BULETINUL Universităţii Petrol – Gaze din Ploieşti	Vol. LX No. 3/2008	63 - 72	Seria Ştiinţe Economice

Analyses of the EU Market Abuse Directive: A Need to Review

Alexandra Ioana Odăgescu

Romanian National Securities Commission, str. Foişorului nr. 2, sector 3, Bucureşti
email: alexandra.bontas@cnvmr.ro

Abstract

Because of the recent changes in the financial market' conditions and because of the complexity of the European capital market, the problems regarding the market abuse have become more stressing in the recent years. Since the events that took place in 2007 and early 2008, it makes sense to address this area of concern regarding the review of market abuse regime. This paper therefore uses some hypothetical examples in order explain the main content and practical problems of the European regulations in this matter. First, it analyses the three main elements of the European market abuse regime, namely; insider dealing, ad-hoc-publicity and market manipulation. Subsequently, the limits to these provisions – including cross-border aspects – are addressed. The final part deals with enforcement issues, in particular the extent to which the law of the Member States remains important.

Key words: *Market Abuse Directive, market abuse, market manipulation, insider dealing*

Introduction

Due to the recent events from the international financial markets, a need for improvement in the area of market manipulation had arisen [4]. European Union stated the need to improve its regulations in this matter. The future stability of the European financial market is based on the efficiency of the enforcement system, which includes the Market Abuse Directive 2003/6/EC [6] (MAD) application. Integrity and transparency of the financial markets and financial sectors are prerequisites for the market to explore the full benefits of high standards of development. The EU Market Abuse Regime leads to limited variations in legal requirements in different Member States. As market abuse cannot be comprehensively defined, detected and prosecuted at domestic level only, this is a major breakthrough. The directive's aim is to promote the integrity of Europe's financial markets.

The scope of the current European law is wider because it covers not only insider dealing (or insider trading) but also ad hoc publicity and market manipulation. This is in line with international developments because IOSCO's (International Organization of Securities Commissions) recommendations [12] also address all these topics. The EU law on market abuse is a result of the Lamfalussy model of law-making. Thus, it consists of a multi-leveled and comprehensive set of provisions. At the first level, the Market Abuse Directive 2003/6/EC provide the basic legal framework. At the second level, the Directives 2003/124/EC [7], 2003/125/EC [8] and 2004/72/EC [9], and the Regulation (EC) No. 2273/2003 [10] specify some technical details. At the third level, the Committee of European Securities Regulators

(CESR) publishes guidance on the common operation of the Directive [5]. Finally, at level four, the Commission ensures compliance with the European law.

The need to define a procedure that will permit financial market abuse to be detected is strongly felt by supervisory authorities. The question of market abuse detection has nonetheless been largely ignored in the financial literature, partly owing to the difficulty of accessing detailed data on trading, which is available instead to supervisory authorities. The literature on market abuse is very limited and often connected to research carried out by supervisory authorities in support of their own activities. This paper relies on the regulatory frame itself, but also on the studies ran by different international organizations (CESR, IOSCO [13]) or by impact assessment papers published by the European Commission or by the Member States. The analysis of the literature on the financial markets in the presence of asymmetric information confirms the usefulness of observing the real movements of the markets under the present regulations in order to construct a new framework for future development based on financial statistical data.

Insider dealing, as a legal issue at least, has come increasingly to the fore in the last 20 years or so. Although it was criminalized in the United States as early as 1934 and the remarks of both lawyers and economists there have featured in books and articles alike at fairly frequent intervals since, other jurisdictions have only taken action somewhat more recently. This is certainly true of Europe, in which even the first jurisdiction, France, did not pass legislation prohibiting insider dealing until 1970. Eight years after that, Professor Barry Rider, writing on the subject in *The Conveyancer* [3], commented in his opening sentences that the use by a fiduciary of confidential information was an issue rather less considered in the UK than in the United States. His call, at the article's close, for legislation outlawing insider dealing in the UK would not be heeded for a further 2 years. The introduction by the European Community of the Insider Dealing Directive in 1989 led, by legal necessity, to implementing legislation, prohibiting insider dealing. The opportunity was therefore created for a comparative study, examining the different measures taken and considering the advantages and drawbacks. A study compiled for the European Commission was published in 1998, but this simply set out which measures were taken in each of the (then) 15 Member States in order to establish the extent to which each complied with the Directive. It therefore contained little or no comment or analysis. The MAD is similarly not addressed. Its implementation by the Member States is still ongoing.

The Market Abuse Directive Needs Reviewing

Reviewing the EU Directives is an ordinary action of the European Commission, its policy indicating that this action should be done in a period of time from implementing a directive or on request. But the MAD is a main Directive. Moreover, its scope is important for ensuring the equal regulated financial market. The events from 2007 and early 2008 formulated the need to improve and enlarge the provisions of MAD. Currently, EU works within Member States to settle a new regulation that will serve better in the scope of MAD for a fair and correct financial market. In order to start the reviewing, one must understand the MAD construction and its components that may cause different problems, by limitation on exclusion. The MAD is structured to cover three important issues: insider dealing, ad hoc publicity and market manipulation.

Insider Dealing

The reason insider dealing is prohibited is only briefly mentioned in the Market Abuse Directive. Recital 12 states that the prohibition ensures the integrity of Community financial markets and enhances investor confidence in those markets. Recital 15 ads that insider dealing

"prevents full and proper market transparency, which is a prerequisite for trading for all economic actors in integrated financial markets".

Yet, the harmfulness of insider dealing should – despite its long history– not be assumed. The counter-view [1] argues that allowing insiders to use their knowledge is favorable for capital markets because the very fact that they sell the shares in question discloses secret information. Furthermore, the possibility of insider dealing provides incentives to find out important information. For instance, it can motivate journalists to uncover corporate scandals. Finally, the alleged harm that insider dealing causes may not call for a statutory prohibition. Rather by requiring disclosure of information, it is possible to reduce the danger of insider dealing. Private contractual prohibition is also possible. For instance, for directors of a company it is usually provided in their service contracts that they should not take advantage of the information they know because of their privileged position.

The trend is, however, to prohibit insider dealing by law. The alleged advantages of insider dealing are discounted. It is argued that insider dealing does not lead to substantial disclosure because insiders will only trade so much that it will not be discovered. It is also doubted whether the admissibility of insider dealing would provide the right incentives. For instance, a manager may buy shares of a competitor and then manage his own company in a way that would benefit the competitor. Further, one can – as the recitals of the EU Market Abuse Directive show – focus on the negative impact that insider dealing has on the investor confidence in capital markets. This harms companies because it makes corporate finance more expensive. An alternative reasoning argues that there is breach of a fiduciary relationship. This is the approach followed in the US. This difference in reasoning also has a practical impact because under EU law no breach of fiduciary relationship has to be shown.

In all cases of insider dealing there has to be inside information. There are four requirements for this. First, the information has to be precise. Secondly, it has to be nonpublic. Thirdly, it has to be market information that is any information relating directly or indirectly to issuers or financial instruments. Fourthly, the information has to be price sensitive, which means that if it were made public the effect on the price of the financial instrument would be significant. Further, there has to be either trade or tipping. Trade means buying or selling, or attempting to buy or sell financial instruments. It does not matter whether the insider buys or sells them for his or her own account or for the account of a third party. "Tipping" is also defined widely. On the one hand, it can be any disclosure of the inside information unless it is made in the normal exercise of employment, profession or duties. This exception may, for instance, apply to the situation in which managers of a company ask external lawyers for advice. On the other, there can be tipping if – without disclosing the information – the insider recommends financial instruments to another person. Finally, the Directive distinguishes between primary and secondary insiders. Primary insiders are, for instance, board members, directors and lawyers of a company. Furthermore, in extension of the old Insider Dealing Directive, anyone who, by virtue of his criminal activities, possesses inside information is regarded as a primary insider.

An example of a questionable situation can be the following: *Ms X is a broker-dealer, which means that she not only buys and sells securities for clients but also deals with securities on her own account. She is accused of insider dealing because she bought shares on her own account but was also charged with the execution of an order for the shares of the same company. She objects that the client order was not "precise" because the size and prize of the purchase was only defined by limits. Furthermore, she argues that due to the liquid capital market the client order was not "price-sensitive".* Is she right? Client orders are explicitly mentioned in the Market Abuse Directive. It is said that "for persons charged with the execution of orders concerning financial instruments, 'inside information' shall also mean information conveyed by a client and related to the client's pending orders". In addition, CESR provides guidance. With respect to the requirement for precise information it is emphasized that not all characteristics of an order need to be defined. Generally, it is also said that information can be precise if it refers

to events which are alternatives. For example, an intended takeover bid for one or other of two companies can be precise even if the bidder had not finally decided which would be its target. More difficult is the issue of price sensitivity. Here CESR lists a set of criteria, for instance, the size of the order, the liquidity of the market, the execution timeframe and the identity of the client. Thus, it depends on the specific facts whether Ms X has committed insider dealing.

Ad hoc Publicity

There is a requirement for issuers to provide ad hoc publicity [11] to certain information: an issuer of financial instruments has to inform the public as soon as possible of inside information which directly concerns the issuer. This serves two purposes. On the one hand, as the linkage to inside information indicates, it aims at the prevention of insider dealing. When inside information is made public, it ceases to be inside information and thus insider dealing cannot take place. On the other hand, similar to other forms of public disclosure, it serves the allocate efficiency of the capital market. The more information issuers publish, the more accurate the prices of financial instruments become and the better capital markets channel investments to the best issuers.

Despite the linkage to inside information, there are differences in scope between insider dealing and ad hoc publicity. First, ad hoc publicity is only necessary for information which directly concerns the issuer, whereas insider dealing can also concern information which indirectly relates to issuers or financial instruments. This makes sense because, for instance, it is not the responsibility of the issuer to inform the public about expected decisions of the Central bank, rating agencies, competition or tax authorities. Secondly, publication may be delayed for "legitimate interests". However, the issuer has to ensure the confidentiality of the information and the prohibition of insider dealing remains. According to a second level directive, examples of legitimate interests are negotiations in course or the need of approval of decisions by another corporate body. For negotiations in course the directive itself mentions negotiations designed to ensure the financial recovery of the issuer. CESR provides further guidance. For instance, it mentions the case where the disclosure that negotiations were taking place would jeopardize the conclusion of a contract. Thirdly, it is prescribed how inside information has to be made public. In general, the mode of publication follows the requirements of the Transparency Directive. Furthermore, the ad hoc publicity must not be misleadingly combined with other pieces of information and changes of previously disclosed information must be published through the same channel. There is also the important requirement of complete disclosure. This means that the issuer must not disclose the information only to a selected group of persons (such as some financial analysts). However, complete disclosure is not required if the other person owes a duty of confidentiality. Thus, for instance, a company can outsource business functions and use the services of external advisers if law or contract provides a duty of confidentiality. Additionally, the issuer has to draw up an insider list about the persons who have access to inside information.

Whereas ad hoc publicity imposes obligations on the issuers of financial instruments, the same article of the Market Abuse Directive also addresses other groups of persons. First, mangers have to disclose to the competent authority if they trade in shares of their company. Of course, mangers' transactions may sometimes even be prohibited because of insider dealing. However, in other cases too disclosure of these transactions is regarded as valuable for both market participants and the competent authorities. Secondly, there are detailed rules regarding anyone who provides financial recommendations. This includes financial analysts and journalists but not individual investment advisers or credit rating agencies. Financial analysts provide recommendations to buy hold or sell financial instruments. They may do this for financial institutions, which sell or publish the recommendations, or for funds, which use them for their own investment. As a dishonest analysis can undercut investor confidence and undermine the efficient allocation of the capital market, EU law tries to ensure that research about financial

instruments is fairly presented and conflicts of interests are disclosed. For journalists, in general, the same rules apply unless self-regulation achieves a similar effect. Finally, the Directive provides that persons whose main business is to produce recommendations have to follow stricter disclosure standards. Thirdly, the article about ad-hoc-publicity addresses market operators, public institutions disseminating statistics and professionals arranging transactions in financial instruments. However, the duties are not specific to ad hoc publicity. Market operators must ensure that they prevent and detect manipulation practices, statistics must be disseminated in a fair and transparent way, and professionals must notify suspicious transactions. Only for the latter duty are more details specified, such as, for instance, the way in which notifications have to be made, and that investment firms and credit institutions are to be regarded as professionals.

Market Manipulation

The Market Abuse Directive states that "Member States shall prohibit any person from engaging in market manipulation". Of course, this alone is not really helpful because it all depends on the way in which market manipulation is defined. This is done in a very complicated way: first, in the Market Abuse Directive itself; secondly, in two of the second level directives; and thirdly in guidance by CESR. In order to understand the purpose of the prohibition of market manipulation it is best to start with the most basic example, that is, the prohibition of securities fraud. Its rationale is related to the general rationale of public disclosure. Information should lead to more accurate pricing of investments and thus result in the capital market channeling investments to the best issuers. However, there is also the danger of false statements. As individual investors are often not able to verify the truth (or at least it would be very costly for them to do so), a rule against fraud is necessary in order to induce them invest in the capital market and ensure market efficiency [2]. Other rules about market manipulation have a similar purpose. They aim at behavior which has a destructive effect on the capital market. However, details are difficult to define. For instance, manipulation cannot be defined as every action that puts pressure on the prices of financial influence because that would also cover ordinary trading. Thus, the predominant view tries to address the problem of market manipulation by distinguishing between different situations and by using various examples.

Market manipulation by "false or misleading information" (*fourth variant*) is least complicated because it covers straight-forward situations such as securities fraud (see example (1) below). More complications can arise for market manipulations by "false or misleading transaction" (*first variant*) and by "transactions involving deception" (*third variant*). They are defined as "transactions or orders to trade which give, or a likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments" and "transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance". In particular, it can be difficult how to distinguish between these two variants – and possibly also further duties of the Market Abuse Directive (see examples (2) and (3) below). Finally, there can be market manipulation by "price positioning" (*second variant*). This case is most complex because a dominant position over the price of securities typically requires the use of futures, options, or other derivative instruments. It will therefore be only briefly being addressed in this article.

Some examples can be given in order to illustrate the market manipulation:

1. *The CEO of a company deliberately publishes incorrect price-relevant information about his company on its webpage. Has he committed market manipulation? Modifications: (1.1) Nobody believes the information is true. (1.2) A journalist, who read the information on the webpage, publishes it in his newspaper. Has he also committed market manipulation?*

The original situation is a straight-forward case of market manipulation under the fourth variant (see Table above). The CEO has published false information which gave a false signal as to financial instruments and he knew that the information was false. It does not matter whether he

made any personal profit from this false information. Modifications: (1.1) The Market Abuse Directive also regards it as sufficient if information is likely to give a false or misleading signal as to financial instruments. Thus, market manipulation is still possible if some persons doubt the correctness of the CEO's information. Of course, this may be different if nobody believes the CEO because in this case the information is unlikely to have an effect on the price of the financial instrument. (1.2) In general everyone can commit market manipulation by false or misleading information, if he or she could have known that this information was false. However, for journalists this may lead to unbearable risks. Therefore, the Directive states that with respect to journalists the rules governing their profession have also to be taken into account, unless the journalist derived profits from the dissemination of the information. Thus, it also depends on this criterion as well as the national press law whether there is market manipulation.

Table 1. The European legal framework on the different types of market manipulation

	First Variant: False/misleading transactions (unless AMP = accepted market practice)	*Second Variant*: Price positioning (unless AMP = accepted market practice)	*Third Variant*: Transactions involving deception	*Fourth Variant*: False or misleading information
Definitions in MAD 2003/6/EC	Art. 1(2)(s1)(a) (ind 1)	Art. 1(2)(s1)(a) (ind 2)	Art. 1 (2) (s1) (b)	Art. 1 (2) (s1)(c)
Examples in MAD 2003/6/EC	Art. 1(2)(s2) (ind 2)	Art. 1(2)(s2) (ind 1)	Art. 1(2)(s2) (ind 3)	
Indicators in Directive 2003/124/EC	Art. 4	Art. 4	Art. 5	
AMPs in Directive 2004/72/EC	Art. 2	Art. 2		
AMPs in CESR/04-505b Guidance	Parts II and III	Parts II and III		
Examples in CESR/04-505b Guidance	Para 4.11	Para 4.12	Para 4.13	Para 4.14
Signals in CESR/04-505b Guidance	Para 5.10	Para 5.10	Para 5.10	

2. *An email spammer sends emails to persons advising them to buy securities of a particular company. Before he sent these emails, he had bought securities of this company himself. Has he violated the Market Abuse Directive?*

There is no market manipulation due to false or misleading information. However, there can be market manipulation under the third variant (see Table above). Taking advantage of access to the media by voicing an opinion about a financial instrument while having previously bought it without disclosing this conflict of interests is regarded as a transaction involving deception. This is sometimes called "scalping" because the purpose of this voicing of a positive opinion is to "scalp" the rise in the share price when the shares are subsequently sold at profit. Furthermore, it could be argued that the spammer had to comply with the duties applicable to someone who produces investment recommendations. Here too it is necessary that this person discloses a conflict of interest. However, these provisions do not apply to persons who provide personal recommendations to a client. It is possible that this is the case here because emails – even if sent by a spammer to various persons – are transmitted to specific email accounts.

3. *A owns securities of a particular company, which are, however, disregarded by the financial press and other investors. Therefore A "sells" his securities to one of his companies and "reacquires" them immediately in order to create some artificial market activity. Has A committed market manipulation? Modifications: (3.1) Instead of using one of his companies A asks his friend B to buy and resell the securities. (3.2) A's securities are just "penny stocks". A agrees to sell, and B agrees to buy, these securities at rising prices.*

> *After a few weeks time the price of the securities is twenty times the original price. Now, B sells all of his securities. (3.3) As (3.2) but B does not buy at rising prices but an increasing amount of securities.*

If there is no change in (beneficial) ownership, this “wash sale” can be market manipulation under the first variant (see Table above). In order to constitute a false or misleading transaction it is necessary that *A*’s manipulation was successful. This means that his artificial market activity has to increase the demand in the securities. Usually this will be the case unless other market participants have completely counter-balanced A’s mispricing. Modifications: (3.1) there can be an “improper matched order”, that is, a transaction where both buy and sell orders are entered at or nearly at the same time, with the same price and quantity by different, but colluding, parties. A similar technique is “painting the tape”, which denotes a transaction or series of transactions which are reported on a public display facility to give the impression of activity or price movement in a financial instrument. In both cases this leads to market manipulation under the first variant (and one can also take the view that the distinction between “improper matched orders” and “painting the tape” is unnecessary). (3.2) this form of market manipulation is called “pumping and dumping” – where the buyer and seller act in collaboration to push the price of a security to an artificially high level and subsequently the buyer sells it for profit. Typically the security in question is an illiquid one – like a penny stock – so its price level is easy to manipulate. There is some confusion whether this is a false or misleading transaction (first variant) or a transaction involving deception (third variant). This is not merely of theoretical importance because only in the first and second variant, but not in the third and fourth, is market manipulation excluded if it conforms to accepted market practices. The correct answer is that it can be both. The initial sale of securities at rising prices is a false or misleading transaction. As these transactions could also be “ordinary transactions” where one person is increasingly skeptical and another person increasingly optimistic about a particular security, it makes sense that an accepted market practice may exclude market manipulation. This is different for the subsequent sale of the securities. Here the initial buyer exploits his position by selling the securities to innocent counterparties. This is a transaction involving deception, likewise example (3.2). (3.3) - this situation is called “advancing the bid”. It is decided in the same way as modification (3.2): the increasing bid for a security is likely to manipulate its price due to the creation of an illusion that an increase in demand was causing the increase in price.

As market manipulation is difficult to define, accepted market practices (AMPs) provide some “negative criteria” which supplement the “positive criteria” of the European directives. These AMPs are not uniform in the EU but depend on the particular market. EU law only provides a list of factors which should be taken into account when considering market practices and CESR has drafted a format for assessing AMPs and publishes the AMPs of Member States on its webpage. This lack of complete uniformity arises for a number of reasons including the fact that AMPs depend on the liquidity and depth of the relevant market. This section has not yet addressed price positioning. The definition of price positioning is that someone secures “the price of one or several financial instruments at an abnormal or artificial level”. For instance, this concerns the situation where someone secures “a dominant position over the supply or demand of financial instruments, mostly relevant for the trading of derivatives.

Limits

In general, the European market abuse regime applies to financial instruments admitted to trading on a regulated market in at least one Member State. This is relatively wide. First, “financial instruments” not only covers shares and bonds but also derivative instruments. Secondly, the term “regulated market” is wide too because it means that all registered and not only listed companies are covered. Thirdly, it is irrelevant whether the transaction itself takes place on a market. Thus, not only public but also private transactions or transactions conducted

on an alternative trading system are part of the market abuse regime if the company's financial instruments are admitted on a registered market.

Nevertheless, there are situations where the European law is not applicable. First, it does not apply to the securities of private companies. Secondly, for public companies whose securities are only traded at a non-regulated market, such as the OTCs, it depends on the national law whether and how in these markets insider dealing, fraud and other forms of market abuse are prohibited. Thirdly, there is an explicit provision which excludes transactions by Member States, central banks and other public bodies.

When companies buy back their own shares and investment banks buy shares in order to stabilize the price of a particular security, this could frequently qualify as insider dealing or market manipulation. Thus, European law provides "safe harbors" if certain requirements are fulfilled. As these safe harbor rules are part of a European regulation, they are directly applicable in all Member States. Companies can have various reasons for buying back their own shares. Like dividends, it can be a means to return surplus money to the shareholders. Its purpose can also be to sell the shares later. For instance, the shares can be used for employee stock option plans or more generally to provide quick liquidity for the company. Finally, to trade in its own shares can have the purpose of influencing the capital market, for example, to affect the market price or the liquidity of the company's shares. There are two potential dangers. On the one hand, the acquisition of own shares reduces the company's capital. Thus, the Second Company Law Directive provides that the board has to be authorized by the general meeting to acquire shares and that the acquisition must not significantly reduce the company's net assets. On the other hand, there is the danger of insider dealing and market manipulation.

However, the EU Regulation specifies under which circumstances market abuse is excluded. First, one has to consider the purpose of the buy-back-program. For instance, reduction of capital and employee share option plans is accepted. Secondly, the buy-back-program has to be properly disclosed. Thirdly, the company must not distort the market, for example, by purchasing shares at a high price or by trading more than 25% of the shares per day. Fourthly, apart from the buy-back program the company must not engage in further trading of the shares. Stabilization of a financial instrument is defined as any purchase by financial institutions, "which is undertaken in the context of a significant distribution of such relevant securities exclusively for supporting the market price of these relevant securities for a predetermined period of time, due to a selling pressure in such securities". These transactions are often made by underwriting investment banks after a public offering in order to secure the market price and thus prevent short-term speculation and guarantee the success of the public offering. However, the danger is that stabilization leads to a manipulation of the market because it may keep the price of a security at an artificially high level. Thus, the EU Regulation only allows it under certain conditions. For instance, the stabilization must not be carried out for longer than 30 days, it must be disclosed and the securities must not be sold above the offering price.

The EU market abuse regime applies to all financial instruments which are admitted to a regulated market in at least one of the Member States. This means that the nationality of the company and the identity of the person who committed market abuse are not decisive. For instance, securities fraud by a Brazilian citizen about financial instruments of an Australian company listed in London leads to the applicability of EU law. Similarly, within the EU, it is the general starting point of the Market Abuse Directive that the country where the financial instruments are admitted to trading is competent for supervising market abuse. If the financial instruments are admitted to trading in several countries, all of these Member States are competent and thus their implementation of the EU law is applicable.

Furthermore, the Member State is competent where the actions are carried out. This leads to problems if the implementation of the EU market abuse law differs in the countries whose law is applicable. Take the example of a French citizen resident in Spain committing securities fraud

regarding securities of an Italian company listed in Frankfurt and London. In this case the Spanish, German, and British implementations of the EU market abuse regime are applicable.

Enforcement

Market abuse may be enforced in four different ways. First, administrative enforcement is the main type of enforcement addressed in the Market Abuse Directive. For instance, the Directive states that the competent authorities of the Member States (in Romania this is the Romanian National Securities Commission – CNVM) must have the powers to access documents, to demand information, to carry out on-site inspections, to request telephone records, to suspend trading and to freeze assets. When provisions of the Directive have not been complied with, Member States shall ensure that there are effective, proportionate and dissuasive administrative sanctions. Further, the Directive specifies that there should be a single administrative authority in each Member State and that the members of the authority shall enjoy professional secrecy. An appeal against the decisions of the competent authority shall be possible, and authorities of different Member States shall cooperate. Secondly, insider dealing and market manipulation often lead to criminal sanctions.

However, the Directive restricts itself to the words "without prejudice to the right of Member States to impose criminal sanctions…" Thus, with respect to criminal sanctions, several aspects remain within the discretion of the Member States, such as: whether they provide sanctions at all; whether they link such sanctions to the definitions of market abuse of EU law (very likely – despite differences in burden of proof); which kind of subjective requirements are imposed (always intent?); and which kinds of criminal punishment can follow. Thirdly, the recitals of the EU Directive recommend internal control mechanisms, namely "grey lists", "window trading", "codes of conduct" and "Chinese walls". A company draws up a "grey list" of its business partners in order to communicate to its employees with whose securities they should not trade. "Window trading" refers to the opposite, specifying if and under which conditions employees can trade certain securities. "Chinese walls" are information barriers in order to ensure that the department of a company (typically a financial institution) which trades in financial instruments does not get access to information available in other departments. Finally, "codes of conduct" specify how sensitive information is to be handled. The recommendations of the recitals are not binding. However, with respect to "Chinese walls" the Regulation on buy-back program provides that the restriction on share trading does not apply if the financial institution has installed "Chinese walls". Furthermore, the Markets in Financial Instruments Directive require "organizational and administrative arrangements to prevent conflict of interests", which can lead to a requirement to install "Chinese Walls". Fourthly, private-law claims are not addressed in the EU market abuse law. Such claims may not be very important for insider dealing, who is often called a "victimless crime", and this being a crime without clearly identifiable aggrieved persons. However, in cases of market manipulation, in particular securities fraud, private enforcement can be important. Here many questions have to answered such as whether the basis of a private claim is securities law or tort law, whether it is directed against the company or the managers, whether causality has to be proven, whether negligence or intent are necessary, whether it leads to disgorgement of profits, rescission, or damages, and how damages are calculated. These topics, which have been extensively debated in the US, still depend on national law in Europe.

Conclusions

The scope and density of the new European Union' market abuse regime is already impressive. Moreover, future level 2 and 3 measures will lead to a further Europeanization of market abuse law. Critics may question whether this development may go too far. Of course, market abuse

has to be prohibited and, since foul play does not care about borders, uniform rules are also plausible. However, there is also no denying the fact that capital markets across Europe are still in quite different stages of development. For instance, the complex criteria for market manipulation may be no problem for authorities in London or Frankfurt but this may be different in Bucharest or Sofia. Thus, alongside further legal measures, empirical data are needed to the extent to which market abuse in different jurisdictions and the new legal regime is applied in practice. This is particularly important for insider dealing and market manipulation.

References

1. Carlton, D.W., Fischel, D.R., *The Regulation of Insider Trading*, Stanford Law Review, 857, 1983
2. Gilson, R.J.,Kraakman, R.H. - *The Mechanism of Market Efficiency*, Virginia Law Review, 549, 1984
3. Rider, B.A.K. - *The Fiduciary and the Frying Pan*, The Conveyancer, 42, 1978
4. Warren, M.G - *European securities regulation*, The Hague: Kluwer, 143 – 150, 2003
5. *** CESR, *CESR/06- 562*, *CESR/*04-505b, www.cesr-eu.org
6. *** *Commission Directive 2003/6/EC of the European Parliament and of the Council on insider dealing and market manipulation (market abuse)*, http://eur-lex.europa.eu
7. *** *Commission Directive 2003/124/EC implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation*, http://eur-lex.europa.eu
8. *** *Commission Directive 2003/125/EC implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest*, http://eur-lex.europa.eu
9. *** *Commission Directive 2004/72/EC implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices*, http://eur-lex.europa.eu
10. *** *Commission Regulation (EC) No. 2273/2003 on Market Abuse*, http://eur-lex.europa.eu
11. *Commission Directive 2001/34/EC of the European Parliament and the Council on the admission of securities to official stock exchange listing and on information to be published on those securities*, http://eur-lex.europa.eu
12. *** IOSCO, *Objectives and Principles of Securities Regulation*, www.iosco.org, 2003
13. *** Technical Committee of IOSCO, *Investigating and Prosecuting Market Manipulation*, www.iosco.org, 2000

Analiza Directivei Europene cu privire la abuzul de piață: o nevoie de revizuire

Rezumat

Datorită schimbărilor recente suferite de piețele financiare şi datorită complexității pieței de capital unice a Uniunii Europene, problemele ridicate de abuzul de piață au devenit mai evidente şi mai stringente în ultimii ani. De la evenimentele din 2007 şi începutul anului 2008 s-a constatat necesitatea revizuirii regimului abuzului de piață. Acest articol foloseşte exemple ipotetice pentru a explica contextul şi problemele practice ale legislației europene în acest domeniu. Articolul analizează cele trei elemente ale regimului european privind abuzul de piață, respectiv informațiile privilegiate, publicitatea ad-hoc şi manipularea de piață, ca apoi să constate limitele prevederilor legale cu privire la aceste aspecte, inclusiv din perspectiva trans-frontalieră. Partea finală a articolului ia în considerare aspectele legate de activitatea de supraveghere, cu accent pe acele aspecte considerate importante de statele membre ale Uniunii Europene.