MARKET ABUSE: WHAT'S NEW?

On 20 October 2011 the European Commission published legislative proposals - Market Abuse Regulation (MAR) and Market Abuse Directive (MAD2) - to update and strengthen the existing framework for the protection of market integrity introduced by the 200a3 Market Abuse Directive (MAD).

The analysis, relating to the evolution of the markets and financial instruments and to the effective implementation of MAD within domestic regulation, highlighted the need for a common regulatory intervention: preventive, through an update of the MAD alongside a revision of the Markets in Financial Instruments Directive (MiFID), and repressive, through the implementation of enhanced powers for investigative authorities and the harmonisation of administrative and criminal sanctions.

Scope

The increase in trading across different venues (MTFs (multilateral trading facility), OTC (over-the-counter), OTFs (organised trading facility)) has increased the difficulty in monitoring potential market abuse. The aim of MAR is to extend the scope of the market abuse statutory framework to apply to any financial instruments admitted to trading on an MTFs or OTFs as well as to any related financial instruments traded OTCs, which can have an effect on the relevant underlying market.

Given the lack, under the existing MAD, of a clear and binding definition of inside information in relation to commodity derivatives markets and emission allowances, MAR is aimed at: aligning the definition of inside information in relation to commodity derivatives to the general definition of inside information by extending it to price sensitive information relevant to spotting commodity contracts as well as to the derivative itself; and, introducing a specific definition of inside information for emission allowances.

Insider dealing and market manipulation

Insider dealing - MAR: extends the definition of inside information to non-public information that a reasonable investor would regard as material in its investment decisions beyond the current definition of price sensitive information; prohibits the use of inside information to deal and attempt to deal in relevant financial instruments; and, extends the dealing restrictions to cover amending or cancelling an order even if this is done to avoid trading on the basis of insider information.

Market manipulation - MAR: extends the definition of manipulative practices to cover all behaviour that may give false or misleading signals to the market, secure prices at artificial levels or employ fictitious devices, deceptions or contrivances making it no longer possible to establish a defence based on accepted market practice; extends the prohibition to any attempt to engage in market manipulation; and, extends the list of practices that constitute presumed market manipulation.

Authorities' powers reinforced

To ensure regulators have access to the information they need to detect and sanction market abuse, MAR: extends suspicious transaction reporting obligations to trading orders and to OTC transactions; grants regulators the powers to obtain telephone and data traffic records from telecom operators and to access private documents or premises (subject to a judicial warrant) where there is a reasonable suspicion of insider dealing or market manipulation; requires member states to provide for the protection of whistleblowers and sets common rules with respect to economic incentives for whistleblowing; and, introduces an obligation for the cooperation and exchange of information as between financial regulators and the regulators of spot commodity markets to ensure a consolidated overseeing of financial and spot markets and to detect and sanction cross-market and cross-border abuses.

Administrative and criminal sanctions

MAR proposals include a requirement that fines should not be less than the profit made from the offence, and the maximum fine should not be less than twice any such profit. For natural persons, the maximum fine should not be less than €5m; for corporate entities, not be less than 10% of annual turnover, with member states free to exceed these limits. In imposing sanctions, competent authorities should take account of other aggravating or mitigating factors, such as the gravity of the offence, previous offences or a suspect's cooperation with the investigation.

In parallel, MAD2 requires member states to: introduce criminal sanctions (extending liability also to corporate entities) for the offences of insider dealing and market manipulation, where these are committed intentionally; introduce the crime of inciting, aiding and abetting insider dealing and market manipulation, as well as any attempt to commit any of these offences; and, ensure effective, proportionate and dissuasive criminal sanctions.

Timing and impact

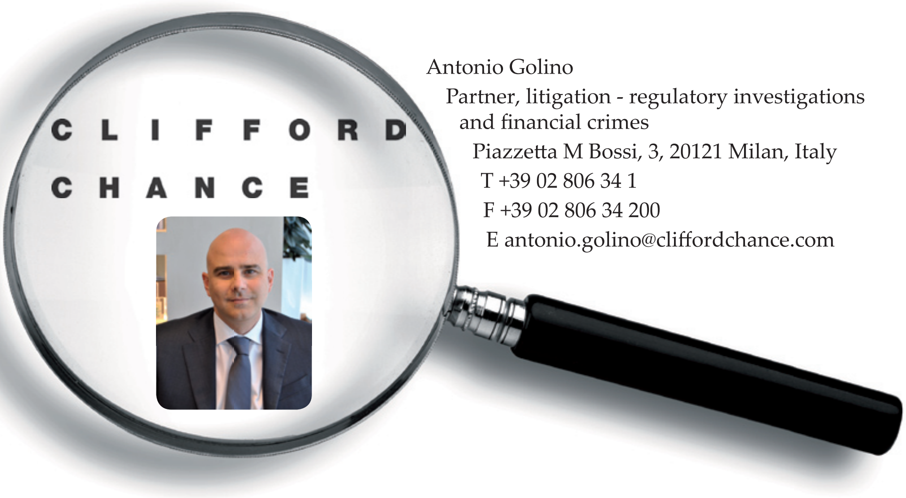
MAR and MAD2 now pass to the European Parliament and the Council for negotiation and adoption. Once adopted, they will take effect within the following two-year period, being the time granted to member states to address the provisions in their state laws.

In regard to the impact on Italian regulation, the proposals relating to a number of topics have already been covered by domestic statutory provisions following the adoption of MAD, including, for example, the introduction of the crimes of insider dealing and market manipulation, or a corporate entity's liability for offences committed in the interest or for the benefit of the entity itself by one of its officers (D Lgs 231/01 or 'Law 231').

However, Italy would have to update its domestic statutory provisions (despite undeniable hermeneutic problems related to internal principles of criminal law) to adapt it to European regulation to cover, for example, the extension of market abuse regulation to new financial instruments.

In addition, in light of the potential for corporate liability, companies are expected to review their internal control protocols under Law 231 (eg, to introduce standardised policies across their business units, to focus on their tolerance levels, etc) and their organisation, management and control protocols to avoid liability under Law 231.

Antonio Golino (partner) and Jean-Paule Castagno (consultant)



Antonio Golino
Partner, litigation - regulatory investigations and financial crimes
Piazzetta M Bossi, 3, 20121 Milan, Italy
T +39 02 806 34 1
F +39 02 806 34 200
E antonio.golino@cliffordchance.com