sup>

If an issuer trades on multiple markets, the competent authority is the place of the issuer's registration. The way in which director's dealing is to be reported is again based on the MAR.

The issuer or emission allowance market participant shall ensure that the information that is notified is made public in a manner which enables fast access to this information on a non-discriminatory basis in accordance with the implementing ESMA technical standards. The issuer or emission allowance market participant shall use such media as may reasonably be relied upon for the effective dissemination of information to the public throughout the Union (MAR Art. 19/3). Alternatively, national law may provide that a competent authority may itself make public the information.

Issuers and emission allowance market participants shall notify the person discharging managerial responsibilities of their obligations in writing. Persons discharging managerial responsibilities shall notify the persons closely associated with them of their obligations under this Article in writing and shall keep a copy of this notification.

This provision is a bit skewed in my opinion, but on the other hand, the transfer of the obligation to a particular person is certain administrative

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<sup>14</sup> A competent authority may decide to increase the threshold set out in paragraph 8 to EUR 20 000 and shall inform ESMA of its decision and the justification for its decision, with specific reference to market conditions, to adopt the higher threshold prior to its application.

<sup>15</sup> The Trade Notice should contain the elements set out in MAR, Art. 19/6.

relief for both the competent authority and the issuer himself, who already keeps lists of insiders.

Besides above mentioned MAR states, that a person discharging managerial responsibilities within an issuer shall not conduct any transactions during a closed period of 30 calendar days before the announcement of an interim financial report or a year-end report which the issuer is obliged to make public. There is an exception of such a ban on a case-by-case basis due to the existence of exceptional circumstances, such as severe financial difficulty, which require the immediate sale of shares; or due to the characteristics of the trading involved for transactions made under, or related to, an employee share or saving scheme, qualification or entitlement of shares, or transactions where the beneficial interest in the relevant security does not change. Clarification of these exemptions is provided by the European Commission Implementing Regulation.<sup>16</sup>

The duty to notify managerial dealings enables, at least partially, to erase the differences between various levels of inside knowledge about securities issuers. Legislators thus try to create equal opportunities for all capital market participants.

A possible benefit gained unfairly from inside information cannot be eliminated completely, though. Such a situation could occur if there were a ban for certain people on the purchase or sale of an issuer's securities; this would, however, curtail the freedom of enterprise and such people would rightly feel discriminated against.

Another measure adopted in this area is the fact that insider trading has been made punishable by criminal law. This is closely related to managerial dealings. Yet, if obliged persons properly and in due time notify the competent authority of any securities transactions of the issuer, they reduce suspicion of insider trading. The existence of and strict adherence to legal regulations concerning managerial dealings is in everybody's interests, whether it be capital market participants or the obliged persons that are to notify certain securities transactions. Currently, market abuse is regulated by MAR and the market abuse directive. Without any doubt we might say that we can hardly expect anything completely new and ground-breaking by the MAR implementation in the notification duty—rather, the existing regulation is going to be extended, specified and updated. What is new and very important, though, is the market abuse directive. It is concerned with the elements constituting market abuse and its criminalisation—the aim is the identical interpretation of what market abuse is, including potential punishment for such activities.

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<sup>16</sup> Exceptions to this obligation are specified in the European Commission's Implementing Regulation 2016/522.

#### 4 Conclusion

I am convinced that new market abuse legislation in Europe definitely fulfils the requirements for the maintenance of fair access to the financial market and its activities there. Among other things, it represents a formal execution of a previously established and promoted strategy to ban strictly any form of market abuse with equal punishment throughout the EU. Such a step appears to be eminently desirable due to frequent cross-border activities of big financial institutions whose impact is truly international. Only by fixing the interpretation of what constitutes market abuse and by agreeing on what punishment can be meted out to the offender in member countries of the EU, can rules regarding the ban on market abuse be internationally standardised, thereby making the international financial market better equipped to provide equal opportunities for investors and consumers. There is no such an important regulation of the capital market like market abuse, because it constitutes equal position for all participants in the area, where so much capital is at stake. Abusing the market is just too tempting in order to earn big money in short term and there is no other threat of the capital market, besides general protection of the capital market existence. The only prevention against market abuse is strong and stable regulation together with strict and effective supervision.

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