EUROPEAN
COMMISSION

Brussels, 13.3.2020
COM(2020) 99 final

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the implementation of Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive)

1. INTRODUCTION

1.1. Background

Directive 2014/57/EU of the European Parliament and of the Council on criminal sanctions for market abuse (market abuse directive) ('the Directive')[1] was adopted on 16 April 2014. Member States had to adopt and publish the necessary national measures in order to comply with the Directive by 3 July 2016, and to apply those measures from the same date, subject to the entry into force of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) ('the Regulation')[2].

The Directive and the Regulation modernise and strengthen the Union rules on safeguarding market integrity and investor protection which were previously provided for by Directive 2003/6/EC of the European Parliament and of the Council on insider dealing and market manipulation (market abuse)[3] and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

The Directive complements the Regulation by ensuring that the most serious offences against the Regulation are criminalised, and by introducing minimum rules for criminal sanctions with regard to insider dealing, unlawful disclosure of inside information and market manipulation.

The Directive was adopted under Article 83(2) of the Treaty on the Functioning of the European Union, according to which '*directives may establish minimum rules with regard to the definition of criminal offences and sanctions'*, if *'the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures'.*

1.2. Purpose and main elements of the Directive

The Directive establishes minimum rules for criminal sanctions for insider dealing, for unlawful disclosure of inside information and for market manipulation ('market abuse offences'). It ensures the effective implementation of the Regulation by requiring Member States to introduce criminal offences and sanctions for at least serious cases of these market abuse offences. It thus contributes to ensuring the integrity of financial markets and to enhancing investor protection and confidence in those markets.

In accordance with Protocols 22 and 21 to the Treaty on European Union, respectively, Denmark and the United Kingdom did not take part in the adoption of the Directive and are therefore not bound by it or subject to its application. Ireland, on the other hand, exercised its right to take part in the adoption and application of the Directive.

[1] OJ L173, 12.6.2014, p. 179.
[2] OJ L173, 12.6.2014, p. 1.
[3] OJ L 96, 12.4.2003, p.16.

The main elements of the Directive are the obligations for Member States to

- criminalise at least serious cases of market abuse offences (Articles 3 to 5[4]);
- criminalise incitement, aiding and abetting market abuse offences, and the attempt to commit any of these offences (Article 6);
- establish minimum rules on criminal penalties for natural persons, in particular a maximum sanction of at least four years for insider dealing and market manipulation, and a maximum sanction of at least two years for unlawful disclosure of inside information (Article 7);
- provide for the liability of and sanctions for legal persons for market abuse offences (Articles 8 and 9);
- establish their jurisdiction over market abuse offences (Article 10); and
- request those responsible for the training of judicial and law enforcement personnel to provide appropriate training on the Directive (Article 11).

1.3. Scope of the report; methodology; procedure

This report assesses the implementation of the Directive in accordance with Article 12 of the Directive, which mandates the Commission to report to the European Parliament and to the Council on the functioning of the Directive (below sections 2 and 3) and, if necessary, on the need to amend it (below section 4).

The description and analysis in this report are primarily based on the information that Member States provided to the Commission through notification of national measures transposing the Directive. The report focuses on the measures Member States have taken to transpose the Directive into their national law. It assesses whether Member States have implemented the Directive within the given timeframe, and whether national legislation achieves the objectives and fulfils the requirements of the Directive.

At the time of drafting this report, all participating Member States had notified complete transposition of the Directive.[5] The Commission started to assess the compliance of national measures with the Directive as soon as Member States communicated them. As a result, infringement procedures for non-conformity were launched in 14 cases. During informal contacts with Member States, a number of transposition issues could be resolved in cooperation with the Member State concerned, and the relating infringement procedures for non-conformity were closed in five cases. These issues are not included in this report. Infringement procedures are on-going in nine cases. In six of these, a letter of formal notice was issued.

[4] All articles without further indication refer to the Directive.

[5] Following the expiry of the transposition deadline of 3 July 2016, 18 Member States had not or not completely communicated transposition measures to the European Commission. The Commission sent letters of formal notice to these Member States for either non-communication or for partial communication, as well as an additional reasoned opinion to one Member State. All these infringement proceedings have meanwhile been closed.

2. GENERAL ASSESSMENT

The Commission's main objective is to ensure that all Member States dispose of sufficiently effective, proportionate and dissuasive criminal law measures to protect the integrity of financial markets against abuse.

A detailed assessment of notified transposition measures confirmed that a majority of Member States has transposed the Directive completely and correctly in all its aspects. Moreover, it can be stated that findings of non-conformity often concerned relatively minor issues. For instance, no transposition issues were found with regard to the provisions on inciting, aiding and abetting, and attempt (Article 6); on sanctions for legal persons (Article 9); on jurisdiction (Article 10); and on traning (Article 11). The transposition of criminal penalties for natural persons (Article 7) and liability of legal persons (Article 8) only gave rise to concerns in two Member States, respectively. A large majority of Member States has correctly transposed the criminalisation of the market abuse offences, i.e. insider dealing (Article 3), unlawful disclosure of inside information (Article 4) and market manipulation (Article 5).

Having said this, the following transposition issues were noted during the transposition checks:

- In a number of Member States, Article 1 (subject matter and scope) has not been transposed correctly and comprehensively;
- In one Member State, definitions (Article 2) were missing or incomplete;
- Insider dealing and recommending that another person engage in insider dealling (Article 3) have not been fully criminalised in three Member States;
- One Member State has not comprehensively criminalised unlawful disclosure of inside information (Article 4);
- The transposition of Article 5 (market manipulation) was often incomplete as some of its elements were not covered in the national legislation. With respect to Article 1(4), which extends the scope of Article 5, a number of Member States did not specifically include all required elements.

Given that the above mentioned issues of compliance, which are analysed in detail under section 3, are still pending, the Commission has taken all appropriate measures, including initiating infringement proceedings pursuant to Article 258 of the Treaty on the Functioning of the European Union, to ensure conformity with the Directive throughout the European Union.

3. SPECIFIC POINTS OF ASSESSMENT

3.1. Subject matter and scope (Article 1)

Article 1 of the Directive lays down the subject matter and scope of the Directive. In that respect, it not only lists the financial instruments to which the Directive applies (positive

scope of application, paragraph 2) but also establishes where the Directive does not apply (paragraph 3). Article 1(4) extends the scope of Article 5 (market manipulation) to certain spot commodity contracts, to certain types of financial instruments relating to spot commodity contracts, and to behaviour in relation to benchmarks. Paragraph 5 clarifies that the Directive applies to any transaction, order or behaviour concerning any financial instrument as referred to in paragraphs 2 and 4, irrespective of whether or not such transaction, order or behaviour takes place on a trading venue.

A majority of Member States has transposed Article 1 completely and in conformity with the Directive. In the remaining Member States, the following problems could be identified and are still pending:

- Article 1(2), on the application of the Directive to different types of financial instruments, was not fully transposed in two Member States as the legislation is limited to trading on certain multilateral trading facilities (MTFs) (point (b)) and organised trading facilities (OTFs) (point (c)) and/or does not include all financial instruments.
- Article 1(3), defining the negative scope of the Directive (such as the exemption of trading in own shares, securities and monetary policy), was not transposed in one MS as trading in securities or associated instruments for stabilisation purposes (point (b)) is not mentioned, contrary to the other exemptions.
- Article 1(4)(a), which extends the scope of Article 5 to certain spot commodity contracts was incompletely transposed in two Member States, as the national transposing provisions fail to apply to any other 'behaviour' that has such an effect. In one Member State, this provision has not been transposed at all.
- Article 1(4)(b) was incompletely transposed by two Member State, where the national transposing measure refers to 'transaction' and 'trade order' but fails to mention other 'behaviour' or 'bid'.
- Article 1(4)(c), providing that Article 5 shall also apply to behaviour in relation to benchmarks, was not (fully) transposed by four Member States.

3.2. Definitions (Article 2)

Article 2 defines 14 technical terms that are central for the application of the Directive. Except for one, all Member States have correctly transposed the definitions of these terms.

In one Member State, a definition of the term 'benchmark' (no (6)) is still missing.

3.3. Offences

Articles 3, 4 and 5 oblige Member States to ensure the criminalisation of three types of market abuse offences, at least in serious cases and when committed intentionally:

- Insider dealing, recommending or inducing another person to engage in insider dealing (Article 3);
- Unlawful disclosure of inside information (Article 4); and

- Market manipulation (Article 5).

3.3.1. Horizontal issues

As the Directive provides for minimum rules, Member States are free to adopt or maintain more stringent criminal law rules for market abuse.

Member States may, for example, criminalise cases of market abuse that are not considered **'serious'**. Indeed, most Member States have used this option with regard to unlawful disclosure. With regard to the other two offences, only a minority of Member States did so. However, even those that went beyond the minimum requirement generally did so without reference to the non-exhaustive lists of criteria in Recitals 11 and 12. This is analysed further below in section 4.1. Moreover, the possibility for Member States to limit criminalisation to serious cases was sometimes used to justify a reduction of the elements of the crime. For instance, the alternative to manipulate the market through 'any other behaviour' in Art. 5(2)(a) was not transposed, creating a lacuna in the criminalisation of that offence.

The Directive does not require Member States to criminalise the **negligent** commission of the offences, although Recital 21 explicitly states that Member States may provide that market manipulation committed recklessly or by serious negligence constitutes a criminal offence. A few Member State have availed themselves of this possibility and have criminalised negligent behaviour in some form, e.g. where a person ought to know that information is inside information. This is analysed further below in section 4.3.

Some Member States added elements to the definition of the offence that are not required by the Directive, particularly with regard to the mental element (*mens rea*). For instance, a **specific intent** to gain an unlawful advantage or to cause an unlawful disadvantage was required under the national legislation. The Commission considered this to be permissible as an expression of the 'seriousness' of the case.

3.3.2. Insider dealing

Article 3(1) stipulates that Member States shall take the necessary measures to ensure that insider dealing, recommending or inducing another person to engage in insider dealing, constitute criminal offences (paragraph 1). For the purposes of the Directive, insider dealing arises where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates (paragraph 2).

The first subparagraph of paragraph 3 lists the persons to whom the article applies. Moreover, the second subparagraph specifies that the article also applies to any person who has obtained inside information under circumstances other than those referred to in the first subparagraph where that person knows that it is inside information. Two Member States have not transposed that latter obligation ('other circumstances').

The offence of recommending or inducing another person to engage in insider dealing is further defined in Article 3(6). One Member State has not fully transposed this offence, as it is not criminalised if the other person does not follow the recommendation.

3.3.3. Unlawful disclosure of inside information

Pursuant to Article 4(1), the unlawful disclosure of inside information as defined in paragraphs 2 to 5 constitutes a criminal offence.

At the time of drafting this report, only one Member State has not yet brought its legislation fully in compliance with this article because it has not criminalised the onward disclosure of recommendations or inducements as required by Article 4(4).

3.3.4. Market manipulation

Article 5 obliges Member States to criminalise market manipulation as defined in that article. Essentially, the offence comprises entering into a transaction, placing an order to trade, disseminating information, or any other behaviour which gives false or misleading signals to the markets or secures the price of a financial instrument at an abnormal level.

This article gave rise to the largest number of transposition issues. In total, over 20 issues were identified in seven different Member States.

All of these seven Member States had problems with the transposition of paragraph 2(a), according to which market manipulation comprises 'entering into a transaction, placing an order to trade or any other behaviour which (i) gives false or misleading signals as to the supply of, demand for, or price of, a financial instrument or a related spot commodity contract; […]' [emphasis added].

In all instances, the concerned Member States failed to include 'any other behaviour' in the definition of the offence. Additionally, three Member State did not include spot commodity contracts. One Member State did not cover the subparagraph at all.

Similarly, with regard to subparagraphs 2(b) (deceptive behaviour which affects the price of financial instruments or a related spot commodity contract) and (c) (disseminating information through the media which gives false or misleading signals, in order to obtain an advantage), four and three Member States, respectively, had not covered all forms of behaviour and/or spot commodity contracts.

Finally, four Member States had not transposed all the elements of paragraph 2(d) (market manipulation with regard to the calculation of a benchmark), as this subparagraph was not transposed at all or did not cover 'any other bahaviour' to manipulate the calculation of benchmarks.

3.4. Incitement, aiding, abetting, attempt (Article 6)

Article 6(1) obliges Member States to criminalise incitement, aiding and abetting in relation to the offences established under Articles 3 (except recommending or inducing another person to engage in insider dealing), 4 and 5 of the Directive.

Pursuant to Article 6(2), attempt shall also be punishable as a criminal offence but only with regard to Articles 3 (including recommending or inducing another person to engage in insider dealing) and 5, not for unlawful disclosure of inside information (Article 4).

All Member States comply with these requirements, which are generally established in the general part of their respective criminal codes.

3.5. Criminal penalties for natural persons (Article 7)

Article 7(1) obliges Member States to ensure that the offences referred to in Articles 3 to 6 are punishable by effective, proportionate and dissuasive criminal penalties.

Under Article 7(2), insider dealing and market manipulation must be punishable by a maximum term of imprisonment of at least four years. Under Article 7(3), unlawful disclosure must be punishable by a maximum term of imprisonment of at least two years.

Compliance with Article 7(1) was measured against:

i. the level of sanctions of similar criminal offences;
ii. other types of offences in the respective national law that provide for the same level of sanctions.

All Member States provide for imprisonment for market abuse offences. The highest maximum term of imprisonment was 10 years. One Member State was found to be in breach of its obligation under Article 7(2) because the minimum maximum sanction was below four years for insider dealing and market manipulation. Another Member State applied different sanctions to Article 3(3)(d) on the one hand and Article 3(3)(a), (b) and (c) on the other.

3.6. Legal persons (Articles 8 and 9)

3.6.1. Liability of legal persons (Article 8)

Article 8(1) sets out the obligation for Member States to ensure that legal persons can be held liable for market abuse offences, if committed for their benefit by persons holding particular responsibilities within the legal entity, namely:

a) power of representation of the legal person;
b) authority to take decisions on behalf of the legal person; or
c) authority to exercise control within the legal person.

While the transposition of Article 8 varies within the limits set by the Directive, all Member States have schemes in place ensuring that legal persons can be held liable for market abuse offences. In line with Recital 18, liability can be criminal or non-criminal.

A few Member States do not provide for criminal liability for legal persons in their legal systems but have established administrative and civil sanctions instead. The majority of Member States, however, have introduced criminal liability regimes for legal persons.

Article 8(2) extends liability of the legal person to cases where the market abuse offence was made possible by a lack of control or supervision by one of these persons. Two Member States have not yet correctly transposed this provision.

Article 8(3) stipulates that criminal liability of a legal person shall not exclude criminal liability of a natural person for a market abuse offence. This was the case in all Member States.

3.6.2. Sanctions for legal persons (Article 9)

Article 9 provides that Member States shall establish effective, proportionate and dissuasive sanctions for legal persons, including criminal or non-criminal fines. Member States may also provide for other non-pecuniary sanctions. In points (a) to (e), non-exhaustive options for such additional sanctions are listed.

Where – as in most Member States – the level of fines was not linked to the benefit of the crime or to the turnover of the legal entity, and where the level of fines was considered to be low, the optional sanctions were taken into account. Where further cumulative sanctions (*e.g.* exclusion from entitlement to public benefits, judicial winding-up etc.) other than fines were provided for in the respective national law, the sanction system in that Member State was – in principle – considered to be in conformity with the requirements of the Directive.

Against these criteria, all Member States have transposed Article 9 satisfactorily, even though the available fines were sometimes relatively low. All Member States have also introduced sanctions other than fines for legal persons. Among the options provided for in the Directive, temporary or permanent disqualification from the practice of commercial activities and judicial winding-up are the preferred options.

3.7. Jurisdiction (Article 10)

Article 10(1) obliges Member States to establish jurisdiction over market abuse offences according to:

a) the principle of territoriality (offences committed in whole or in part on the territory of the Member State); and
b) the active personality principle (offences committed by a national of the Member State).

All Member States have established the principle of territoriality as set out in Article 10(1)(a) by explicit general provisions that criminal offences committed in whole on their territory fall under their jurisdiction. Most Member States' national law also contains explicit provisions extending jurisdiction to offences committed 'in part' on national territory. In other Member States, not distinguishing between 'whole' or 'part', coverage of both alternatives could be inferred. In one Member State, this results from the jurisprudence.

Likewise, all Member States have correctly transposed the active personality principle as a basis for establishing jurisdiction, as set out in Article 10(1)(b). Generally, Member States require the offender to be a national at the time of the offence being committed.

A large number of Member States has made use of the options in the Directive to extend their jurisdiction. Five Member States opted to extend jurisdiction for offences committed against one of its nationals (passive personality principle). Fourteen Member States chose to use the option under Article 10(2)(a) on jurisdiction over habitual residents; six apply the option

under Article 10(2)(b) on jurisdiction where the offence has been committed for the benefit of a legal person established in its territory; and fourteen do not require dual criminality in case of offences committed abroad by their nationals.

4. NEED FOR AMENDING THE DIRECTIVE

Article 12 requires the Commission not only to assess the transposition of the Directive but also, if necessary, the need to amend it, including with regard to the interpretation of serious cases, the level of sanctions and the optional elements referred to in the Directive (see below section 5).

4.1. Interpretation of serious cases

The Directive contains non-exhaustive indications as to which cases should be considered 'serious'. These criteria could be used in individual cases to determine whether a concrete case is a 'serious' one. According to Recital 11, insider dealing and unlawful disclosure of inside information should be deemed to be serious in cases where the impact on the integrity of the market, the actual or potential profit derived or loss avoided, the level of damage caused to the market, or the overall value of the financial instruments traded is high. Other circumstances that might be taken into account are involvement in a criminal organisation or recidivism.

Similarly, market manipulation should be deemed to be serious in cases where, inter alia, 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 where the manipulation is committed by a person employed or working in the financial sector or in a supervisory or regulatory authority (Recital 12).

Member States have taken some guidance from these recitals. However, in most cases, they have taken into account only one or some of the criteria mentioned, e.g. the value of the financial instruments traded. During informal contacts, several Member States stressed the non-binding nature of the recitals. Many Member States have chosen to abstractly limit either the definition of the offence or the sanctions to serious cases only.

4.2. Level of sanctions

There were very few compliance issues with regard to the level of sanctions. Only in a single Member State, the minimum maximum sanction for insider dealing and market manipulation was below four years. Often, the upper limit for imprisonment was higher than the four and two years, resprectively, provided for in the Directive.

4.3. Optional elements

With the exception of jurisdiction (see 3.7), relatively few Member States have implemented the optional elements of the Directive. Even though Recital 21 explicitly states that Member States may provide that market manipulation committed recklessly or by serious negligence

constitutes a criminal offence, many Member States seem to have doubts whether the offences at issue may in fact be committed without intent. Nonetheless, in one Member State, negligent behaviour is punishable where a person ought to have known that information is inside information or ought to know that a behaviour is based on inside information; in one, while only intentional conduct is considered a crime, negligent behaviour is considered a misdemeanour; in another, the ordinary offences are also criminalised in case of gross negligence. In threee Member States, negligent actions are generally criminalised.

In some other instances, Member States have also gone beyond the minimum requirements of the Directive. These relate mainly to the scope of the market manipulation offence, the sanctions for natural persons, and the criminalisation of market abuse offences regardless of whether they are serious or not. Indeed, only two Member States have not gone beyond the Directive ('gold plating') in one way or the other.

5. CONCLUSIONS

The Directive was introduced with a view to reinforcing the integrity of financial markets and to enhancing investor protection and trust in those markets. Overall, the Directive provides added value by buttressing these goals through criminal law and by ensuring the effective implemenation of the Regulation for at least serious cases of market abuse offences.

With the exception of Article 5 (market manipulation), the large majority of the Member States has correctly transposed the provisions of the Directive on criminalisation of market abuse offences, on criminal penalties and the liability of legal persons. For some articles, like the provisions on jurisdiction, no transposition issues were found at all. With regard to market manipulation, it was usually the element of manipulation through 'any other behaviour' and/or 'relating to spot commodity contracts' that was not covered in the national legislation.

The assessment shows that the application of the Directive could still be improved: while most of the Directive's provisions have each been transposed by a large majority of the Member States, in total 11 Member States had transposition issues with one or several provisions, as indicated in the previous sections.

The Commission will continue to assess Member States' compliance with the Directive and will take every appropriate measure to ensure conformity with its provisions throughout the European Union.