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# Legal Regulation of Market Abuse – European and Slovak Perspective

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## Abstract:

BABONY, Dean: *Legal Regulation of Market Abuse – European and Slovak Perspective*. The article deals with contemporary legal regulation of market abuse in European and Slovak Perspective. It is divided into two parts. The first part is focused on European Union approach, namely the Regulation (EU) No. 596/2014 on market abuse (Market Abuse Regulation), Directive 2014/57/EU on criminal sanctions for market abuse (Market Abuse Directive). The second part is focused on Slovak national law – namely Slovak Criminal Code No. 300/2005 Coll. and Slovak Act No. 91/2016 Coll. on Criminal Liability of Legal Persons.

## Key words:

market abuse, Regulation (EU) No. 596/2014 on market abuse (Market Abuse Regulation), Directive 2014/57/EU on criminal sanctions for market abuse (Market Abuse Directive), jurisprudence of the Court of Justice of the European Union, Slovak Criminal Code No. 300/2005 Coll., Slovak Act No. 91/2016 Coll. on Criminal Liability of Legal Persons

## Introduction

Practices in market may change over time. Domestic legislators may need to deal with different practices on different types of markets. Differences in States may regard as market manipulation may be susceptible to manipulative arbitrage. Fragmentation may have the potential to undermine the integrity of markets across the Europe on the whole.<sup>1</sup> In the European Union the approximation of law was intended to improve the conditions for the establishment and functioning of the internal market. Its objective was to prevent the emergence of obstacles to free trade and competition resulting from divergent development of national laws. The

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1 CHIU, I. H.-Y. *Regulatory Convergence in EU Securities Regulation*. Alphen aan den Rijn : Kluwer Law International, p. 115.

diversity of national laws dealing with economic activities resulted in a need for common rules for all market participants.<sup>2</sup>

The European Union is the opinion that a genuine internal market for financial services is crucial for economy and for its growth. An integrated financial market requires its integrity. On the one hand, the smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. On the other hand, market abuse harms the integrity of financial markets and public confidence.<sup>3</sup>

The European Union has adopted a series of legislative documents regulating market abuse, which are addressed to the Member States of the European Union. Also individual Member States have adopted national legislation to regulate it. The article is focused on European and Slovak approach.

### **1. European Union: The Market Abuse Regulation (2014) and the Market Abuse Directive (2014)**

Current legislation of the European Union in the field of market abuse is represented by the *Regulation (EU) No. 596/2014 on market abuse*<sup>4</sup> (hereinafter the “Market Abuse Regulation”) and the *Directive 2014/57/EU on criminal sanctions for market abuse*<sup>5</sup> (hereinafter the “Market Abuse Directive”).<sup>6</sup> The European Union completed a legal framework to protect market integrity. However, given the legislative, market and technological developments, which have resulted in considerable changes to the financial landscape, these instruments were needed. There was a need to establish a more uniform and stronger framework in order to preserve market integrity, to avoid potential regulatory arbitrage, to ensure accountability in the event of attempted manipulation, and to provide more legal certainty and less regulatory complexity for market participants. The Market Abuse Regulation aims at contributing in

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2 BÖSE, M. The Connection of Internal Market Law and Criminal Law. In MÜLLER-GRAFF, P.-Ch. – SELVIG, E. (eds.). *Regulation Strategies in the European Economic Area*. Berlin : Berliner Wissenschafts-Verlag, p. 117.

3 KLIMEK, L. Criminal Responsibility for Market Abuse in European Legal Framework. In *EU Law Journal*, Vol. 4, No. 2 (2019), p. 15.

4 Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation). Official Journal of the European Union, L 173/1 [2014]. Available online <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0596>>.

5 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). Official Journal of the European Union, L 173/179 [2014]. Available online <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0057>>.

6 MARCO, V. – SEBASTIAN, M. *Market Abuse Regulation: Commentary and Annotated Guide. Second edition*. Oxford : Oxford University Press, p. 92; ROTMAN, E. *Regulating Fraud Across Borders: Internationalised Criminal Law Protection of Capital Markets*. Oxford – New York – Dublin : Bloomsbury Publishing, p. 16; SERGAKIS, K. *The Law of Capital Markets in the EU: Disclosure and Enforcement*. London : Bloomsbury Publishing, p. 368.

a determining manner to the proper functioning of the internal market and is therefore be based on Article 114 of the Treaty on the Functioning of the European Union<sup>7</sup>.

To remove the remaining obstacles to trade and the significant distortions of competition resulting from divergences between national laws and to prevent any further obstacles to trade and significant distortions of competition from arising, it was necessary to adopt the Market Abuse Regulation, i.e. the regulation establishing a more uniform interpretation of the Union market abuse framework, which more clearly defines rules applicable in all Member States. Shaping market abuse requirements in the form of a regulation should ensure that those requirements are directly applicable. This should ensure uniform conditions by preventing diverging national requirements. The Regulation requires that all persons follow the same rules in all the Union. According to the principle of subsidiarity, as regulated in Article 5(3) of the Treaty on European Union<sup>8</sup>, action at European Union level should be taken only when the aims envisaged cannot be achieved sufficiently by Member States alone and can therefore be better achieved by the European Union.<sup>9</sup> As regards the Market Abuse Directive, it added to the Market Abuse Regulation another measure – criminal sanctions.

First, as regards scope of application, the *Market Abuse Regulation*, according to Article 2, applies to the following:

- financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;
- financial instruments traded on a multilateral trading facility, admitted to trading on an multilateral trading facility or for which a request for admission to trading on an multilateral trading facility has been made;
- financial instruments traded on an organised trading facility;
- financial instruments not covered by points above, the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in those points, including, but not limited to, credit default swaps and contracts for difference.

The Market Abuse Regulation also applies to behaviour or transactions, including bids, relating to the auctioning on an auction platform authorised as a regulated market of emission allowances or other auctioned products based thereon, including when auctioned products are not financial instruments, pursuant to the Regulation (EU) No. 1031/2010 on the timing, administration and other aspects of auctioning of

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7 Treaty on the Functioning of the European Union (consolidated version). Official Journal of the European Union, C 326/1 [2012]. Available online <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>>.

8 Treaty on European Union (consolidated version). Official Journal of the European Union, C 326/1 [2012]. Available online <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>>.

9 Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation. COM/2011/0654 final - 2011/0297 (COD). Available online <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011PC0654>>.

greenhouse gas emission allowances.<sup>10</sup> Without prejudice to any specific provisions referring to bids submitted in the context of an auction, any requirements and prohibitions in this Regulation referring to orders to trade shall apply to such bids.

Market abuse inhibits the full transparency required for trading in modern integrated financial markets. The Market Abuse Regulation rules apply to a person or a company committing market abuse while trading financial instruments, whether through trading platforms or negotiated privately in so called *over-the-counter transactions*<sup>11</sup>, as long as it can influence: financial instruments traded on a trading venue; or financial instruments whose price or value depends or has an effect on the price or value of a financial instrument traded on a trading venue. The Market Abuse Regulation requires Member States to ensure that competent authorities have the power to impose *administrative sanctions* or to take administrative measures in case of its infringements. The Market Abuse Regulation rules reinforce the supervisory and investigatory powers of the regulators appointed by each Member State of the EU to ensure the proper functioning of their financial markets. For instance, their powers include being able to carry out on-site inspections and investigations and to request the freezing or sequestration of assets.<sup>12</sup>

Second, for the purposes of the *Market Abuse Directive* insider dealing and unlawful disclosure of inside information should be deemed to be serious in cases such as those 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, for instance, where an offence has been committed within the framework of a criminal organisation or where the person has committed such an offence before (recital 11 of the Preamble to the Directive). For the purposes of the Directive, market manipulation should be deemed to be serious in cases such as those 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, 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 of the Preamble to the Directive). Due to the adverse effects of attempted insider

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10 Commission Regulation (EU) No. 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community. Official Journal of the European Union, L 302/1 [2010]. Available online <<https://eur-lex.europa.eu/eli/reg/2010/1031/oj>>.

11 The *European Market Infrastructure Regulation* (also known as “EMIR”), lays down rules regarding *over-the-counter* derivative contracts, central counterparties and trade repositories, in line with the *G20 commitments* made in Pittsburgh, United States, in September 2009. The European Market Infrastructure Regulation aims to reduce systemic risk, increase transparency in the over-the-counter market and preserve financial stability. See: EU rules on over-the-counter derivatives contracts, central counterparties and trade repositories [online]. Available online <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:mi0093>> [2023-01-17].

12 Preventing market abuse in financial markets [online]. Available online <<https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=celex:32014R0596>> [2023-01-17].

dealing and attempted market manipulation on the integrity of the financial markets and on investor confidence in those markets, those forms of behaviour should also be punishable as a criminal offence (recital 13 of the Preamble to the Directive). The Directive should oblige the Member States of the European Union to provide in their national law for criminal penalties in respect of insider dealing, market manipulation and unlawful disclosure of inside information to which the Directive applies. The Directive should not create obligations regarding the application of such penalties or any other available system of law enforcement, to individual cases (recital 14 of the Preamble to the Directive). The Directive should also require the Member States of the European Union to ensure that inciting, aiding and abetting the criminal offences are also punishable (recital 15 of the Preamble to the Directive).

Under the new rules *insider dealing* and *market manipulation* are punishable by a maximum term of imprisonment of at least 4 years. As regards their interpretation:<sup>13</sup>

- *Market manipulation* consists in manipulating the prices of financial products artificially. For instance, this can happen when an individual spreads false information on the supply, the demand or the price of a financial product. For the purposes of this Directive, market manipulation should be deemed to be serious in cases such as those 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, 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.
- *Insider dealing* is when an individual trades a financial product with access to ‘inside information’. This is confidential information relating to the financial product traded or the company that issued it on the market. Accessing this type of information gives him an unfair advantage.
- *Unlawful disclosure of inside information* is also considered as an offence punishable by a maximum term of imprisonment of at least 2 years. This happens when an individual discloses ‘inside information’ to other persons, unless this disclosure is made in the regular exercise of its profession.

The legislative legal regulation of the European Union was supplemented by the jurisprudence of the Court of Justice of the European Union, namely:<sup>14</sup>

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13 Criminal sanctions for market abuse [online]. Available online <<https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32014L0057>> [2023-01-17].

14 Older cases were adopted in the period prior the Market Abuse Regulation and of the Market Abuse Directive. They supplement legislation, which was repealed by contemporary legislation, namely: the Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing. Official Journal of the European Union, L 334 [1989]. Available online <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31989L0592>> and the Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse). Official Journal of the European Union, L 96 [2003]. Available online <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003L0006>>. See: KLIMEK, L. *Judikatura Súdneho dvora EÚ vo veciach zneužívania trhu a súvisiacich trestnoprávných otázok*. Bratislava : Wolters Kluwer, 2020, 240 pages.

- judgment of 3 May 2001 in case C-28/99 – *Verdonck and others*,
- judgment of 22 November 2005 in case C-384/02 – *Knud Grøngaard and Allan Bang*,
- judgment of 10 May 2007 in case C-391/04 – *Ipourgos Ikonomikon*,
- judgment of 23 December 2009 in case C-45/08 – *Spector Photo Group and Chris Van Raemdonck*,
- judgment of 7 July 2011 in case C-445/09 – *IMC*,
- judgment of 22 March 2012 in case C-248/11 – *Rareş Doralin Nilaş and others*,
- judgment of 28 June 2012 in case C-19/11 – *Markus Geltl proti Daimler AG*,
- judgment of 26 February 2013 in case C-617/10 – *Hansov Åkerberg Franssoni*,
- judgment of 11 March 2015 in case C-216/14 – *Jean-Bernard Lafonta*,
- judgment of 29 June 2016 in case C-486/14 – *Piotr Kossowsky*,
- judgment of 16 November 2017 in case C-658/15 – *Robeco Hollands Bezit and others*,
- judgment of 20 March 2018 in case C-537/16 – *Garlsson Real Estate and others*,
- judgment of 20 March 2018 in joined cases C-596/16 and C-597/16 – *Enzo Di Puma (C-596/16), Antonio Zecca (C-597/16)*,
- judgment of 20 March 2018 in case C-524/15 – *Luca Menc and*
- judgment z 28 October 2021 in case C-95/20 – *Varčev Finans*.

For example, in case C-537/16 – *Garlsson Real Estate and others* the Court of Justice of the European Union argued that Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation which permits the possibility of bringing administrative proceedings against a person in respect of unlawful conduct consisting in *market manipulation* for which the same person has already been finally convicted, in so far as that conviction is, given the harm caused to the company by the offence committed, such as to punish that offence in an effective, proportionate and dissuasive manner. The *ne bis in idem* principle guaranteed by Article 50 of the Charter of Fundamental Rights of the European Union confers on individuals a right which is directly applicable in the context of a dispute such as that at issue in the main proceedings.

In joined cases C-596/16 and C-597/16 – *Enzo Di Puma and Antonio Zecca* the Court of Justice of the European Union added that Article 14(1) of Directive 2003/6/EC on insider dealing and market manipulation (repealed by the *Market Abuse Regulation*), read in the light of Article 50 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding national legislation in accordance with which proceedings for an administrative fine of a criminal nature may not be brought following a final criminal judgment of acquittal ruling that the acts capable of constituting a violation of the legislation relating to insider dealing, on the basis of which those proceedings had also been initiated, were not established.

## 2. Slovak National Law

As far as the national context of the Slovak Republic is concerned, the seriousness of market abuse is manifested by two criminal offences in Slovak *Criminal Code No.*

300/2005 Coll.<sup>15</sup>, namely “Misuse of Information in Business Relations” (*Zneužívania informácií v obchodnom styku*) according to Article 265 of the Criminal Code and “Manipulation of the Market” (*Manipulácia s trhom*) according to Article 265a of the Criminal Code. These criminal offences belong to the group of crimes called “Criminal Offences Against Economic Discipline” (Articles 259-269a of the Criminal Code) – they are systematically classified as “Economic Crimes” (fifth head of the special part of the Criminal Code).

According to Article § 265(1) of the Criminal Code, which regulates “*Misuse of Information in Business Relations*”, the perpetrator unlawfully uses information previously not publicly available, which he obtained in his employment, profession, position or in his capacity, and the publication of which significantly affects decision-making in business relations, and carries out or initiates the execution of a contract or operation on the organized market of securities or goods, or who unauthorizedly uses confidential information according to a special regulation or who discloses such confidential information to an unauthorized person; the sanction is imprisonment from zero to four years. The second alternative of this criminal offence, according to Article § 265(1) of the Criminal Code, is based on the fact that the offender as an employee, member of a statutory body, partner, entrepreneur or participant in the business of two or more enterprises or legal entities with the same or similar object of activity in the intention stated above, concludes or initiates the conclusion of a contract at the expense of one or more of them; the sanction is the same.

According to Article § 265a(1) of the Criminal Code, which regulates “*Manipulation of the Market*”, the perpetrator unlawfully (i) provides false or grossly misleading information about the supply, demand or price of a financial instrument or a related commodity spot contract, (ii) causes the price of a financial instrument or a related commodity spot contract to reach or maintain an unnatural or artificial level, (iii) manipulates the calculation of the reference value in the market; The sanction is imprisonment from zero to four years. The second alternative of this criminal offence, according to Article § 265a(2) of the Criminal Code, is based on the fact that the offender, using fraud or machination, carries out a trade, gives an instruction to carry out a trade or commits another action affecting the price financial instrument or related commodity spot contract; the sanction is the same.

Legal entities, not only natural persons, are also criminally responsible for the mentioned criminal offences. The *Act No. 91/2016 Coll. on the Criminal Liability*

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15 Zákon č. 300/2005 Z. z. Trestný zákon v znení neskorších predpisov. See: IVOR, J. et al. *Trestné právo hmotné – Osobitná časť*, second edition. Bratislava : Wolters Kluwer, 524 pages; KLÁTIK, J. et al. *Trestné právo hmotné – Osobitná časť*, second edition. Plzeň : Aleš Čeněk, 506 pages; MENCEROVÁ, I. et al. *Trestné právo hmotné – Osobitná časť*, third edition. Šamorín : Heuréka, 567 pages; SZABOVÁ, E. et al. *Trestné právo hmotné – Všeobecná a osobitná časť*. 4. vydanie. Plzeň : Aleš Čeněk, 634 pages; BURDA, E. et al. *Trestný zákon: Komentár – II. diel*. Bratislava : C. H. Beck, 1616 pages; ČENTÉŠ, J. et al. *Trestný zákon: Veľký Komentár*, fifth edition. Žilina : Eurokódex, 1024 pages; STRÉMY, T. et al. *Trestný zákon: Komentár – II. diel*. Bratislava : Wolters Kluwer, 1534 pages.

of *Legal Persons contains*<sup>16</sup> in Article 3 so-called “list of criminal offences of legal entities” for which legal entities can be held criminally liable. Both “Misuse of Information in Business Relations” and “Manipulation of Market” are on this list.

## Conclusion

An integrated financial market requires integrity. On the one hand, the smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. On the other hand, market abuse harms the integrity of financial markets and public confidence. The European Union has adopted a series of legislative documents regulating market abuse, which are addressed their Member States.

Current legislation of the European Union in the field of market abuse is represented by the *Regulation (EU) No. 596/2014 on market abuse* (Market Abuse Regulation) and the *Directive 2014/57/EU on criminal sanctions for market abuse* (Market Abuse Directive). To remove the remaining obstacles to trade and the significant distortions of competition resulting from divergences between national laws and to prevent any further obstacles to trade and significant distortions of competition from arising, it was necessary to adopt the Market Abuse Regulation, i.e. the regulation establishing a more uniform interpretation of the Union market abuse framework, which more clearly defines rules applicable in all Member States. Shaping market abuse requirements in the form of a regulation should ensure that those requirements are directly applicable. This should ensure uniform conditions by preventing diverging national requirements. As regards the Market Abuse Directive, it added to the Market Abuse Regulation another measure – criminal sanctions. The legislative legal regulation of the European Union was supplemented by the jurisprudence of the Court of Justice of the European Union.

As regards Slovak Republic, the seriousness of market abuse is manifested by Criminal Code No. 300/2005 Coll., which regulates two relevant criminal offences. Legal entities, not only natural persons, are also criminally responsible for such criminal offences – according to the Act No. 91/2016 Coll. on the Criminal Liability of Legal Persons.

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16 See: ZÁHORA, J. – ŠIMOVČEK, I. *Zákon o trestnej zodpovednosti právnických osôb: Komentár*, second edition. Bratislava : Wolters Kluwer, 288 pages; BURDA, E. – KORDÍK, M. – KURILOVSKÁ, L. – STRÉMY, T. et al. *Zákon o trestnej zodpovednosti právnických osôb: Komentár*, second edition. Bratislava : C. H. Beck, 560 pages.



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**Summary: Legal Regulation of Market Abuse – European and Slovak Perspective**

Current legislation of the European Union in the field of market abuse is represented by the Regulation (EU) No. 596/2014 on market abuse (Market Abuse Regulation) and the Directive 2014/57/EU on criminal sanctions for market abuse (Market Abuse Directive). The legislative legal regulation of the European Union was supplemented by the jurisprudence of the Court of Justice of the European Union. In the Slovak Republic market abuse is regulated by Criminal Code No. 300/2005 Coll. Legal entities, not only natural persons, are also criminally responsible for such criminal offences – according to the Act No. 91/2016 Coll. on the Criminal Liability of Legal Persons.

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