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THE PROHIBITION OF MARKET MANIPULATION IN THE EU

A focus on the MAR and MAD II applicability to the Italian Wholesale Electricity Market

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Abstract

No other commodity in the history of human beings has been such important as electricity. Everyone needs it from day to night and, being an end-consumer, has to pay electricity bills periodically. At the same time, every end-user should be prevented from paying unfair prices for electricity.

In Italy, electricity pricing is formed on the Italian wholesale electricity market (IPEX), were qualified operators virtually trade contracts for the electricity supply and transportation. Unfortunately, experience has shown that manipulative misconduct still affects the IPEX if there are not Italian Government's effective repressive measures.

However, there might still be a solution. Two legislative instruments concerning the prohibition of market manipulation at the EU level could apply to combat manipulative misbehaviour at the IPEX: the MAR and MAD II. They provide for a general regulatory framework to fight the manipulation of financial markets and prescribe a comprehensive legislative system including minimum rules on criminal offences and definition of the related sanctions. But, another autonomous regulation may overlap with them, the REMIT. It encompasses all the activities related to the Union wholesale electricity markets and enshrines rules to prevent the commission of market manipulation within them. Furthermore, the relationship between the MAR, MAD II, and the REMIT has become even more challenging since the MiFID II entry into force.

Given the foregoing, chapter I aims to introduce the topic of this thesis. Then, chapter II wishes to explain the pillar concepts of the market manipulation prohibition in the EU, since they represent the building blocks of the analysis in chapters III and IV about the MAR and MAD II applicability to fight manipulative misconduct at the IPEX and prevent the Italian consumers from paying unfair electricity prices.

Keywords: financial instrument; financial market; IPEX; MAD I; MAD II; MAR; MiFID II; market abuse; market manipulation; REMIT; wholesale electricity market; wholesale electricity product.

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Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other those already included in the Convention and in the first Protocol thereto, as amended by Protocol No. 11 [1963].

The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common Border [2000] OJ L239/19.

List of Abbreviations

ACER	European union Agency for the Cooperation of Energy Regulators
AFM	Dutch Financial Services Authority
AG	Advocate General
App	Application
ARERA	*Autorità di regolazione per energia reti e ambiente*/Italian Regulatory Authority for Energy, Networks and Environment
art/arts	article/articles
BI	*Borsa Italiana S.p.A*/Italian Stock Exchange
CJEU	Court of Justice of the European Union
ch/chs	chapter/chapters
Charter	Charter of Fundamental Rights of the European Union
CISA	Schengen Agreement
CONSOB	*Commissione Nazionale per le società e la Borsa/* National Commission for companies and Stock Exchange

cc	*Codice Civile*/Italian Civil Code
cp	*Codice Penale*/Italian Penal Code
d.lgs.	*decreto legislativo*/legislative decree
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ed/eds	editor/editors
EDA I	2014 European Delegation Act on Market Abuse
EDA II	2016-2017 European Delegation Act on Market Abuse
edn	edition
ENI	Ente Nazionale Idrocarburi/*National Hydrocarbon Corporation*
etc	*et cetera*/eccetera
EU	European Union
EURIBOR	Euro Interbank Offered Rate
GDP	Gross Domestic Product

GSE S.p.A.	*Gestore dei Servizi Energetici*/Energy Services Manager
GME	*Gestore dei Mercati Energetici*/Energy Markets Manager
i.e.	*id est*/that is
IDEM	*Mercato Italiano dei Derivati su Azioni* /Italian Derivatives Market
IDEX	*Mercato Italiano dei Derivati dell' Energia*/Italian Derivatives Energy Exchange
IPEX	*Borsa Elettrica Italiana*/Italian Power Exchange
LIBOR	London Interbank Offered Rate
MAD I	Directive on Market Abuse
MAD II	Market Abuse Directive
MAR	Market Abuse Regulation
MiFID II	Directive on markets in financial instruments
MPE	*Mercato elettrico a pronti*/Spot electricity market
MTE	*Mercato elettrico a termine*/Forward electricity market
MTF	Multilateral Trading Facility
no/nos	number/numbers

OJ	Official Journal of the European Union
OTC	Market Over the Counter
OTF	Organised Trading Facility
par/paras	paragraph/paragraphs
PIF Directive	Directive on the fight against fraud to the Union's financial interests by means of criminal law
PUN	National Single Price
rec/recs	recital/recitals
REMIT	Regulation on wholesale energy market integrity and transparency
s/ss	section/sections
sub-s/sub-ss	sub-section/sub-sections
TEC	Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union
TUF	*Testo unico disposizioni in materia di intermediazione finanziaria*/Consolidated Law of Finance
VAT	Value Added Tax
vol	volume

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CHAPTER I

INTRODUCTION

1. Introduction of chapter I

Chapter I aims to introduce the topic of this thesis. To that end, the author will present the background, limitations, and a brief description of the chosen topic (ch I, s 2). Then, she will analyse the societal (ch I, sub-s 3.1) and scientific (ch I, sub-s 3.2) relevance of this contribution. Finally, the author will examine the methodology used to write this thesis (ch I, s 4), to conclude by explaining the content of the following chapters (ch I, s 5).

2. Background and limitations

At the foundation of the European Community in 1957, the Community pursued the aim of eliminating internal borders and establishing an Internal Market where ensuring the free movement of goods, persons, services, and capital.[1] Accordingly, with the entry into force of the Lisbon Treaty on the 1st December 2009, the European Union (EU) legislator reiterated the importance of an Internal Market; guaranteeing its proper functioning became one of the EU's priorities.[2] Hence, the Union law creates a new legal order, provided as an integral part of the legal systems of the EU Member States and which their national courts are bound to apply regardless of the various sub-area of the law.[3]

The expression "Internal Market" stands for any sector of the capital market where, *inter alia*, goods and services are sold by providers to purchasers throughout the Union competing to establish the price of products. In the capital market, the value of goods is determined on the basis of both supply and demand of the products

[1] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU), art 26; Andrew Klip, *European Criminal Law – An Integrative Approach* (3rd edn, Intersentia 2016) 17.
[2] TFEU, arts 4(2)(a) and 114.
[3] Klip (n 1) 17-18.

concerned.[4] In turn, goods' supply and demand are affected by the comprehensive knowledge held by the markets' operators.[5] In this regard, two aspects require attention. The former consists in the necessity that all the significant information related to goods as bought and sold on markets would promptly reach investors and in such a way as to guarantee simultaneous accessibility to the public.[6] The latter corresponds to the prohibition of carrying out transactions that might unlawfully alter markets' prices and, consequently, the supply and demand interplay.[7] Those aspects are even more valuable in relation to a specific sector of the capital market where operators principally trade dematerialised assets. That is the financial sector, which encompasses the Union financial markets.

The Union financial markets refer to the banking and credit, non-banking financial intermediation, and insurance sectors.[8] In other words, financial markets broadly embrace any venue where the trading of financial instruments occurs. Those instruments are mainly virtual documents which represent a legal agreement involving any type of monetary value. They are assets traded on financial markets that can consist in cash, contractual right to deliver or receive cash or another kind of financial instrument, or evidence of an investor's ownership of an entity.

The organization and regulation of financial markets and financial instruments aim to facilitate, conclude, and execute sales contracts and enable the fair pricing of exchanged financial instruments.[9] To ensure such a fair pricing and, consistently, the fair functioning of the Union financial markets it is necessary to guarantee the constant dissemination of all the relevant information concerning financial instruments traded within them and enforce the prohibition of altering prices of those instruments. To that end, the Union Member States have introduced supranational acts over time. Those acts aim to fight several of the so-called "Euro-

[4] Filippo Annunziata, *La disciplina del mercato mobiliare* (10th edn, Giappichelli Editore 2017) 7-8; Renzo Costi, *Il mercato mobiliare* (11th edn, Giappichelli Editore 2018) 14-15; Marco Onado, *Economia e regolamentazione del sistema finanziario* (4th edn, Il Mulino 2014) 13-14.
[5] Sergio Seminara, *Diritto Penale Commerciale – Il diritto Penale del Mercato Mobiliare*, vol 3 (1st edn, Giappichelli Editore 2018) 53-54.
[6] ibid.
[7] ibid.
[8] ibid 2.
[9] Campobasso G F, *Contratti titolo di credito procedure concorsuali*, vol 3 (5th edn, UTET Giuridica 2014) 204.

crimes",[10] which include, *inter alia*, insider trading, the unlawful disclosure of inside information, and market manipulation. The Euro-crimes jointly refer to the expression "market abuse", which embraces all the unlawful behaviours in financial markets that are capable of illegally altering prices of financial instruments.

In the overall context of market abuse and the related Euro-crimes, this contribution is confined to the analysis of market manipulation for three reasons. Primarily, because, reading literature and case law on the abuse of financial markets so far, the author has noticed that they are mainly about market manipulation rather than insider dealing and the unlawful disclosure of inside information. Secondly, due to the primary interest of this thesis' author in expanding her knowledge on the market manipulation offence. Thirdly, the focus on market manipulation keeps the thesis feasible, given that insider dealing, in particular, is a completely different offence. Indeed, market manipulation consists in trading within financial markets to artificially increase or decrease an asset's price to obtain a personal profit.[11] In comparison, insider dealing is about misusing of relevant information.[12]

Moreover, this thesis is subject to another limitation. In the second part of this contribution (chs III and IV), the author will deepen into examining the prohibition of market manipulation in a specific kind of financial market: the Italian Wholesale Electricity Market. It is also known as the Italian "electricity stock exchange", and technically called the "Italian Power Exchange" (IPEX).[13] The IPEX is the Italian non-physical financial market where qualified electricity wholesalers trade financial instruments in the form of contracts for the electricity's supply and transportation through the Italian power grid by means of telematic platforms accessible via the Internet.[14] Consistently, in the first part of this thesis

[10] Enrico Basile and Francesco Mucciarelli, "Market Abuse Evolution after the MAD II and the MAR: how Italy Amended its Legislation in Light of the Regulation (EU) 596/2014" (23 November 2018) ISSN 2611-8858 Criminal Justice Network, <https://www.criminaljusticenetwork.eu/it/post/market-abuse-evolution-after-the-mad-ii-and-the-mar-how-italy-amended-its-legislation-in-light-of-the-regulation-eu-596-2014> accessed 28 May 2021.

[11] George Anstey, Sean Gammons and Robert Patton, "Market Abuse in Energy Markets at a glance" (*NERA*, 2018) https://www.nera.com/content/dam/nera/upload/AAG_Remit_1118.pdf accessed 23 June 2021.

[12] MAR, art 8(1).

[13] Glossario (*GME*) <https://www.mercatoelettrico.org/en/Tools/Glossario.aspx> accessed 17 June 2021.

[14] Leigh Hancher Adrien de Hauteclocque, Christopher Jones, Lars Kjølbye, Valérie Landes, Francesco Salerno and Lena Sandberg, *EU Competion Law and Energy Markets*, vol 2 (4th edn,

(ch II), the author will analyse the prohibition of market manipulation in the EU from a general perspective, pursuing the goal of depicting some of the building blocks on which chapters III and IV will be based on. Following this, she will focus on the IPEX and, particularly, on its legislative framework.

The author interest in discussing the prohibition of market manipulation at the IPEX has stemmed from the reading of the beginning of an article of the leading Italian economic newspaper, *Il Sole 24 ore*, which reads as follows: «Bad news for consumers: after reductions recorded in the first two quarters of 2016, from the 1st July the electricity bill will rise again. For a typical household, electricity will cost 4,3% more, while the gas increase will be 1,9%».[15] In line with those words, from July to September 2016, each kilowatt per hour would cost EUR 18,67 cents more than in the first two quarters of 2016 (+ 4.3%).[16] This development affected the Italian users, who had to pay more for electricity. To make an example, suppose that, in 2016, an average family household had to pay an utility fee of EUR 1000 per year. By applying the increase of 4,3% on this amount, the considered annual electricity bill would correspond to EUR 1043. Therefore, the household concerned would pay EUR 43 more than without that price spike. This example shows that even an amount that, at first glance, seems to be irrelevant would significantly burden a typical family's annual average cost.

According to the Italian Regulatory Authority for Energy, Networks and Environment (ARERA), the electricity value's surge is principally due to the remarkable growth of the electricity's dispatching costs.[17] These costs refer to the

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Claeys & Casteles 2016) 13-14; Sabrina Guarnieri, "La normativa finanziaria dei commodity derivatives con particolare riferimento ai mercati energetici (The financial regulation of commodity directives in the wholesale energy market)" (January 2018) ISSN: 2036-4873 Rivista Trimestrale di Diritto dell'Economia 31-32 <http://www.fondazionecapriglione.luiss.it/2018_01_RTDE_supplemento.pdf> accessed 20 May 2021; PUN: cos'è e come determina il costo dell'energia (*Sorgenia*, 2018) <https://www.sorgenia.it/guida-energia/pun-cose-e-come-determina-il-costo-dellelettricita> accessed 23 June 2021. See also Profilo Aziendale (*GME*) <https://www.mercatoelettrico.org/It/gme/Info/ProfiloAziendale.aspx> accessed 17 June 2021.

[15] Vittorio Nuti, "Energia: da luglio bolletta luce + 4,3%, gas + 1,9%. L'Autorità indaga su strategie anomale degli operatori" (28 June 2016) Il Sole 24 Ore <https://st.ilsole24ore.com/art/notizie/2016-06-28/energia-luglio-bolletta-luce-43percento-gas-19percento-l-autorita-indaga-strategie-anomale-operatori-195448.shtml?uuid=AD1tDpk> accessed 30 May 2021.

[16] Luca Martinelli, "Bolletta della luce e mercati elettrici, i conti non tornano" (*Altraeconomia*, 30 August 2016) <https://altreconomia.it/bolletta-mercati-elettrici-conti-non-tornano/> accessed 28 May 2021.

[17] Nuti (n 16).

price of the electricity's dispatching service that guarantees 24/7 electricity supply throughout Italy and its constant balancing with electricity demand.[18] In turn, the electricity's dispatching component depends on the costs of the electricity's dispatching service. The electricity's dispatching component has a meaningful impact on utility fees that everyone, as a consumer, needs to pay. Indeed, it might reach almost 50% of the electricity bill.

Being the electricity's pricing important, the ARERA, jointly with the Energy Markets Manager (GME), constantly overviews the IPEX.[19] If the ARERA discovers an infringement of the IPEX regulatory provisions, it will act accordingly. For instance, in the above case of 2016, the ARERA noted that the overall electricity dispatching service's value amounted to EUR 745 million, namely the difference between dispatching costs incurred in the first two quarters of 2016 and 2015.[20] Due to this considerable sum, the ARERA initiated investigations.[21] It encountered several criticisms due to abnormal strategies carried out by some operators, such as Enel, involved in the IPEX electricity trade. It observed that such anomalies had led to a notable increase in electricity price. Therefore, the ARERA undertook sanctioning proceedings against, *inter alia*, Enel. In December 2016, it imposed this company an administrative fine of EUR 802 000 for having manipulated the IPEX by infringing rules on the electricity dispatching service.[22] In June 2020, the ARERA punished another Italian company (unknown for privacy reasons) by imposing an administrative pecuniary sanction of EUR 84 000 for having adopted manipulative strategies within the electricity dispatching service at the IPEX.[23]

Since the abnormal growth of electricity's dispatching service's costs jeopardizes consumers, fighting the IPEX manipulation seems inevitable to ensure

[18] Testo Unico Ricognitivo della produzione elettrica (*ARERA*, 6 October 2020) 117.
[19] Profilo Aziendale (*GME*) (n 15).
[20] Martinelli (n 17).
[21] Energia: procedimenti sanzionatori ad Eni ed Enel (*ARERA*, 9 December 2016) <https://www.arera.it/it/com_stampa/16/161209.htm> accessed 20 June 2021.
[22] Deliberazione irrogazione di una sanzione amministrativa pecuniaria [2016] 700/2016/S/EEL 13-14; Elettricità: conclusi i primi procedimenti per la restituzione in bolletta degli importi indebiti da condotte anomale nei mercati all'ingrosso nel 2016 (*ARERA*, 6 March 2017) <https://www.arera.it/it/com_stampa/17/170306.htm> accessed 20 June 2021.
[23] Deliberazione irrogazione di una sanzione amministrativa pecuniaria [2020] 242/2020/S/EEL 1, 7.

the IPEX integrity and transparency, fair electricity pricing, and, consequently, that every Italian end-user would pay a reasonable price for electricity.[24] Moreover, the mentioned case of 2020 has highlighted that manipulative misconduct still occurs at the IPEX. Particularly in recent years, in which financial markets' operators are developing innovative trading platforms and technologies, new possibilities to manipulate are arising.[25] In addition, that case has underlined that facing this issue is of primary importance for the entire category of electricity consumers.

The main related problem is that there are shortcomings in fighting these manipulative behaviours in Italy because legislation capable of enforcing the prohibition of the IPEX manipulation properly is still missing there. In other terms, experience has shown that manipulative misconduct still affects the IPEX because there are not Italian Government's effective repressive measures. Therefore, the IPEX is and could even be manipulated, impacting on the annual average cost of the Italian end-consumers. However, the fact that Italy has not found a proper answer to the IPEX manipulation so far does not mean that there is no solution at all.

In fact, there are specific rules regarding market manipulation at the EU level that might be applied to fight the manipulation of the IPEX. Those rules are enshrined in both the Market Abuse Regulation (MAR)[26] and the Market Abuse Directive (MAD II)[27]. Since the MAR and MAD II enactment in 2014, the prohibition of market manipulation at the Union level has been based on them. They represent the two main pillars on which the repression of manipulative misconduct is currently based on. They have incisively affected the financial sector at the Union

[24] CESR and ERGEG advice to the EC in the context of the Third Energy Package, Response to Question F.20-Market Abuse (*ESMA*, October 2008) paras 20 and 8; Emanuele Grippo and Ottaviano Sansaverino (*Gianni, Origoni, Grippo, Cappelli & Partners*, February 2012) 1 <http://www.gop.it/doc_pubblicazioni/130_5riac17wby_ita.pdf> accessed 26 June 2021.

[25] Ensuring the integrity markets. EU laws aimed at ensuring the integrity of securities markets, including rules on financial benchmarks and safeguards against market abuse (*EC*) <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/securities-markets/ensuring-integrity-securities-markets_en> accessed 29 June 2021.

[26] Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (Text with EEA relevance) [2014] OJ L173/1.

[27] 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) [2014] OJ L173/179 (MAD II).

and domestic levels as a consequence.[28] The MAR and MAD II prescribe a comprehensive legislative system including minimum rules on criminal offences and sanctions' definition.[29]

On the one hand, the MAR enshrines measures to prevent market abuse to guarantee the integrity of financial markets in the EU and investors' protection and confidence in those markets.[30] Also, the MAR provides for a common regulatory framework on market manipulation and prohibits this misconduct in article 12 MAR.[31] On the other hand, the MAD II establishes minimum rules for criminal sanctions and requires the Member States to enforce the MAR provisions in a certain way.[32] Both the MAR and MAD II apply to all operators that trade financial instruments.[33]

Concerning the IPEX, there, around fifteen companies produce, trade and distribute electricity.[34] But the IPEX also comprehends other operators that trade electricity regardless of their involvement in producing and distributing it.[35] Since all the IPEX listed corporations trade at least a financial instrument for the electricity's supply and transportation throughout Italy, the MAR and MAD II might encompass those operators and their trading behaviour. If such is the case, manipulative behaviour of operators at the IPEX can fall within the scope of the market manipulation prohibition as provided under article 12 MAR and the MAD II rules.[36]

In addition, to the MAR and MAD II, with regard to the wholesale electricity market, one separate regulation is applicable: the Regulation on

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[28] Enrico Basile, "Verso la riforma della disciplina Italiana del *market abuse*: la legge-delega per il recepimento della Direttiva 57/2014/UE" (10 December 2015) La Legislazione Penale 1 <http://www.lalegislazionepenale.eu/wp-content/uploads/2015/12/approfondimenti_basile_2015.pdf> accessed 20 May 2021.
[29] Basile and Mucciarelli (n 11).
[30] MAR, art 1.
[31] ibid.
[32] MAD II, art 1.
[33] MAR, art 2; MAD II, art 1.
[34] Anna Maria Ciardullo, "Le 15 principali compagnie elettriche in Italia" (*Money.it*, 6 July 2020) <https://www.money.it/Le-15-principali-compagnie-elettriche-in-Italia> accessed 4 June 2021.
[35] Elenco degli operatori ammessi al mercato energetico ai sensi ai sensi dell'articolo 16, comma16.3, del Testo integrato della Disciplina del mercato elettrico approvato con D.M. 19/12/2003 e ss.mm.ii (*GME*) <https://www.mercatoelettrico.org/it/mercati/mercatoelettrico/ElencoOperatori.aspx> accessed 17 June 2021.
[36] CESR and ERGEG advice to the EC in the context of the Third Energy Package, Response to Question F.20-Market Abuse (*ESMA*) (n 25) paras 20 and 8.

wholesale energy market and transparency (REMIT).[37] It covers the entire electricity market by establishing rules concerning the functioning of the wholesale energy market and the prohibition of abusive practices affecting it to guarantee that consumers and other economic operators trust its integrity.[38] Therefore, the purpose of the REMIT is to profile an overall regulatory framework focused only on the wholesale electricity market, its structure, and how it works. Moreover, it contains rules capable of preventing manipulative behaviour only within the wholesale electricity market, such as article 5 REMIT.

For the scope of this thesis, the demanding fact is that the wholesale electricity market is a financial market and, from July 2016, also the MAR and MAD II are applicable to fight market manipulation in the Union financial markets.[39] Hence, the MAR and REMIT provisions might accumulate because article 12 MAR also aims to repress manipulative misconducts in financial markets. Then, the REMIT seems to have predated the MAR. Being the IPEX the Italian wholesale electricity market, and part of financial markets, the question is how rules settled in the REMIT are currently related to article 12 MAR and the MAD II.

Furthermore, it must be pointed out that, in January 2018, the entry into force of the Directive on markets in financial instruments (MiFID II)[40] complicated the relationship between the MAR, MAD II, and REMIT. The reason behind this is that the MiFID II has indirectly enlarged the MAR applicability to certain categories of financial instruments that were already regulated pursuant to the REMIT.[41] For all of these reasons, understanding the relationship between the REMIT on the one hand and the MAR and MAD II on the other, by also considering the MiFID II novelties, as concerns the EU regime of market manipulation, is pivotal to analyse whether article 12 MAR and the MAD II might be applied to

[37] Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (Text with EEA relevance) [2011] OJ L326/1 (REMIT).
[38] REMIT, rec 1 and art 1(1).
[39] Market abuse and accepted market practices (*ESMA*) <https://www.esma.europa.eu/regulation/trading/market-abuse> accessed 14 June 2021.
[40] Directive 2014/65/EU of The European Parliament and of The Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (Text with EEA relevance) [2014] OJ L173/349 (MiFID II).
[41] MiFID II, s C of Annex 1; MiFID II"(*ESMA*) <https://www.esma.europa.eu/policy-rules/mifid-ii-and-mifir> accessed 16 June 2021.

fight the IPEX manipulation. Therefore, the author will examine this relationship in light of the post MiFID II regime.

Finally, this thesis is circumscribed to the applicability of article 12 MAR and the MAD II rules at the IPEX, based in Italy. Choosing Italy among other Member States has been a choice of convenience because the author needed to narrow down her contribution to make the thesis feasible and only limited to the prohibition of market manipulation and the sanctions concerned. The author's intention is not to study the MAD II's implementation in Italy. It consists in going through how the Italian legislator has transposed the MAD II to give it full effect in Italy to be then able of clarifying whether article 12 MAR and MAD II are applicable to the IPEX.

Secondly, picking Italy has depended on the fact that there are still cases related to the IPEX manipulation in Italy, such as the cases mentioned above (ch I, s 2). Probably, such a phenomenon also affects other Member States. However, discussing article 12 MAR and the MAD II applicability to each other Member States' wholesale electricity markets in this thesis would be unfeasible. Thus, the author has picked Italy given that cases in which electricity dispatching costs' spike, similar to the above regarding Enel, could impact the electricity bill that the Italian end-consumers might have to pay in the future.

Last but not least, given the author's mother tongue being Italian, she has made this choice to study sources in both languages, English and Italian.

3. Relevance of the thesis

As explained in section 2 of chapter I, the author's attention in chapters III and IV will be focused on discussing the applicability of article 12 MAR and the MAD II rules on the prohibition of market manipulation to the IPEX, how those provisions are implemented in Italy in accordance with the MAD II rules, and whether they can be used for the repression of market manipulation at the IPEX.

In this regard, the societal and scientific relevance of the author's contribution are the following.

3.1 Societal relevance

The wholesale electricity market is of great economic and social importance given its impact on the production system of a country and thus on the generation of the annual Gross Domestic Product (GDP).[42] The GDP represents «the standard measure of the value-added created by producing goods and services in a country during a certain period».[43] Likewise, the IPEX is highly important due to its impact on the Italian production system and GDP.

The IPEX manipulation can lead to an unfair transfer of wealth from one sector to another and an excessive increase in the living cost to the detriment of the entire Italian community and businesses. Also, the abnormal electricity pricing and particularly the anomalous formation of the electricity's dispatching service's costs, caused by the IPEX operators' manipulative misconduct, damage consumers and micro-enterprises, that will be required to pay an unfair price for electricity.[44]

Given those considerations, it follows that financial markets' transparency,[45] legislative framework's effective enforcement related to market abuse,[46] and, specifically, prevention of market manipulation, represent the essential premises for the fair functioning of financial markets and economic growth.[47] Moreover, as for the IPEX, prohibiting its manipulation to ensure its integrity and safeguard electricity users constitutes an essential matter for Italy. It seems the only way to guarantee fair electricity pricing and, consequently, that consumers would pay the proper electricity bill. Otherwise, if cases like 2016 and 2020 would continue to occur (ch I, s 2), the Italian electricity consumers would still have to pay unfair electricity prices and be the final "victims" of such operators' manipulative misconduct at the IPEX.

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[42] Definition of "Gross Domestic Product" (*The Economic Times*, 11 July 2021) <https://economictimes.indiatimes.com/definition/gross-domestic-product> accessed 14 June 2021.
[43] Glossary (*OECD*) <https://stats.oecd.org/glossary/> accessed 2 June 2021.
[44] REMIT, rec 4; Ilaria Cianci, "Fatti e misfatti: la manipolazione di mercato" (*Starting Finance*, 25 July 2019) <https://www.startingfinance.com/approfondimenti/manipolazione-di-mercato/> accessed 11 June 2021.
[45] MAR, rec 2.
[46] MAD II, rec 4.
[47] MAR, rec 2.

As stated, from a societal perspective, this thesis aims to analyse whether the MAR and MAD II are applicable to the IPEX to combat market manipulation and, accordingly, prevent the Italian end-consumers from paying unfair electricity prices.

3.2 Scientific relevance

The applicability of the MAR and MAD II is already discussed in the literature. However, there are no consistent answers given to the question concerning the applicability of article 12 MAR with regard to market manipulation and the MAD II at the IPEX to prevent operators from manipulating it. Indeed, a proper answer cannot be found either in literature or in the legislative framework. There are some indications in the MAR and MAD II on their applicability at the EU level, but they are unclear about the possibility of applying them to the IPEX. Therefore, this issue still requires a solution.

For this reason, it seems highly relevant to look at whether the MAR and MAD II regime is applicable to combat manipulative misbehaviour at the IPEX. That is important because if the MAR and MAD II are applicable to the IPEX, they can prevent manipulating electricity pricing. Then, it is of societal relevance because this misconduct still takes place at the IPEX. Being out there, it harms both the fair electricity pricing and Italian users.

As observed, this thesis's author wishes to fill this gap and contribute to the body of knowledge by profiling an answer to article 12 MAR and the MAD II applicability to the IPEX by also considering their correlation with the REMIT in light of the post-MiFID II regime. The main purpose is to figure out if their applicability could represent a feasible and valuable solution to fight the IPEX manipulation.

4. Methodology

This thesis's methodology bases on traditional legal research, characterized by a combination of methods consisting of internal legal comparison and legal studies. The author will look into different aspects of rules as concerns market manipulation

that can be found in the MAR, MAD II, and REMIT. To that end, the author applies the interpretation method of the Court of Justice of the EU (CJEU), applicable to all provisions at the EU level. Such method corresponds to a "preference" order that might consist of a maximum of four stages: literal interpretation, comparing language versions, teleological interpretation and using *travaux préparatoires*. It means that the CJEU begins by analysing the rule concerned by means of literal interpretation.[48] However, the Union law written text might be insufficient to interpret it. Hence, if there is something wrong with the rule's wording, the Court compare it to its language versions.[49] Furthermore, if it is necessary to interpret the Union norms uniformly, the CJEU applies the teleological interpretation by considering both the objectives that the legislator wishes to achieve by drafting the specific considered rule and the overall scope of the legal tool comprising it.[50] Finally, if the previous three steps do not provide for any solution, the Court examines the rules' *travaux préparatoires*.

As for the collection of information needed to address this thesis's topic, the author will gather data from both the European and Italian legislative sources. Secondly, she will collect data through reports, secondary academic sources and literature. Thirdly, this thesis's research method will encompass the analysis of some CJEU and European Court of Human Rights (ECtHR) case law.

Books, journal articles, and judgements will be gathered by means of Google Scholar, University of Utrecht online Library, LUISS library, LUISS online library, and several official websites such as EUR-lex, Curia, Gazzetta Ufficiale della Repubblica Italiana website, etc.

Finally, to search for existing sources about this contribution's topic, the author will use combinations of the following keywords: "administrative enforcement regime", "administrative sanctions", "commodity derivatives", "criminal enforcement regime", "criminal sanctions", "dual enforcement regime", "electricity wholesale", "energy market", "European legislative framework", "financial instrument", "IPEX", "Italian legislative framework", "MAD I", "MAD

[48] Case C-467/05 *Giovanni Dell'Orto* [2007] ECLI:EU:C:2007:395, par 54.
[49] Case C-29/69 *Stauder* [1969] ECLI:EU:C:1969:57 p 424, par 3; Case C-403/09 PPU *Detiček v. Sgueglia* [2009] ECLI:EU:C:2009:810, par 33; Klip (n 1)147.
[50] Case *Stauder* (n 50) p 424, par 3; Case C-45/08 *Spector* [2009] ECLI:EU:C:2009:806, par 62; Cases *Detiček v. Sgueglia* (n 50) par 33.

II", "MAR", "MiFID II", "market manipulation", "punishment", "REMIT", "sanctions", "spot commodity contract", "wholesale electricity market", etc.

Once collected all the relevant sources for writing this thesis, the author will read them and analyse their arguments to interpret the MAR, MAD II, and REMIT, discuss their applicability, explain their relationship, and so on.

5. Reading guide

Chapter II will discuss the first building block of this contribution, namely the market manipulation prohibition in the EU. Primarily, the author will explain how this misconduct was repressed before the enactment of the MAR and MAD II: under the Directive on Market Abuse (MAD I)[51] (ch II, s 2). Secondly, she will analyse the relevant aspects prior to the MAR and MAD II enactment by focusing on the EU criminal policy under the MAD I and the related criticisms (ch II, s 3). Third, the author will discuss the fighting of market manipulation under the MAR and MAD II (ch II, s 4). Accordingly, being the thesis confined on the applicability of article 12 MAR and the MAD II, the author will deepen into both of their scopes regarding market manipulation. Moreover, since this contribution focuses on the repression of market manipulation, chapter II will depict the prohibition of market manipulation under article 12 MAR, its significant aspects, and how the Member States shall enforce it.

Next, chapter III will describe the prohibition of market manipulation in the EU in relation to the IPEX. It begins by providing a proper overview of the field on which the applicability of the MAR and MAD II will be circumscribed: the IPEX. Therefore, the author will explain how both the wholesale electricity market and the IPEX work by considering the specific kind of commodity they are related to: electricity (ch III, s 2). Following this, chapter III aims to depict the other building blocks of this thesis. Hence, the author will look at the REMIT and its applicability in relation to the IPEX (ch III, s 3). Likewise, she will discuss the MAR and MAD II in the IPEX context (ch III, s 4). Finally, given the relevance of the mentioned relationship between the MAR and MAD II on the one hand and the REMIT on the

[51] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L96/16.

other, chapter III will analyse it in detail, considering the main novelties under the post-MiFID II regime (ch III, s 5).

Finally, chapter IV will deepen into the national perspective. The author will contribute to look at the applicability of the MAR and MAD II to fight the manipulation of the IPEX. Firstly, chapter IV will discuss the enforcement of article 12 MAR and the MAD II implementation in Italy in order to verify whether the Italian legislator has complied with the MAR and MAD II; they respectively settled rules on administrative and criminal law enforcement to repress market manipulation in the Italian financial markets (ch IV, s 2). Following this, the author wishes to provide an answer to the possibility of applying the MAR and MAD II at the IPEX to fight its manipulation and, consistently, prevent Italian end-consumers from paying unfair prices for electricity (ch IV, s 3).

CHAPTER II

PROHIBITION OF MARKET MANIPULATION IN THE EU

1. Introduction of chapter II

Chapter II aims to provide a complete overview of the prohibition of market manipulation at the EU level.

First of all, it seems important to stress that the current repression of market manipulation under article 12 MAR is based on the same prohibition provided under the MAD I and replaced by the MAR and MAD II in 2014. Then, since it is almost the same prohibition, the author will also look at the literature about the fighting of manipulative misconduct under the MAD I to interpret the prohibition of market manipulation under article 12 MAR and its applicability.[52] Consistently, it is necessary to understand the reasons why the Union legislator felt the need to substitute the MAD I and establish an entirely new legislative framework on market abuse composed of the MAR, MAD I, and MiFID II.

To that end, the author will introduce the prohibition of market manipulation in the EU from a historical perspective, analysing the MAD I (ch II, s 2.1) and the repression of market manipulation under it (ch II, s 2.2). Later on, the author will discuss the most important aspects before the MAR and MAD II enactment, related to the economic crisis of 2008 and the corporate scandals that highlighted the MAD I criticisms concerning the EU criminal policy on the repression of market manipulation (ch II, ss 3.1 and 3.2). Following this, the author will provide some preliminary considerations on the EU competence in criminal matters on the basis of which the MAD I was replaced by the MAR and MAD II in 2014 (ch II, s 3.3), to then explain the legal basis for criminalization measures enshirined under those legal instruments (ch II, s 3.4).

Once clarified the historical background of the Union legislative framework on market abuse, the author will examine one of the building blocks of this thesis: the prohibition of market manipulation under article 12 MAR and the MAD II.

[52] MAD I, art 1(2); MAR, art 12.

Indeed, given that chapters III and IV will be focused on the MAR and MAD II applicability to the IPEX to fight market manipulation, figuring out how the MAR and MAD II combat manipulative misconduct at the EU level appears to be crucial to then discuss whether they can be applicable to the IPEX. Therefore, it is essential to understand the scope and content of the prohibition under article 12 MAR and how this norm needs to be enforced by the Member States according to the rules prescribed in the MAR and MAD II.

Coherently, section 4 of chapter II has the purpose of analysing the repression of market manipulation enshirined under the MAR and MAD II. Section 4.1 of chapter II will introduce the MAR, MAD II, and MiFID II. Next, section 4.3 of chapter II will discuss the applicability of article 12 MAR as established under article 2 MAR. Moreover, since article 2 MAR refers to the notions of "financial instrument", "spot commodity contract" and "commodity derivative", section 4.2 of chapter II will define those terms within the meaning of article 3 MAR to allow the complete understanding of article 2 MAR and its applicability. Later on, section 4.4 of chapter II will explain misbehaviour that constitutes market manipulation at the EU level by examining article 12 MAR, its constitutive elements – the *actus reus* and *mens rea* –, and to whom the market manipulation prohibition pursuant to article 12 MAR applies. Finally, chapter II will enshrine how article 12 MAR requires to be enforced by the Member States following the rules settled in the MAR and MAD II, respectively for administrative and criminal law enforcement (ch II, s 4.5), to conclude with some of the significant related aspects (ch II, s 4.6), as the *ne bis in idem* (ch II, s 4.7).

2. Prohibition of market manipulation under the MAD I

2.1 The MAD I

The regulation of financial markets has always been a cornerstone of the EU strategy of improving the investment services and ensure the protection of investors

across the EU.[53] Indeed, the EU regulation of financial markets dates back to the '60s, when a group of experts appointed by the European Commission (EC) found that the development of a EU capital market fell far from the EU economic agenda.[54] Moreover, it was believed that closer cooperation in domestic, economic, and financial policies represented a prerequisite to establish a monetary union.[55]

Hence, in 1989, the EC adopted the first EU legislation on financial markets: the Insider Dealing Directive.[56] It pursued the goal of preventing markets' participants from using their knowledge to arbitrage information asymmetry in the Union financial markets.[57] Nevertheless , the Insider Dealing Directive was later considered inadequate to promote the integration of financial markets; it left several areas of financial regulation unharmonised and fragmented. In fact, it was believed that an integrated and efficient financial market required market integrity and transparency.[58] Also, the proper functioning of financial markets and public confidence within them represented two prerequisites for the EU economic growth and wealth.[59] The main related problem was that the Directive for coordinating regulations on insider dealing of 1989 did not comply with those requirements nor satisfied those needs at the Union level.

Given the overall unsuccessfulness of the Insider Dealing Directive, in 1999, it was proposed the introduction of new legislative techniques based on framework principles, implementing measures, cooperation, and enforcement.[60] Then, in 2003, the EC adopted the MAD I. It introduced a basic legal framework to create a «level playing field for all economic operators in the Member States as part

[53] Tóth Tamás, "How MAR/CS MAD changed the EU's view on market abuse" (December 2020) vol 21 n 3 ERA-Forum 365 <https://link.springer.com/article/10.1007/s12027-020-00620-y> accessed 23 July 2021.
[54] Huseyin Cagri Corlu, *Application of Anti-Manipulation Law to EU Wholesale Energy Markets and Its Interplay with EU Competition Law, Energy and Environmental Law & Policy Series*, vol 35 (1st edn, Kluwer 2018) 14.
[55] ibid.
[56] Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing [1989] OJ L334/1930.
[57] Corlu (n 55) 14.
[58] MAD I, recs 2 and 14.
[59] ibid rec 2.
[60] ibid rec 4.

of the effort to combat market abuse».[61] By providing so, the MAD I and, particularly, articles 1(2) and 5 enshrined a market abuse regime that would play a central role in developing and harmonizing national laws on the prohibition of market manipulation at the EU level. Accordingly, the MAD I was enacted to reinforce the market integrity, contribute to the harmonization of the rules for market abuse throughout Europe, establish a strong commitment to transparency and equal treatment of market's participants, and require a closer cooperation and higher degree of information exchange between national authorities to reduce the potential inconsistencies, confusion, and loopholes.[62]

2.2 The prohibition of market manipulation under the MAD I

Article 1(2) MAD I enshrined four kinds of manipulative misconduct. Three of them were called "transaction" – "operative", or "trade based" – manipulation, because they related to commit market manipulation by means of transactions (ch II, sub-s 2.2.1).[63] While the other was known as "information" – "informative", or ""information based" – manipulation, because it regarded the infringing of the market manipulation prohibition by disseminating information (ch II, sub-s 2.2.2).[64]

Despite this distinction, both the operative and informative manipulation under article 1(2) MAD I followed the traditional construction of the Euro-crimes, composed of the *actus reus* and *mens rea*.[65] The *actus reus* corresponds to a combination of objective circumstances established by the Union law, which constitutes the prohibited conduct.[66] Instead, the *mens rea* refers to the intention to obtain an advantage from the Union rules by artificially creating the conditions laid down for obtaining it.[67] It means that, in addition to the existence of a prohibited

[61] Market abuse and accepted market practices (*ESMA*) (n 40); Mathias Siems, "The EU Market Abuse Directive: A Case-Based Analysis" (*SSRN*, 7 December 2017) 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1066603> accessed 27 May 2021.
[62] Market abuse and accepted market practices (*ESMA*) (n 40).
[63] Atto del Governo n. 25, Abusi di mercato (regolamento UE n. 596/2014), 27 June 2018 2; Guido A. Ferrarini, "The European Market Abuse Directive" in Danny Busch, Guido Ferrarini and Gerard van Solinge (eds) *Common Market law Review*, vol 41 (Kluwer 2004) 724; Seminara (n 5) 94.
[64] ibid.
[65] Klip (n 1) 218.
[66] Case C-110/99 *Emsland-Stärke* [2000] ECLI:EU:C:2000:695, paras 52-53; Klip (n 1) 219.
[67] Case *Emsland-Stärke* (n 67) paras 52-53.

conduct – *actus reus* –, the perpetrator shall be aware or must intend to behave in a certain matter.[68] According to those considerations, the *actus reus* and *mens rea* in transaction and information manipulative misconduct were enshrined under article 1(2) MAD I as follows.

2.2.1 Misconduct of transaction manipulation under article 1(2)(a) and (b) MAD I: the *actus reus* and *mens rea*

Focusing on transaction manipulation, first, article 1(2)(a) MAD I stated that market manipulation shall mean transactions or orders to trade which gave, or were likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments; or those transactions by means of which a person, or persons acting in collaboration, secured the price of one or several financial instruments at an abnormal or artificial level. Therefore, the *actus reus* in the manipulative misconduct as provided under article 1(2)(a) MAD I embraced two different kinds of market manipulation.

The former *actus reus* was about engaging in transactions or placing an order to trade and trying to manipulate the price of financial markets by giving false or misleading signals concerning financial instruments traded within them. By analysing the Union legislator's language, article 1(2)(a) MAD I qualified signals as "false" or "misleading". "False" meant that those signals regarded information that did not correspond to the truth.[69] Instead, "misleading" signified that those signals might be true, but it was not clear whether they were true or not.[70] Also, signals could be related to the supply of, request for, or value of financial instruments. Furthermore, the use of the expression "give, or is likely to give" seems to mean that article 1(2)(a) MAD I encompassed both situations where transactions for sure created false or misleading signals ("give"), as well as those

[68] Klip (n 1) 220.
[69] Sending false or misleading signals (*BaFin*) <https://www.bafin.de/EN/Aufsicht/BoersenMaerkte/Emittentenleitfaden/Modul3/Kapitel3/Kapitel3_7/Kapitel3_7_3/kapitel3_7_3_node_en.html;jsessionid=F2CA632271D2EF6F167DBF5860F2D7F9.1_cid501> accessed 15 June 2021.
[70] ibid.

where it was not clear whether transactions would give false or misleading signals ("likely to give").

The latter *actus reus* in the manipulative misconduct described by article 1(2)(a) MAD I regarded the engagement in transactions or placement of an order to trade and trying to manipulate the price of financial markets by fixing financial instruments' prices at an abnormal or artificial level. By looking at article 1(2)(a) MAD I, it can be observed that the *actus reus* referred to "abnormal" and "artificial" level. In this respect, prices of financial instruments were considered to be "abnormal" if they already existed but were far from the normality. While they were classified as "artificial" if those prices were artificially created by traders to manipulate financial instruments.

With regard to the *mens rea*, article 1(2)(a) MAD I did not mention the requirement of intent. However, it was intended that the person who entered into the transactions concerned or placed an order to trade to provide false or misleading signals aimed to manipulate prices of financial instruments.

Second, article 1(2)(b) MAD I stated that market manipulation encompassed the misbehaviour consisting in carrying out transactions or orders to trade by employing fictitious devices or any other form of deception or contrivance.

The *actus reus* under article 1(2)(b) MAD I concerned entering into transactions to manipulate financial markets by means of fictitious device, deception, or contrivance. "Fictitious device" signified a device that was false or did not exist despite someone claimed that it was true or existed. "Deception" stood for acting in a way that tended to or was capable of misleading the financial markets' investors as to the truth of the facts.[71] Instead, the expression "contrivance" meant any artificial arrangement planned for gaining a profit.

As for the *mens rea*, similarly to article 1(2)(a) MAD I, article 1(2)(b) MAD I did not explicitly require that the misconduct at stake had to be committed intentionally. Nevertheless, it was intended that the person who employed fictitious device, deception, or contrivance, had the intent to alter financial markets.

[71] "*Deception* definition" (*Law Insider*) <https://www.lawinsider.com/dictionary/deception> accessed 21 June 2021.

2.2.2 Misconduct of information manipulation under article 1(2)(c) MAD I: the *actus reus* and *mens rea*

Turning to information manipulation, article 1(2)(c) MAD I established that market manipulation related to the activity of disseminating information by means of the media, or any other mean, that give, or was capable of giving, false or misleading signals as to financial instruments, where the person who made the dissemination was aware, or ought to be aware, that the information was false or misleading.

The *actus reus* was about spreading information to manipulate financial markets by using the media. Article 1(2)(c) MAD I used the expression "disseminating information". It signified disclosing knowledge that was considered to be relevant for a large number of investors. Also, the relevant information needed to be broadcasted by employing the media, such as the Internet. Moreover, article 1(2)(c) MAD I used the expression "give, or is likely to give". By providing so, the Union legislator wished to cover both situations where disseminating information certainly created false or misleading signals ("give"), as well as those where it was not sure whether spreading relevant knowledge would provide false or misleading signals ("likely to give").

For what concerns the *mens rea*, unlike the cases pursuant to articles 1(2)(a) and (b) MAD I, article 1(2)(c) MAD I explicitly required the intention to commit the misbehaviour concerned. In other terms, the Union legislator explicitly required that the person who perpetrated the offence of market manipulation under article 1(2)(c) MAD I was aware of the fact that signals concerned were false or misleading; or that the person acted without being aware that they were false or misleading for being negligent, but having to know that the broadcasted information was false or misleading.

3. Relevant aspects between the MAD I and the MAR and MAD II enactment

The main purpose of this section consists in explaining the background of the MAR and MAD II enactment to clarify the reasons that led those legislative instruments to replace the MAD I. Historically, those grounds can be found in the economic

crisis of 2008 and in the financial crimes committed by corporations between the MAD I enactment in 2003 and the introduction of the MAR and MAD II in 2014 (ch II, s 3.1). Indeed, those events highlighted the MAD I shortcomings in establishing a criminal policy to prohibit the perpetration of market manipulation in the EU on the one hand (ch II, s 3.2), and the necessity to employ the EU competence in criminal matters based on the Treaties' rules to definitely combat it on the other (ch II, ss 3.3 and 3.4).

3.1 The economic crisis of 2008 and the financial corporate crimes

The economic crisis of 2008 and the financial corporate scandals committed in the time frame between 2003 and 2014 represented the incipit of the European legislative process of integration and harmonization, which led to the MAD I replacement through the MAR and MAD II enactment in 2014. Accordingly, before deepening into the prohibition of market manipulation under article 12 MAR and the MAD II (ch II, s 4), it seems significant to look at the economic crisis of 2008 and the related financial crimes committed by corporations in Europe in that period.

In the first decade of the 21st century, some Member States were affected by considerable financial corporate crimes. They involved national banks and credit institutions, which carried out abusive misconduct able to alter the proper functioning of the EU financial market and damage trust of investors within them.[72]

Among the others, the *Fortis* case represents a striking example of those scandals. To briefly summarize the facts, in 2007, the Banco Santander, the Fortis Bank and the Royal Bank of Scotland obtained control over ABN AMRO Bank, through hostile takeover without sufficient capital to complete the transaction.[73] In the wake of the meltdown of the EU financial markets and the nationalization of the Fortis Bank by the Belgian, Dutch and Luxembourg governments in 2008,

[72] Pietro Maria Sabella, "Il percorso ad ostacoli del processo di integrazione e armonizzazione europea in materia penale. Il modello della controversa riforma eurounitaria in tema di *market abuse*" (7 May 2019) Actos Congreso internacional 25 anos de mercado unico en la Unione Europea 2. See also Amati Enrico, *Abusi di mercato e sistema penale* (Giappichelli Editore 2012) 1-12.
[73] Michiel Luchtman, "The ECJ' recent case law on *ne bis in idem*: implications for law enforcement in a shared legal order" (2018) vol 5 Common Market Law Review 1719 <http://dspace.library.uu.nl/handle/1874/374358> accessed 18 May 2021.

questions arose on the potential misleading character of the communication strategies of the Fortis Bank to attract new capital to finance its share of the ABN AMRO Bank takeover.[74] Therefore, in 2014, the highest Dutch administrative court issued an administrative fee against the holding of the Fortis Bank.[75]

The *Fortis* case law is still considered as one of the biggest financial scandal ever, given is indirect impact on many other European banks.[76] However, the *Fortis* judgement was not a market abuse sporadic case in the first decade of the 21st century. Indeed, the *LIBOR* dispute represents another valuable example of the financial corporate scandals perpetrated between 2003 and 2014.[77] It was about a highly publicized scheme in which bankers of the major French, British, and German financial institutions – i.e. the Societè Generale, the Deutsche Bank, Barclays, and the Royal Bank of Scotland – agreed to manipulate the London Interbank Offered Rate (LIBOR). The LIBOR was, and still is, a benchmark interest rate to which the most important global banks referred for short-term loans. It was fundamental to carry out operations in international financial markets and, thus, represented the basis for financial transactions. Moreover, it influenced the determination of the Euro Interbank Offered Rate (EURIBOR). Both the LIBOR and the EURIBOR were the daily references for setting the value of mortgages, consumer credit products, swaps, and other derivative instruments, whose pricing had a notable impact on consumers' behaviour and on the entire financial market.[78] Between 2005 and 2009, the Barclays – one of the largest and most important bank in the world –, manipulated the LIBOR to gain profits and limit losses from derivative trading. Also, between 2007 and 2009, the Barclays dishonestly made low LIBOR submissions rated to dampen market speculation. The scheme resulted in the alteration of financial contracts' prices in the EU and all around the word. It

[74] ibid 1719.
[75] ibid.
[76] Sabella (n 73) 2.
[77] Enrico Basile, "Verso la riforma della disciplina Italiana del *market abuse*: la legge-delega per il recepimento della Direttiva 57/2014/UE" (n 29) 8; Enrico Basile, "Una nuova occasione (mancata) per riformare il comparto penalistico degli abusi di mercato?" (29 May 2017) Diritto Penale Contemporaneo 5 <https://archiviodpc.dirittopenaleuomo.org/upload/5366-basileenrico517.pdf> accessed 13 May 2021.
[78] Sabella (n 73) 2-3.

led to several lawsuits and imposition of fines against the involved corporations, the Barclays, as well as the Deutsche Bank and the Royal Bank of Scotland.

Both the *Fortis* and *LIBOR* judgements underline the overall inefficiency of the EU legislative framework in preventing and fighting market abuse in the first decade of the 21st century. This inadequacy was due to, first, the different kinds of legislative measures imposed by the Member States.[79] Second, the absence of a European common approach adopted by the domestic institutions, because the latter preferred to protect the national economic interests rather than those of the EU.[80] Third, the shortcomings in combatting market abuse were due to the fact that, if the offences were perpetrated in different Member States and, thus, had a supranational dimension, the sanctions imposed by the Member States' competent authorities were inhomogeneous.[81] Indeed, those measures did not always provide for the use of criminal penalties or prosecution by the competent judicial authorities. On the contrary, in some cases, only the Member States' administrative authorities were allowed to intervene and, thus, allowed to issue only administrative sanctions.[82] Finally, it was not clear whether sanctions should be imposed against the natural person or against the corporation when the misconduct was committed by a corporation rather than an individual, as occurred in the *Fortis* and *LIBOR* disputes.[83]

Overall, there was thus a deep fragmentation in facing market abuse. It resulted in legislative asymmetries among the EU Member States, demonstrated i.e. by the *Fortis* case law. Indeed, after the mentioned events of 2007, investigations were opened by the Dutch Financial Services Authority (AFM). In 2012, after the conclusion of those investigations, the AFM issued four punitive fines against the Belgian and Dutch legal persons, that together constituted the holding of the Fortis Bank. They were punished, first, for the incorrect public announcement made by the Fortis Bank on its financial position at the time of the ABN AMRO Bank takeover. Second, for having not disclosed price-sensitive information.[84] At the

[79] Sabella (n 73) 2.
[80] ibid.
[81] ibid.
[82] ibid.
[83] ibid.
[84] Luchtman (n 74) 1719.

same time, both the Belgian supervisory and judicial authorities opened investigations against the same legal persons and some of their board's members. Consistently, the facts under the Belgian authorities' investigations overlapped with those that had led to the previous Dutch fine decisions. Moreover, the Belgian administrative enforcement agency found that the Fortis Bank had distributed misleading information. Then, the Belgian agency imposed administrative fines against the Fortis Bank and several members of its board. Additionally, the Belgian judicial authorities started criminal prosecution in 2013 against seven board's members of the Fortis Bank for having issued misleading information and the forgery documents, and for deception. Later on, in 2014, the highest Dutch administrative court confirmed the fines against the Fortis Bank holding.[85] In the meanwhile, in Belgium, administrative proceedings reached the Belgian Court of Cassation, which established a violation of the *ne bis in idem* principle and mitigated the fines imposed against the Fortis Bank.

The Fortis Bank thus merely represent an example of the several banks and credit intuitions prosecuted for financial corporate crimes in the first decade of the 21st century. Those prosecutions showed the preference of the Member States to prosecute and punish manipulative misconduct at the domestic rather than EU level. The EU was, indeed, able to autonomously act only in an administrative manner, due to its direct exclusive competence in protecting competition in the common market, legitimized under article 114 TFEU. Instead, the EU could not intervene by means of criminal measures. In this regard, the following section will discuss the EU criminal policy on the market manipulation prohibition before the MAR and MAD II, and the MAD I criticisms in repressing market manipulation within the EU after the economic crisis of 2008 and the mentioned financial corporate scandals.

[85] ibid.

3.2 The EU criminal policy on the prohibition of market manipulation before the MAR and MAD II enactment: a focus on the MAD I criticisms

The economic crisis of 2008 and the financial corporate crimes committed in the first decade of the 21st century pointed out the possibility of the EU to merely intervene in a few cases by imposing only administrative sanctions. They thus underlined the inadequacy of the MAD I to establish a EU criminal policy on the prohibition of market manipulation.

The MAD I only provided for administrative sanctions, such as those enshrined under article 14 MAD I. Instead, it did not legitimize the EU's authorities to act to punish the commission of market manipulation within the EU by means of criminal sanctions. In other words, the repression of market manipulation through penalties was exclusively in the hands of the Member States. Therefore, the EU's institutions started to observe that the prevention and fighting of market manipulation required the establishment of a well-founded criminal policy. In this respect, although the MAD I had many pros, it suffered of several drawbacks. Then, the satisfaction of the EC about the MAD I provisions was short-lived due to the MAD I inadequacy in dealing with the financial market's evolution.[86] First, new trading venues appeared on the market: not only regulated markets were operated in the EU but also multilateral and organized trading facilities started operating their systems.[87] Second, the technological development contributed to change the kinds of financial instruments to trade with, such as options, futures, swaps, and any other derivative contracts if settled or may be settled in cash (ch II, sub-s 4.2.1).[88]

Moreover, although the EU's legal discipline about trading on financial markets was strongly harmonized, the Union's protection of financial markets was inhomogeneous because of the inefficient integration process between the EU and the national legislative frameworks.[89] Therefore, the MAD I substantial gap in criminal matters regarding financial markets impacted the Union methods of intervening within them and led to a fragmented process of their harmonization.[90]

[86] Tamás (n 54) 365.
[87] ibid.
[88] ibid.
[89] Sabella (n 73) 3-4.
[90] ibid 3.

It had thus determined the absence of a single comprehensive model to ensure the proper functioning of the Union financial markets and prevent their manipulation.[91] In fact, discrepancies between models and techniques to safeguard financial markets, as outlined by the Union legislator and transposed by the Member States, highlighted that there were shortcomings in sharing common values.[92] For this reason, national legislators entrusted the Union for legislating on the protection of financial markets and their investors. However, the Union may intervene by enacting directives and regulations with different premises and purposes. Then, the Member States struggled to implement and enforce them. Accordingly, coordinating the European and national legal frameworks appeared frustrating and altered by the Union's excessive intrusiveness in financial matters on the one side and the Member States' inefficiency on the other.[93]

Overall, given the evolution of the EU financial markets on the one hand, and discrepancies between models and techniques for safeguarding those markets on the other, the EC considered the MAD I unable to face those concerns.[94] It believed that the MAD I was no longer satisfactory to fight unlawful misconduct on the EU financial markets.[95] Particularly, the EC stressed that, after 2003, financial markets became increasingly global, giving rise to new methods of trading within them, but also leading to new possibilities to manipulate those markets and move large sums of money within them in less than a second.[96] It was evident that the manipulation of the Union financial markets could result in significant losses for both the Union consumers and investors.[97]

For those reasons, the Union legislator proposed to make a regulation harmonizing the rules to fight market abuse – the MAR – and issue a directive on the criminal sanctions to punish, *inter alia*, market manipulation – the MAD II .[98]

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[91] ibid 4
[92] ibid 9.
[93] ibid 10.
[94] Ensuring the integrity markets. EU laws aimed at ensuring the integrity of securities markets, including rules on financial benchmarks and safeguards against market abuse (*EC*) (n 26). See also Amati, *Abusi di mercato e sistema penale* (n 73) 14-16.
[95] Tamás (n 54) 365.
[96] Ensuring the integrity markets. EU laws aimed at ensuring the integrity of securities markets, including rules on financial benchmarks and safeguards against market abuse (*EC*) (n 26).
[97] ibid.
[98] Tamás (n 54) 366. See also Andrea Francesco Tripodi, *Informazioni privilegiate e statuto penale del mercato finanziaria* (CEDAM 2012).

As a result, the MAR and MAD II were adopted by the Parliament and the Council in 2014.[99] Both became applicable on the 3rd July 2016.

3.3 The EU competence in criminal matters

Unlike the MAD I, the MAR and MAD II enshrine a criminal policy for the prohibition of market manipulation. For this reason, before deepening into this prohibition, providing an overview of the EU competence in criminal matters (ch II, s 3.3) and understanding which legal basis legitimizes the Union legislator to combat market manipulation by also employing criminal measures (ch II, s 3.4) seems relevant for the scope of this thesis.

Overall, the Union competence is based on four leading principles: the principles of sovereignty, conferral, subsidiarity, and proportionality. The former guarantees to each Member State the power to control all the activities within its territory over which it has the sovereignty and, accordingly, the power to legislate on it. The principle of conferral enshrines that the EU competences are conferred on the Union authorities and institutions by the Member States to achieve the objectives shared among them.[100] In those specific areas in which the Union has exclusive competence, the Member States cannot act. Instead, in the others, the Member States and the Union shared the competence. It means that both may legislate and adopt legally binding acts.[101] However, according to the principle of subsidiarity, in the shared competence areas, the Union shall act only if and in so far as the objective of the proposed action cannot be sufficiently attained by the Member States and, instead, they can be better reached by the Union.[102] It signifies that in those areas that do not fall within the Union exclusive competence, the Member States' right to legislate on them and adopt legally binding acts always prevails on the corresponding right of the Union legislator. That is due to the principle of sovereignty. The only exception occurs in those situations where the EU may achieve certain purposes better than the Member States. Therefore, the

[99] Ensuring the integrity markets. EU laws aimed at ensuring the integrity of securities markets, including rules on financial benchmarks and safeguards against market abuse (*EC*) (n 26).
[100] Consolidated Version of the Treaty on European Union [2008] OJ L 115/13 (TEU), art 1.
[101] Klip (n 1) 37.
[102] TEU, art 5(3).

principle of subsidiarity represents a limit to the Union competence, as well as the principle of proportionality. The latter, indeed, establishes that the content and form of the Union action shall never exceed what is strictly necessary to reach the goals provided under the Treaties.[103]

As for the competence in criminal matters, the process to legitimize the EU to intervene by means of criminal measures has been challenging over the years. in this regard, there were two pillar case law on the basis of which the EU has obtained this right: the C-176/03[104] and C-440/05[105] disputes.

The C-176/03 judgement represents a landmark ruling on the enforcement of the Community law, since the CJEU recognised and legitimized the competence of the EC to harmonize criminal law within the Union.[106] In other terms, the CJEU accepted a criminal competence of the EU, functional to the substantive policy for ensuring the effective enforcement of the Community law. Precisely, the Court stated that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence.[107] However, it also established that this finding does not prevent the Community legislature to act when the application of effective, proportionate, and dissuasive criminal penalties by the competent national authorities is an essential measure for fighting serious environmental offences.[108] The CJEU thus allows the Community to take measures related to criminal law of the Member State if necessary to guarantee that the rules laid down for the EU protection are fully effective.[109] Therefore, the EC was considered as a competent European institution to harmonize the criminal law enforcement of the EU law if needed for the achievement of the EU Treaties' objectives.

The C-440/05 case mainly followed the reasoning of the C-176/03 judgement, but enlarged its applicability.[110] Indeed, the CJEU reiterated that it is true that, in general, neither criminal law nor the rules of criminal procedure fall

[103] TEU, art 5(4).
[104] Case C-176/03 *Commission v Council* [2005] ECLI:EU:C:2005:625.
[105] Case C-440/05 *Commission v Council* [2007] ECLI:EU:C:2007:542.
[106] John A. E. Vervaele, "Harmonised Union policies and the harmonisation of substantive criminal law" in Francesca Galli and Anne Weyembergh (eds) *Approximation of substantive criminal law in the EU: The way forward* (Editions the l'Université de Bruxelles 2012) 50.
[107] Case *Commission v Council* [2005] (n 105) par 47.
[108] ibid 48.
[109] ibid.
[110] Vervaele (n 107) 55.

within the Community's competence.[111] Although, the fact remains that the Community legislature may require the Member States to introduce such penalties to ensure that the laid down rules of the Treaties are fully effective, when the application of effective, proportionate, and dissuasive criminal penalties by the competent national authorities represents an essential measure to combat serious offences.[112] Hence, the EC has been enshirined as competent to harmonize criminal law enforcement if two criteria are met. First, the EC criminal policy shall be essential in the context concerned. Second, the criminal law harmonization must be necessary and the only way to achieve a certain objective. In brief, the EC can act by means of criminal measures only as far as its action represents an *ultimu ratio* and it is needed for the *effect utile*.[113] By providing so, the C-440/05 decision has thus extended the competence of the Union legislator into criminal matters to all fields of the Community law, going beyond the provision of the EU criminal competence within the environmental sector, as established under the C-176/03 case.

3.4 The legal basis for the EU criminalization measures

Although the mentioned C-176/03 and 440/05 cases clarified that the EC is competent to act within criminal matters, there are still uncertainties on the provision that legitimizes the enactment of the related criminalization measures.

Generally speaking, the choice of a legal basis has represented an important constitutional development in the EU law.[114] This choice must be based on objective factors and follow the so-called "rule of the predominant purpose", according to which legislative acts should be based only on a legal basis taking into consideration the acts' leading goal.[115]

Article 83(2) TFEU was introduced by the Treaty of Lisbon to confer to the EU the power to harmonize the Member States' legislation by defining criminal

[111] Case *Commission v Council* [2007] (n 106) par 66.
[112] ibid.
[113] Vervaele (n 107) 55.
[114] Maria Bergström, "Money laundering" in Valsamis Mitsilegas ed al. (eds) *Research Handbook on EU Criminal Law* (Edward Elgar 2016) 98.
[115] ibid.

offences and criminal sanctions. However, doubts still persist as to whether this provision exhaustively determines the EU's power to adopt criminal law to enforce its policies.[116] The debate regards whether article 83(2) TFEU is the exclusive legal basis for criminalization measures – as being the provision introduced by the Lisbon Treaty to allow the criminal law harmonization –, or whether other legal basis of the Treaties – i.e. articles 114 and 325 TFEU – may also be employed to adopt measures harmonizing criminal law.[117] There are two opposing views on this concern.

On the one hand, the Member States and certain scholars argue that article 83(2) TFEU is the only legal basis for criminalization measures. The reason is that the intention of the Treaties' drafters suggests that this provisions would codify and replace the European Community criminal law competence recognized under the C-176/03 and 440/05 cases.[118]

On the other hand, the EC and other scholars argue that an implicit general criminal law competence still exists in addition to the criminal law competence explicitly enshirined by article 83(2) TFEU (ch II, sub-s 3.4.1).[119] Hence, it could be exercised under other provisions, such as article 114 (ch II, sub-s 3.4.2) and 325 (ch II, sub-s 3.4.3) TFEU.[120]

3.4.1 Article 83(2) TFEU

Article 83(2) TFEU states that if the approximation of criminal laws and regulations of the Member States is essential to guarantee an effective implementation of the Union policy in an area that has been subject to harmonization measure, directives can enshrine minimum rules concerning the definition of criminal offences and sanctions in those areas of particularly serious crimes resulting from the nature or impact of such offences.

[116] Jacob Öberg, "The Legal Basis for EU Criminal Law Harmonisation: A Question of Federalism?" (*SSRN*, 22 July 2018) 366 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3199699> accessed 8 June 2021.
[117] ibid 367.
[118] ibid
[119] ibid 367-68.
[120] ibid.

By using the expression "definition of criminal offences", article 83(2) TFEU refers to the constitutive elements of the crime.[121] While "minimum rules" shall be interpreted on the basis of the objectives and spirit of the instrument concerned. Moreover, those minimum rules shall not exceed what is necessary to achieve the Treaties' purposes and they shall not infringe the principle of legality which preserves to the Member States the exclusive competence in criminal jurisdiction.[122]

Article 83(2) TFEU gives the European legislator a huge competence to adopt criminalization measures for the benefit of any Union policy which has been subject to harmonization measures.[123] It may be considered as a *lex specialis* for criminal law measure and the only legal basis for criminalization measures for the following reasons. First, article 83(2) TFEU suggests that the directive was chosen as the sole instrument for the adoption of criminalization measures and for the protection of the EU financial interests.[124] Second, the expression "criminal" explicitly mentioned under article 83(2) TFEU seems to be pivotal.[125] It indicates that this provision was envisaged to be the leading legal basis for substantive criminal law enforcement.[126] Third, the overall tenor of article 83(2) TFEU reflects a restrained approach to criminal law harmonization, containing power-restricting elements – such as the "essentiality" requirement – and avoiding excessive criminalization by the EU legislator.[127] Consistently, article 83(2) TFEU suggests that, in line with the principle of sovereignty of the Member States, criminal law enforcement of EU law must be employed as a last resort exercises and only under certain strict conditions.

Despite those reasons, there are some limitations to use article 83(2) TFEU as the legal basis for criminalization measures. First, it may be argued that this provision seems to be confined to the adoption of directives, minimum rules, and

[121] Klip (n 1) 182.
[122] ibid.
[123] Öberg, "The Legal Basis for EU Criminal Law Harmonisation: A Question of Federalism?" (n 117) 370.
[124] ibid 371.
[125] ibid 370.
[126] ibid.
[127] ibid 372.

measures in areas where the EU already has adopted other measures.[128] Indeed, the directive was chosen as the only instrument to employ to criminalize misconduct under article 83(2). Hence, the reference under article 83(2) to "directives" clearly indicated that any criminal law harmonization measures adopted on the basis of this norm cannot be in the form of a regulation since directive represents the exclusive instrument to criminalize unlawful misbehaviour.[129] Second, it may be observed that article 83(2) TFEU suggests that the Union legislator cannot adopt instruments with the purpose of decriminalize criminal conduct. On the contrary, it appears that the Union legislator is only competent to increase the level of criminalization and that the repressive character of the law in the Member States by the imposition of minimum rules on criminal offences and sanctions.[130] Finally, it may be argued that article 83(2) TFEU does not cover the criminalization of misbehaviour in the sectors that have not been subject to harmonizing measures, because it requires the prior harmonization by means of an ordinary or special legislative procedure.[131]

3.4.2 Article 114 TFEU

Given the above arguments against the use of article 83(2) TFEU as the legal basis for criminalization measures, the main two alternatives may be found in articles 114 and 325 TFEU.

Focusing on article 114 TFEU, it allows the EU legislator to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States which have as their objectives the establishment and functioning of the internal market, except when it is otherwise provided in the Treaties.[132]

According to several commentators, article 114 TFEU might represents a valuable legal basis for the EU criminalization measures. First, because this norm seems to have a broader scope than article 83(2) TFEU. Second, because article 114 TFEU appears to have a notable value, given that it has constituted a fundamental

[128] ibid 383.
[129] ibid.
[130] ibid.
[131] ibid 384.
[132] TFEU, art 114(1).

tool in promoting the EU integration over sensitive national policies from a general perspective. Indeed, even though it seems to be confined to the internal market, in practice, it is considered as having a more general regulatory power by the EU institutions.[133] As a demonstration of that, the jurisprudence of the Court itself regarding disputes on legal basis has given a wide interpretation of article 114 TFEU and has often expressed the preference for this provision rather than for others representing possible alternatives of legal basis for a certain legislative instruments.[134]

Although those reasons in favour of article 114 TFEU as legal basis for criminalization measures, some authors are of the opinion that the Court will not accept article 114 TFEU as the legal basis for a proposed legislative measure in those cases in which another and more specific norm will be available (i.e. article 83(2) TFEU).[135] Then, they believe that article 114 TFEU should be applied only in those cases in which the proposed measure has a demonstrable connection to the internal market. According to this line of reasoning, article 114 TFEU seems to be employed exclusively when other *lex specialis*, such as article 83(2) TFEU, cannot be used for a proposed EU measure.[136]

3.4.3 Article 325 TFEU

Turning to article 325 TFEU, it states that the Union and the Member States shall repress fraud and any illegal activities affecting the financial interests of the Union by means of measures to be taken in accordance with the Treaties.[137]

Article 325 TFEU was proposed by the EC as the legal basis for the proposal of the Directive on criminalization of fraud against the EU's budget, namely the PIF Directive.[138] Being fraud a crime which affects the EU's financial interests, analysing the legal basis of the PIF Directive seems to be useful for the scope of

[133] Öberg, "The Legal Basis for EU Criminal Law Harmonisation: A Question of Federalism?" (n 117) 387.
[134] ibid.
[135] ibid 389.
[136] ibid 390.
[137] TFEU, art 325(1).
[138] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [12017] OJ L198/29.

this thesis, as it looks at the legal basis to criminalize market manipulation which harms the EU's financial interests as well.

On the one hand, the EC claimed that article 325 TFEU provided for a broad competence to enact any measures against illegal activities affecting the EU's financial interests which act as a deterrent and ensure their effective protection.[139]

On the other hand, both the Council and Parliament preferred article 83(2) TFEU as legal basis, since the PIF Proposal met the harmonization and minimal law requirements. Moreover, given that the PIF Proposal includes only criminal sanctions and criminalization provisions and, instead, article 325 TFEU does not explicitly refer to criminalization measures, the Council and Parliament believed that article 83(2) was more appropriate than article 325 TFEU.[140]

Some authors supported the EC's position. They affirm that, despite article 325 TFEU does not literally refer to criminalization measures, it allows the EU legislator to adopt any kind of measure including criminal ones to achieve the objective of preventing and fighting fraud.[141] As a demonstration of the broader scope of article 325 TFEU than article 83(2) TFEU, first, article 325 TEU enshrines the principle of assimilation, which obliges the Member States to penalize persons who infringe the Union law in the same ways as they penalize those who violate the domestic law.[142] Instead, article 83(2) does not. The principle of assimilation requires the Member States to use the same or similar means of legislation that they would use with regard to similar infringements of domestic law.[143] Hence, by establishing this principle, article 325 TFEU confers to the Union a more flexible and wide margin to act, because it does not bind the legislative measures to the enactment of minimum rules confined to the definition of criminal offences and the related sanctions.[144] On the contrary, it allows the Union legislator to act within the

[139] Öberg, "The Legal Basis for EU Criminal Law Harmonisation: A Question of Federalism?" (n 117) 391.
[140] ibid 392.
[141] Costanza Di Francesco Maesa, "Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law: a missed goal?" (22 October 2018) vol 3 n 3 European Papers 1457 <https://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2018_I_008_Costanza_di_Francesco_Maesa_00240.pdf> accessed 29 July 2021.
[142] Case C-68/88 *Greek maize* [1989] ECLI:EU:C:1989:339, par 24. See also Case C-105/14 *Taricco* [2015] ECLI:EU:C:2015:555, par 22.
[143] Sabella (n 73) 6.
[144] ibid.

content of the single provisions by providing to the Member States more specific and consistent guidelines.[145] Second, under article 83(2) TFEU national criminal laws can be harmonized only if their approximation is essential to guarantee the effective implementation of Union policy in an area which has been previously subject to harmonization measures. In other words, both the essentiality of criminal measures to ensure effective protection of the Union's financial interests and the existence of harmonization measures in this areas must be proved. Instead, article 325 TFEU does not require to prove essentiality, but it merely requires that criminal measures are necessary to guarantee an equivalent and effective protection of the Union's financial interests in the Member States and EU. Third, article 83(2) TFEU regards only minimum rules concerning definitions of criminal offences and sanctions. Instead, article 325 TFEU is not circumscribed to those minimum rules. Fourth, article 83(2) TFEU allows the Union to adopt those measures only through directives. Unlike, article 325 TFEU is not limited to directives, since it also allows the employment of regulations. Fifth, article 83(2) requires the so-called "emergency break" mechanism for the EC's intervention. Instead, article 325 TFEU does not. In addition to the broader scope of article 325 TFEU than article 83(2) TFEU, it was believed that the text of article 280(4) TEC[146] was entirely transposed in article 325 TFFU, except for the final sentence that stated that the measures that the Council had to take to prevent fraud did not regard the application of domestic criminal law. Hence, the non-inclusion of this final sentence into article 325 TFEU seems to signify that the Member States clearly intended to confer on the EU the power to adopt criminal measures to fight fraud and other illegal activities affecting the EU's financial interests by means of criminal law.[147]

Instead, other scholars opted for the Council and Parliament's position. They preferred article 83(2) TFEU because they considered it as the *lex specialis* enshirined under the TFEU to tackle all cases where the EU legislature needs to harmonize the definition of criminal offences and sanctions to make more effective other EU harmonized measures.[148] Furthermore, they believed that the deletion of

[145] Sabella (n 73) 6.
[146] Consolidated Versions of the Treaty on European Union and of the Treaty establishing the European Community [2002] OJ C 325/1.
[147] Maesa (n 142) 1459.
[148] ibid.

the final sentence of article 280 TEC into article 325 TFEU cannot be considered as a special criminal law regime to exclusively flank article 325 TFEU measures. Also article 325 TFEU could not be intended to be a *lex specialis* compare to article 83(2), given that the latter is the *lex specialis* for national criminal law harmonization.[149]

At a first instance, the Council and Parliament argument did not seem to be convincing, since the believing that the criminal sanctions aimed at protecting the financial interests of the Union might not be based on article 325 TFEU but on article 83(2) TFEU has been proven to be false by the jurisprudence of the CJEU. Indeed, in the *Taricco* case,[150] the Court established that article 325 TFEU imposes an obligation for the Member States to counter illegal activities damaging the financial interests of the EU by means of effective deterrent measures.[151] Moreover, it stated that from article 325 TFEU derives a precise duty for the EU and the Member States to adopt criminal penalties for combating, at least, the most serious offences affecting the financial interests of the EU.[152] Hence, from those passages of the *Taricco* judgement, article 325 TFEU appeared to be the legal basis that allows the EU legislator to define criminal offences affecting the financial interests of the Union and the related sanctions in an EU instrument adopted to that purpose.[153] Thus, the non-inclusion of the final sentence of article 280 TEC in article 325 TFEU was considered to be an indication in that sense. Then, article 325 TFEU represents a *lex specialis* in the field of the protection of the Union's financial interests compared to article 83(2) TFEU. The latter is, instead, a general basis which can be employed in conjunction with any substantive Treaty provisions for the adoption of minimum criminal rules concerning the definition of criminal offences and sanctions in a given area.[154] Otherwise, a different interpretation of article 325 TFEU would deprive this norm from its utility. Then, the useful effect of article 325 TFEU would be weakened in those cases in which it does not give

[149] ibid.
[150] Case *Taricco* (n 143).
[151] ibid par 37.
[152] ibid par 39.
[153] Maesa (n 142) 1459.
[154] ibid 1460.

the EU legislator the competence to protect its own financial interests by means of criminal law if necessary.

Despite those reasons, at the end of the day, article 83(2) TFEU was preferred as legal basis for the PIF Directive, because it was considered as a *lex specialis* and, thus, more capable of allowing the EC to enact directive to guarantee the protection of the EU financial interests by means of criminalization measures. Accordingly, article 83(2) TFEU should be employed as the legal basis for any other EU criminalization measure against the commission of financial crimes, such as market manipulation.

4. Prohibition of market manipulation under the MAR and MAD II

4.1 The market abuse package: the MAR, MAD II and MiFID II

The MAR and MAD II were enacted in 2014 and entered into force in July 2016. They constitute the so-called "market abuse package", due to their mutual integration as, first, the result of several cross-references among them.[155] Second, because they enshrine a close administrative – in the MAR – and criminal – in the MAD II – network of sanctions, known as the "dual enforcement regime".[156]

The dual enforcement regime represents a milestone in the field of market abuse at the Union level, since, for the first time, a directive – the MAD II (ch II, sub-s 4.1.1) – jointly with a regulation – the MAR (ch II, sub-s 4.1.2) – prescribes a comprehensive legislative system including minimum rules on criminal offences and definition of the related sanctions on the basis of article 83(2) TFEU.[157]

4.1.1 The MAR

The MAR basis on article 114 TFEU, that allows the Union legislator to adopt measures for the approximation of provisions laid down by law, regulations or

[155] Basile, "Verso la riforma della disciplina Italiana del *market abuse*: la legge-delega per il recepimento della Direttiva 57/2014/UE" (n 29) 5.
[156] ibid.
[157] Basile and Mucciarelli (n 11).

administrative acts to ensure the establishment and fair functioning of the internal market. Coherently, the EC adopted a regulation that broadens the scope of instruments covered by the Union market abuse framework, strengthening the regime for commodity and related derivative markets.[158]

The enactment of a regulation instead of a directive did not represent a random choice. In fact, in deciding whether to adopt a directive or a regulation, the Union legislator has opted for a regulation to guarantee a uniform interpretation of the EU market abuse discipline.[159] By doing so, the Union legislator has avoided the risk of having diverging transpositions among the Member States because, being a regulation, it is directly applicable and binding in its entirety.[160]

The leading purposes of the MAR and, particularly, of article 12 MAR as enshrining the prohibition of market manipulation at the EU level, are provided under the MAR preamble. Recital 1 MAR points out the MAR goal of establishing a genuine internal market for all the financial services issued in the EU that are considered to be essential for the Union economic growth. Moreover, according to recital 2 MAR, the MAR has the objective of strengthening the market integrity through an integrated, efficient, and transparent financial market. Also, recital 3 MAR provides that the MAR wishes to set up a more uniform and stronger framework to safeguard market integrity, avoid potential regulatory arbitrage, ensure accountability in the event of attempted manipulation, and guarantee more legal certainty by abolishing regulatory complexity for all the markets' participants. Finally, recital 4 establishes that the MAR seeks to promote a uniform interpretation of the abuse requirements to remove any obstacle to trade, and the significant distortion of competition stemmed from divergences among the domestic laws.

[158] Ensuring the integrity markets. EU laws aimed at ensuring the integrity of securities markets, including rules on financial benchmarks and safeguards against market abuse (*EC*) (n 26).
[159] Robert Kert, "The relationship between administrative and criminal sanctions in the new market abuse provisions" in Francesca Galli and Anne Weyembergh (eds) *Do labels still matter?* (Editions the l'Université de Bruxelles 2014) 96.
[160] ibid; TFEU, art 288(2).

4.1.2 The MAD II

The MAD II is based on article 83(2) TFEU, the legal basis for substantive approximation of criminal law as explained in section 3.4.1 of this chapter.[161] Unlike the MAR, the MAD II is a directive. Hence, it must be transposed by the Member States.[162] In this way, it requires the Union Member States to introduce common definitions of criminal offences of, *inter alia*, manipulative misconduct as provided under article 12 MAR, and to impose maximum criminal penalties for the most serious offences of market manipulation. The Member States shall thus make sure that serious and intentional behaviour of market manipulation is a criminal offence and, consistently, punishable with effective sanctions throughout Europe.

The leading purpose of the MAD II is to complement the MAR. Specifically, it aims to fight market manipulation pursuant to article 12 MAR by providing rules that the Member States shall comply with in implementing the market abuse package.

Furthermore, the MAD II recognises the MAD I virtue of having completed and updated the Union's legal framework to protect market integrity by, *inter alia*, providing for administrative sanctions.[163] Nevertheless, at the same time, it also points out that, in 2014, the adoption of administrative measures by the Member States has proven to be insufficient to ensure compliance with the rules on preventing and repressing market abuse. Then, the introduction by all the Union Member States of criminal sanctions seems to be inevitable to guarantee the effective implementation of the Union policy on combatting market abuse.[164] This is the reason why, in recital 6 MAD II, the Union legislator explicitly requires the imposition of stronger criminal sanctions in terms of social disapproval, at least in the most serious and intentional misbehaviour of market abuse. Indeed, this misbehaviour is considered to be particularly unacceptable. In the opinion of the Union legislator, the only way to avoid it consists in punishing its perpetrator by

[161] Kert (n 160) 96.
[162] TFEU, art 288(3).
[163] MAD II, rec 2.
[164] ibid rec 7.

criminal offence and sending the message to the public and potential markets' offenders that competent authorities take such misconduct very seriously.[165]

4.1.3 The MiFID II

The market abuse package is also composed of the MiFID II. The latter entered into force in January 2018. To date, more investors were active in financial markets and the wide-ranging set of financial services became more complex to regulate. In addition, the financial crisis exposed weakness in the functioning and transparency of financial markets, which changed over time and, accordingly, needed to be handled by an updated legislative framework. Furthermore, the market showed a particular inefficiency over the years concerning the dissemination of information between intermediaries that was asymmetric and unsuitable for protecting the Union's investors.[166]

Therefore, the MiFID II pursues the objective of harmonizing requirements governing the operation of financial markets.[167] To that end, the MiFID II wishes to establish a more transparent and efficient approach by financial intermediaries and companies, and the sufficient degree of harmonization necessary to guarantee to markets' investors an appropriate level of protection to allow investments and issue services throughout the Union.[168]

4.2 Defining concepts under article 3 MAR

The prohibition of market manipulation at the Union level is provided under article 12 MAR. By looking at the MAR, it can be observed that several norms define the scope of this provision. One of them is article 3 MAR. It contains significant definitions related to the content of article 12 MAR. It means that article 12 MAR must be assessed according to, *inter alia*, article 3 MAR as contributing to define the MAR scope. For this reason, in the following sections, the author will examine

[165] ibid rec 6.
[166] MiFID II, rec 4.
[167] ibid rec 2.
[168] ibid rec 3.

the significance of "financial instrument", "spot commodity contract" and "commodity contracts" pursuant to article 3 MAR, to allow then a complete understanding of the applicability of article 12 MAR in section 4.3 of chapter II.

Before deepening into these terms, it appears interesting to notice that the Union legislator defines financial instruments and commodity derivatives through the so-called "referral technique".[169] In comparison, the Union legislator explains the spot commodity contracts directly providing their significance.

The referral technique consists of linking different legislative instruments relating the one to the other. Legislators frequently use it to simplify and accelerate drafting a text, such as the MAR.[170] However, it often has some disadvantages. Particularly concerning the MAR, this practice is as widespread as questionable given that it leads to challenging reading of norms and complex and insecure interpretation.[171] Consequently, it has represented and still represents a relevant issue for the Union Member States legislators in executing article 12 MAR and implementing the MAD II.

4.2.1 Definition of "financial instrument"

The Union legislator provides the meaning of financial instruments under article 3(1)(1) MAR by using the referral technique. This provision appeals to article 4(1)(15) MiFID II, which, in turn, recalls section C of Annex I MiFID II.

Section C of Annex I MiFID II enumerates several kinds of financial instruments. All of them are binding monetary contracts between two or more operators who can trade, modify and settle financial instruments as they prove their ownership, such as in stocks. In the context at stake, "monetary" stands for those agreements that correspond to virtual documents with a payable value.

[169] Francesco Mucciarelli, "Gli abusi di mercato riformati e le persistenti criticità di una tormentata disciplina" (10 October 2018) Diritto Penale Contemporaneo 8 <https://www.penalecontemporaneo.it/upload/4765-mucciarelli2018a.pdf> accessed 28 May 2021.
[170] Paola Cappello, "La fenomenologia del rinvio statico e del rinvio dinamico" (University of Genova 2005) 2.
[171] Mucciarelli (n 170) 9.

In detail, firstly, section C of Annex I MiFID II states that financial instruments include transferable securities and money-market instruments.[172] According to article 3(2)(35)(a) MAR, securities are shares and other securities equivalent to them and securitized debts, also convertible or exchangeable into shares or in other securities equivalent to them.[173] In the case in which securities are negotiable on the capital market – except for instruments of payment – they represent transferable securities. Instead, money-market instruments are debt securities that generally give the owner the unconditional right to receive a fixed sum of money on a specific date. They are usually traded at a discount, depending on the interest rate and the time remaining to maturity.[174]

Secondly, section C of Annex I MiFID II provides that financial instruments embrace options, futures, swaps, forward rate agreements and any derivative contracts relating to securities, currencies, interest rate, emission allowances or other derivative instruments, financial indices or financial measures that might be settled physically or in cash.[175] Derivatives contracts are standardized financial instruments whose value depend on the value of others contracts to which they are related.[176] Indeed, they are called "derivatives" because their value concretely derives from the trend of quotations of other financial instruments taken as reference parameters.[177] Derivative contracts include options, futures, swaps, and forward rate agreements. The options are derivative financial instruments that give the right, rather than obligation, to buy or sell an asset within a certain term.[178] The futures are standardized derivative contracts whereby the parties undertake to exchange a financial asset at an agreed price and deferred settlement by a specific deadline.[179] The options differ from the futures essentially because, in futures, investors are obliged to exchange a certain quantity of financial assets at an agreed

[172] MiFID II, ss C (1) and (2) Annex I.
[173] MAR, art 3(2)(35)(a)(i), (ii) and (iii).
[174] Glossary (*OECD*) (n 44).
[175] MiFID II, s C (4) Annex I.
[176] Campobasso (n 10) 213.
[177] ibid.
[178] Piero Schlesinger and Andrea Torrente, *Manuale di Diritto Privato* (22th edn, Giuffrè Editore 2015) 753; Edoardo Scirè, "Contratti di opzione" (*Starting Finance*) <https://www.startingfinance.com/guide/derivati-intermedio/contratto-di-opzione/> accessed 13 June 2021.
[179] ibid 753; Glossario Finanziario (*Borsa Italiana*) <https://www.borsaitaliana.it/borsa/glossario.html> accessed 17 June 2021.

date. In contrast, in options, one of the parties involved in the option contract, upon payment of the price concerned, has the right – not the obligation – to choose whether or not carry out the exchange. Therefore, and more precisely, with the option contract one of the parties, upon payment of the related price, acquires the right to receive an amount of money corresponding to the difference between the price of the option at the day when it is exercised and the price of the option when the option was agreed with other parties: "call option"; or, vice versa, if the investor had bet on a decrease of financial markets' prices, with the option contract he/she, upon payment of the related price, acquires the right to receive the difference between the price of the option when it was agreed and the price of the option at the day when it is exercised: "put option". The swaps refer to both the spot and forward contracts through which parties undertake to exchange future payments within a given period.[180] Finally, the forwards stand for derivative contracts in which parties agree to exchange a determined asset at the price as fixed when the contract is concluded by a certain deadline.[181]

Thirdly, as for section C (5) of Annex I MiFID II, financial instruments include options, futures, swaps, forwards, and any derivative contract relating to commodities that can be settled in cash at the option of one of the parties other than because of default or other termination events.

Fourthly, as provided under section C (6) of Annex I MiFID II, financial instruments encompass options, futures, swaps, and any derivative contract regarding commodities traded on a regulated market and that can be physically settled.

Fifthly, according to section C (7) of Annex I MiFID II, financial instruments include options, futures, swaps, forwards, and any derivative contract relating to commodities that can be physically settled not otherwise mentioned in section C (6) of Annex 1 MiFID II and not traded for commercial purposes, which have the peculiarities of other derivative financial instruments.

Both sections C (6) and (7) Annex 1 MiFID II use the verb "can" rather than "must" or "shall". It signifies that derivatives concerning commodities traded on a

[180] ibid.
[181] Glossario Finanziario (*Borsa Italiana*) (n 180).

regulated market and whose physical settlement is mandatory rather than optional are not considered to be financial instruments within the meaning of the MAR. Likewise, derivatives relating to commodities other than those mentioned in section C (6) of Annex 1 MiFID II that must be physically settled, without commercial purposes but with the peculiarities of other derivative financial instruments, are not financial instruments under the MAR.

Finally, sections C of Annex I MiFID II establish that the expression "financial instruments" covers derivative instruments for the transfer of credit risk, financial contracts for differences and emission allowances.[182]

4.2.2 Definition of "spot commodity contract"

A spot commodity contract is a "buy now, pay now" contract. It aims to promptly deliver a commodity, and its settlement is known as the "spot price". The latter corresponds to the agreed price for the sale contract that provides for the immediate delivery of the commodity concerned.[183] Article 3(1)(15) MAR enshrines two kinds of spot commodity contracts.

The first type refers to contracts for the supply of a commodity traded on spot markets and delivered as soon as the transaction concerned is settled.[184] Spot markets are those venues where operators sell commodities for cash and promptly delivered them when the related transactions are settled.[185] In other words, markets in which the exchange of commodities occurs with the immediate settlement – namely with securities' delivery and countervalue payment with a few days delay – are considered to be spot markets.[186]

The second type of spot commodity contracts embraces those contracts for the supply of a commodity other than financial instruments, including physically forward contracts traded on forward markets for commodities.[187] Forward markets

[182] MiFID II, ss C (8), (9) and (11) Annex I.
[183] ibid.
[184] MAR, art 3(1)(15).
[185] ibid art 3(1)(16).
[186] Glossario Finanziario (*Borsa Italiana*) (n 180).
[187] MAR, art 3(1)(15).

stand for those venues that set prices of financial instruments for their future delivery.

4.2.3 Definition of "commodity derivatives"

Commodity derivatives are financial instruments whose value depend on that of a commodity.[188] Their main purpose consists in reducing the risk arising out of commodities' future price uncertainty.

By applying the referral technique, the Union legislator defines them by linking article 3(1)(24) MAR to article 2(1)(30) of Regulation No 600/2014.[189] In turn, the latter norm recalls article 4(1)(44)(c) MiFID II. It defines commodity derivatives as securities that give the right to sell or acquire transferable securities or rise to a cash settlement determined by reference to commodity or transferable securities.

4.3 Applicability of article 12 MAR under article 2 MAR

Given the meaning of financial instruments, spot commodity contracts and commodity derivatives according to article 3 MAR (ch II, s 4.2), the author will now assess the applicability of article 12 MAR in relation to the Union financial markets.

In the past, the applicability of the market manipulation prohibition under article 1(2) MAD I (ch II, s 2.2) was circumscribed to financial instruments traded on a regulated market or relating to which a request for admission to trading on it has been submitted.[190] The expression "regulated market" stands for a multilateral system operated and/or managed by a market operator.[191] In turn, a market operator is an individual who handles and/or acts in the business of a regulated market.[192]

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[188] "Commodities derivatives (MiFID definitions)" (*Glowacki Law Firm*, 25 November 2020) <https://www.emissions-euets.com/internal-electricity-market-glossary/677-commodity-derivatives> accessed 29 June 2021.
[189] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 Text with EEA relevance [2014] OJ L173/84.
[190] MAD I, art 1(3); Mucciarelli (n 170) 9.
[191] MAR, arts 3(1)(6); MiFID II, art 4(1)(21).
[192] MiFID II, art 4(1) n18.

Likewise, article 2(1)(a) MAR enshrines that the MAR applies to financial instruments – as examined in section 4.2 of chapter II – that can be traded on a regulated market or relating to which a request for admission to trading on it has been submitted.[193]

However, the MAR has currently a broader applicability than the MAD I.[194] Indeed, in 2014, the Union legislator would expand the MAR applicability. Among the other concerns, the Union legislator highlighted the need to enlarge and update the MAR scope, due to the technological developments of financial markets arisen from 2003 to 2014 which have considerably changed the Union financial markets over time.[195] Therefore, the Union legislator has opted to extend the MAR applicability to new categories of financial instruments and trading venues previously excluded from the MAD I.[196]

a) New financial instruments

Firstly, article 2(1)(d) MAR establishes that the MAR comprises financial instruments different from those provided in letters (a), (b), and (c) of article 2(1) MAR, whose price or value depends on or impact on price or value of a financial instrument covered by such letters, such as credit default swaps and contracts for difference. Furthermore, article 2(1)(d) MAR states that the MAR also encompasses behaviour or transactions connected to the auctioning on an auction platform allowed as an emission allowances' regulated market.[197] There, the market participants enter into transactions or place orders to trade in emission allowances, auctioned products based thereon, or derivatives thereof. [198]

Secondly, article 2(2)(a) MAR provides that article 12 MAR on the prohibition of market manipulation at the Union level applies to spot commodity contracts – defined in section 4.2 of chapter II – where transactions, order or behaviour has or might affect the price or value of a financial instrument referred in article 2(1) MAR.

[193] MAR, art 2(1)(a).
[194] Market abuse and accepted market practices (*ESMA*) (n 40) .
[195] MAR, rec 3.
[196] Atto del Governo n. 25 (n 64).
[197] MAR; art 2 (1); Atto del Governo n. 25 (n 64) 2.
[198] MAR, art 3(1)(20).

Thirdly, according to article 2(2)(b) MAR, article 12 MAR embraces financial instruments for transferring credit risk where the transaction, order, bid or behaviour impact or may influence the price or value of a spot commodity contract where those price or value depend on those financial instruments' price or value.[199] Such financial instruments comprise derivatives contracts or instruments, such as commodity derivatives.[200] As for the author's analysis, by extending the regulatory perimeter around financial and commodity derivatives, the MAR seems to capture manipulative misbehaviour that may otherwise fall outside its regime.[201] Specifically, it aims to capture cross-market manipulation between the relevant derivative markets and the related spot markets due to the capacity for transactions in derivative markets to manipulate prices on spot markets and vice versa.[202]

Finally, articles 12 MAR is applicable to manipulative conduct relating to benchmark indices and trading orders carried out by electronic means.[203] The benchmark corresponds to any public or published rate, index or figure periodically or regularly established to determine the payable amount under, or the value of, a financial instrument.[204]

b) New trading venues

The new trading venues where the above financial instruments are traded represent the second defining criteria relevant to establish the MAR scope. Those venues encompass the Multilateral Trading Facility (MTF), the Organized Trading Facility (OTF), and the Market Over the Counter (OTC).[205]

The Union legislator has enlarged article 12 MAR applicability to the MTF, OTF, and OTC because, after the adoption of the MAD I in 2003, financial instruments traded on MTFs and OTFs have increased over time.[206] However, in 2003, they felt outside the scope of the MAD I. Hence, the Union legislator believed

[199] ibid art 2(2)(b); Basile and Mucciarelli (n 11).
[200] ibid.
[201] Niamh Moloney, *EU Securities and Financial Markets Regulation* (3rd edn, Oxford EU Law Library 2014) 743.
[202] ibid.
[203] MAR, art 2(2)(c); Atto del Governo n. 25 (n 64) 2.
[204] MAR, art 3(1)(29).
[205] MAR, rec 8 and art 2(1)(b) and (c).
[206] MAR, rec 8.

that the MAR scope could not have failed to also include financial instruments traded on an OTF or MTF or for which a request to be traded on the latter has been submitted.[207] Indeed, by including those cases, the MAR would strengthen investors' protection and safeguard the integrity of financial markets.

Thus, firstly, letters (b) and (c) of article 2(1) MAR respectively enshrines that the MAR concerns financial instruments traded or admitted to trading or for which an admission demand has been sent to trading on a MTF and financial instruments traded on an OTF.

An MTF means a multilateral system operated by an investment firm or a market operator that connects third-party buying and selling interests in financial instruments according to a contract within the meaning of Title II MiFID II on authorisation and operating requirements for investment firms.[208] In turn, the word "investment firms" refers to any legal person whose regular occupation or business consists of providing one or more investment services to other parties and/or performing one or more investment activities on being professional.[209]

In comparison, an OTF signifies a multilateral system, different from a regulated market or an MTF, where multi third-party acquire and sell interests in, *inter* alia, bonds or derivatives being capable to interact in the system complying with a contract within the meaning of Title III MiFID II on regulated markets.[210]

Secondly, recital 8 MAR states that the MAR scope currently also applies to financial instruments traded on an OTC. It stands for securities markets released from any particular regulation concerning that markets' organisation and operation.[211]

Finally, the Union legislator has decided to ensure the MAR execution on any transaction, order or behaviour related to any financial instrument within the meaning of article 2, paragraphs (1) and (2) MAR, regardless of whether or not transactions listed occur on a trading venue.[212]

[207] MAR, rec 8.
[208] ibid art 3(1)(7); MiFID, art 4(1)(22).
[209] MAR, art 3(1)(2); MiFID, art 4(1)(1).
[210] MAR, art 3(1)(8); MiFID, art 4(1)(23).
[211] Glossario Finanziario (*Borsa Italiana*) (n 180).
[212] MAR, art 2(3).

Given the foregoing, it can be observed that the MAR applicability only encounters the limit stated in recital 20 MAR. This norm defines as «not appropriate practicable» the enlargement of the scope of the MAR to misbehaviour that does not involve financial instruments. Then, the Union legislator's goal of expanding, *inter alia*, article 12 MAR applicability to all misconduct as involving financial instruments seems to be consistent with the aim to ensure the fair functioning of financial markets and public trust, and economic growth and wealth within the Union.[213] In fact, by expanding article 12 MAR scope, the Union legislator has sought to repress market manipulation that would harm financial markets' integrity and transparency.[214]

4.4 The prohibition of market manipulation under article 12 MAR and the MAD II

Clarified the applicability of article 12 MAR (ch II, sub-s 4.3), the author will now focus on the content of this provision (ch II, sub-s 4.4.1). She will thus examine the *actus reus* and *mens rea* in the manipulative misconduct provided under article 12 MAR. The main purpose consists of figuring out which misbehaviours are qualified as market manipulation under the MAR and MAD II. Then, she will discuss to whom the prohibition of market manipulation applies (ch II, sub-s 4.4.4).

The prohibition of market manipulation is provided under article 12(1) MAR, which aims to describe manipulative misconduct exhaustively. Moreover, for the benefit of the interpretation and application of this prohibition, article 12(2) MAR provides for examples.

Article 12(1) MAR includes five prohibited activities consisting of market manipulation. Three of them relate to transaction manipulation (ch II, sub-s 4.4.1).[215] While the other two concern information manipulation (ch II, sub-s 4.4.2).[216] Making such a distinction between transaction manipulation on the one hand and information manipulation on the other depends on whether the

[213] ibid rec 2.
[214] ibid rec 8.
[215] Atto del Governo n. 25 (n 64) 2; Seminara (n 5) 94.
[216] ibid.

misconduct concerned occurs by means of transactions or the dissemination of information.[217]

However, despite this distinction, as mentioned in relation to the prohibition of market manipulation under article 1(2) MAD I (ch II, s 2.2), both misconduct of manipulation trade and information based manipulation pursuant to article 12 MAR follow the classical structure of the Euro-crimes based on the *actus reus* and *mens rea*.

4.4.1 Misconduct of transaction manipulation under article 12(1)(a) and (b) MAR: the *actus reus* and *mens rea*

As for transaction manipulation, first, article 12(1)(a)(i) MAR enshrines that market manipulation encompasses the activity consisting in «entering into a transaction, placing an order to trade or any other behaviour which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument, a related spot commodity contracts [...]».

Regarding the *actus reus*, the first element to analyse concerns the conduct itself. Article 12(1)(a)(i) MAR states that the misbehaviour is about engaging in transactions or, as sub-variety, placing an order to trade or other behaviours and trying to manipulate the price of financial instruments or related spot commodity contracts by sending, or trying to send, false or misleading signals concerning the supply of, request for, or value of, those financial instruments or related spot commodity contracts.[218] Moreover, article 12(1)(a)(i) MAR qualifies signals as false or misleading. "False" means that those signals concern information which does not correspond to the truth.[219] While the expression "misleading" stands for those signals that might be true, but it is not known if they are true or not. In other words, false signals are not true. Instead, misleading signals are objectively likely to give a false impression to a reasonable investor but not definitely capable of

[217] Ferrarini (n 64) 724.
[218] MAR, art 12(1)(a)(i); Moloney (n 202) 741.
[219] Pierre Hauck, "Europe's commitment to countering insider dealing and market manipulation on the basis of Art. 83 para.2 TFEU" (2015) 347 <http://www.zis-online.com/dat/artikel/2015_6_930.pdf > accessed 3 July 2020; Sending false or misleading signals (*BaFin*) (n 70).

doing so.[220] In addition, signals can regard the supply of, request for, or value of financial instruments or related spot commodity contracts. Finally, the expression "gives, or is likely to give" shows that article 12(1)(a)(i) MAR embraces both situations where transactions for sure create false or misleading signals ("gives") and those in which it is not known for sure that transactions will give those signals ("likely to give"). Consistently, it can be supposed that the Union legislator has used this construction to avoid that transactions have necessarily resulted in manipulated prices nor to establish that prices of financial instruments or spot commodity contracts were unfairly fixed in the Union financial markets.[221] According to the most strict interpretation of article 12(1)(a)(i) MAR, it is not necessary that transactions were already placed because an order is enough to be encompassed under this provision. It signifies that persons already commit market manipulation pursuant to article 12(1)(a)(i) MAR if they place an order which is likely to give false or misleading signals; or also situations where they place an order, then transactions are allowed in the Union financial market, and next the related reaction within the market occurs as false or misleading signals are created.

For what concerns the *mens rea*, article 12(1)(a)(i) MAR does not mention the requirement of intent. However, it is hard to imagine that the considered transactions are executed without manipulative intent.[222] In other words, it is difficult to think of entering into the transactions concerned for purposes other than manipulating prices of financial markets. Then, by providing so, article 12(1)(a)(i) MAR implicitly requires that the related misconduct is put in place intentionally.[223] It means that despite the intention is not explicitly required by article 12(1)(a)(i) MAR, the intent is implied in the type of misconduct itself as depicted under this norm.

Second, according to article 12(1)(a)(ii) MAR, market manipulation refers to the misbehaviour consisting in «entering into a transaction, placing an order to trade or any other behaviour which secures, or is likely to secure, the price of one several

[220] ibid.
[221] Moloney (n 202) 741.
[222] Ferrarini (n 64) 725.
[223] ibid.

financial instruments, a related spot commodity contract […] at an abnormal or artificial level».

As for the *actus reus*, article 12(1)(a)(ii) MAR is firstly about the conduct itself or arranging transactions or other misbehaviour which as the consequence of fixing, or trying to fix, the price of one or several financial instruments or connected spot commodity contracts at an abnormal or artificial level.[224] Furthermore, the *actus reus* refers to both abnormal and artificial levels of prices of instruments. In this respect, "abnormal" concerns those prices that already exist but deviated from what is considered to be usual. Instead, "artificial" signifies that financial instruments' prices are created by perpetrators of market manipulation rather than occurring naturally or following the normal and usual trend of financial markets. Additionally, the CJEU has held that the prohibition on misconduct that secures prices at an abnormal or artificial level is not qualified by a duration requirement.[225] Accordingly, it may capture a single abusive transaction, irrespective of how long the alteration of the price of the financial instrument concerned would last.[226] It signifies that if a natural or legal person made a transaction or an order to trade by fixing the price of one or several financial instruments at an abnormal or artificial level, it is considered guilty regardless of how long it had artificially or abnormally altered that price. Otherwise, the aims of the market abuse regime to protect the integrity and transparency of financial instruments, and enhance public trust would be undetermined.[227] Finally, the expression "secures, or is likely to secure" shows that article 12(1)(a)(ii) MAR embraces situations in which transactions for sure fix the price of financial instruments or related spot commodity contracts at an abnormal or artificial level ("secures"). Also, it applies to those cases where it is not sure that prices of financial markets or related spot commodity contracts will be abnormally or artificially secured by transactions ("likely to secure).

As for the *mens rea*, similarly to article 12(1)(a)(i) MAR, article 12(1)(a)(ii) MAR does not mention the requirement of intent. Nevertheless, it seems to be challenging to imagine that the transactions concerned are executed without

[224] MAR, art 12(1)(a)(ii); Moloney (n 202) 741.
[225] Case C-445/09 *IMC Securities* [2011] ECLI:EU:C:2011:459, par 30. See also Amati, *Abusi di mercato e sistema penale* (n 73) 286-88.
[226] ibid.
[227] MAR, rec 2; Case *IMC Securities* (n 226) par 30; Moloney (n 202) 741.

manipulative intent.[228] Hence, it is implied in article 12(1)(a)(ii) MAR that the misbehaviour at issue must be intentional.

Third, article 12(1)(b) MAR states that market manipulation covers the misconduct related to «entering into a transaction, placing an order to trade or any other behaviour which affects or is likely to affect the price of one several financial instruments, a related spot commodity contract […], which employs a fictitious device or any other form of deception or contrivance».

Concerning the *actus reus*, the provision at issue captures the activity of entering into transactions or other misbehaviour to manipulate the value of financial instruments or related spot commodity contracts by using artifice or any other form of deception or contrivance as capable of impacting, or probably impacting, the value of those financial instruments or connected spot commodity contracts.[229] In addition, article 12(1)(b) MAR requires that the misconduct is perpetrated using fictitious device or other forms of deception or contrivance. In this regard, "fictitious device" means not true device or that does not exist despite someone claiming that it is true or exists. Instead, by using the term "deception" it is intended an act or practice which tend to or is capable of misleading investors as to the truth of the facts.[230] Finally, "contrivance" relates to any artificial arrangement planned for gaining an advantage. Furthermore, the expression "affects, or is likely to affect" pursuant to article 12(1)(b) MAR demonstrates that this provision comprises both situations where transactions definitely impact the price of financial instruments or connected spot commodity contracts ("affects") and those in which it is not sure that those prices will be impacted by employing artifices, deceptions, or contrivances ("likely to affect").

As for the *mens rea*, similarly to article 12(1)(a)(i) and (ii) MAR, article 12(1)(b) MAR does not refer to intent. However, also in the case at stake, it appears to be hard to think of the transactions concerned executed without manipulative intent.[231] Thus, it is implicitly required that perpetrators of the manipulative misbehaviour as provided under article 12(1)(b) MAR must intend to affect the

[228] Ferrarini (n 64) 725.
[229] MAR, art 12(1)(b).
[230] "*Deception* definition" (*Law Insider*) (n 72).
[231] Ferrarini (n 64) 725-26.

financial instruments or related spot commodity contracts' price.

4.4.2 Misconduct of information manipulation under article 12(1)(c) and (d) MAR: the *actus reus* and *mens rea*

As for information manipulation, article 12(1)(c) MAR establishes that market manipulation is the activity consisting in «disseminating information through the media, including the internet […], which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument, a related spot commodity contract […] or secures, or is likely to secure, the price of one several financial instruments, a related spot commodity contract […] at an abnormal or artificial level, […], where the person who made the dissemination known, or ought to have known, that the information was false or misleading». This article addresses manipulative activities related to information. Thereby, the Union legislator seeks to repress misbehaviours that clearly affects the information side of financial markets.[232]

The *actus reus* under article 12(1)(c) MAR corresponds to the conduct of spreading information to manipulate financial markets by disclosing, or trying to disclose, false or misleading signals as to the supply of, request for, or value of, financial instruments or related spot commodity contracts, or by fixing, or trying to fix, their price at an abnormal or artificial level.[233] In this context, "disseminating information" means broadcasting relevant information or knowledge to a large audience. Also, the information concerns shall be disseminative in a specific way, namely by employing the media, such as the Internet. Moreover, concerning the expression "gives, or is likely to give false or misleading signals", similar definitions and considerations provided in relation to misconduct of transaction manipulation pursuant to article 12(1)(a)(i) MAR can be applied. Likewise, as for the expression "secure, or is likely to secure" prices of financial instruments or spot commodity contracts at an "abnormal or artificial level" both definitions and observations provided with regard to misbehaviours of transaction manipulation as

[232] Moloney (n 202) 741.
[233] MAR, art12(1)(c); Moloney (n 202) 742.

enshrined under article 12(1)(a)(ii) MAR (previous par) might apply.

Regarding the *mens rea*, article 12(1)(c) MAR differs from article 12(1)(a) and (b) MAR, because it explicitly mentioned the intent requirement.[234] Indeed, by reading this provision, it can be noticed that it uses the expression "knew, or ought to have known" that explicitly encompasses the intent of committing the misconduct at stake.[235] Thus, two different situations might occur. The first situation refers to the case in which a person disseminates information being aware that it was false or misleading. Instead, the second situation encompasses the case in which a person disseminates false or misleading signals without being aware that they were false or misleading, but he should be aware of it. Hence, in that second case, article 12(1)(c) MAR comprises the case in which the perpetrator of market manipulation is negligent in the sense that he spreads false or misleading signals without paying due attention but he should know that the signals concerned were false or misleading.

Finally, article 12(1)(d) MAR establishes that market manipulation is the misbehaviour corresponding to «transmitting false or misleading information or providing false or misleading inputs in relation to a benchmark where the person who made the transmission or provided the input knew, or ought to have known, that it was false or misleading, or any other behaviour which manipulates the calculation of a benchmark».

Concerning the *actus reus*, this article captures the activity of transmitting false or misleading information, or inputs, on a benchmark with the purpose of manipulating its calculation.

As for the *mens rea*, article 12(1)(d) MAR explicitly imposes that the person who transmits the information at issue is aware, or should have been aware, that it was false or misleading.[236] Therefore, two different cases may occur. The first case relates to the situation where a person transmits or provides false or misleading information or inputs related to a benchmark being aware that information or inputs were false or misleading. While the second case embraces the situation in which a person transmits or provides false or misleading information or inputs related to a

[234] Ferrarini (n 64) 727.
[235] Moloney (n 202) 742.
[236] ibid.

benchmark without being aware that they were false or misleading but he should be aware of it. In other words, similarly to article 12(1)(c) MAR, the second situation described under article 12(1)(d) MAR covers the case where the perpetrator of manipulative misbehaviour negligently spreads false or misleading information or inputs even though he should pay the due attention to recognize that the information or inputs concerned were false or misleading.

4.4.3 Examples of market manipulation under article 12(2) MAR and the indicators under Annex I MAR

Overall, the EU regime of market manipulation as provided under article 12(1) MAR is supported by article 12(2) MAR and the non-exhaustive indicators listed in Annex I MAR.

Concerning article 12(2) MAR, it sets out examples of misconduct that will be considered as manipulative since they cover "abusive squeezes",[237] market open/close abuses,[238] abuses concerning high-frequency trading,[239] and information-related abuses involving taking advantage of occasional or regular access to the traditional or electronic media.[240]

For instance, article 12(2)(a) MAR states that the behaviour adopted by a person to secure a dominant position over the supply of, or demand for, a financial instrument – or related spot commodity contracts – which affects, or may affect, purchase or sale prices or determines, or may determine, other unfair trading conditions within the Union financial markets is considered to be market manipulation. Also, article 12(2)(d) MAR establishes that a person who gains a profit by voicing an opinion about a financial instrument – or related spot commodity contracts – while having before taken positions on that instruments and profiting then from the impact of the opinions concerned is liable for having manipulated financial markets in the case in which he does not simultaneously disclosed that conflict of interest to the public in a proper and effective way, etc.

[237] MAR, art 12(2)(a).
[238] ibid art 12(2)(b).
[239] ibid art 12(2)(c).
[240] ibid art 12(2)(d).

With regard to the non-exhaustive indicators listed in Annex I MAR, they regard the employment of fictitious device or any other form of deception or contrivance, false or misleading signals, and price securing.[241] Even though the manipulative intent is implied in the nature of signals, those indicators are nor dependent on intention.[242] However, their existence should not necessarily be deemed in itself to indicate an instance of market manipulation because the misconduct at stake might be legitimate in a specific context.[243]

To make some examples, in verifying whether a manipulative behaviour concerns false or misleading signals or price securing, competent authorities shall look at the extent to which the undertaken transactions are concentrated within a short period in the trading session and whether they lead to a price alteration which is then reversed;[244] in overseeing whether a manipulative conduct refers to the employment of artifice or any other form of deception or contrivance, it shall be deepened in whether before, or after, some people' orders to trade, false or misleading signals are disseminated by them or other individuals connected to them; and so on.[245]

4.4.4 Applicability of article 12 MAR to natural and legal persons

Once examined the kinds of manipulative misbehaviour that article 12 MAR prohibits (ch II, sub-ss 4.4.1 and 4.4.2), the author will now examine to whom those prohibitions of market manipulation apply.

Article 15 MAR enshrines that a person shall not engage in or attempt to engage in market manipulation. Within the meaning of the MAR and MAD II, the expression "person" encompasses both natural and legal persons.[246] Indeed, recital 18 MAD II states that, in order to ensure effective implementation of the EU policy for ensuring the integrity of financial markets financial markets set out in the MAR, the Member States should extend liability for the offences provided in the MAR

[241] ibid art 12(3); Moloney (n 202) 742.
[242] Moloney (n 202) 742.
[243] ibid.
[244] MAR, Annex I(A)(e).
[245] ibid Annex I(B)(a).
[246] MAR, rec 40 and art 12(4); MAD II, rec 18 and arts 7-8.

and MAD II also to legal persons through the imposition of effective, proportionate and dissuasive criminal or non-criminal sanctions or other measures. In line with this recital, the MAD II enshrines the responsibility of both natural and legal persons, respectively under articles 7 and 8 MAD II.

With regard to the liability of natural persons, according to article 7(1) MAD II, the Member States shall take the necessary measures to guarantee that natural persons who intentionally commit the manipulative misconduct pursuant to article 5 MAD II are punishable by means of penal sanctions.

Focusing on the nature of the responsibility for having committed market manipulation, article 7 MAD II explicitly imposes that natural persons' liability shall be criminal.

Turning to the liability of corporations, article 8 MAD II states that they can be responsible for having committed market manipulation for their benefit by any person, acting either individually or as a part of an organ of the legal person, and having a leading position within the legal person based on a power of representation or authority to take decisions or to exercise control within it. Also, legal persons' liability as provided in article 8(1) MAD II shall not exclude criminal proceedings against natural persons who have committed manipulative misbehaviour as their perpetrators, inciters, or accessories.[247] Accordingly, if the person who perpetrates manipulative misconduct is a legal person, the market manipulation prohibition must also encompass, in line with the domestic law, the natural persons who have participated in the decision-making of the legal person to put in place that misbehaviour for the account of the legal person concerned.[248]

Regarding the nature of corporations' liability for having perpetrated market manipulation, it must be highlighted that, different from natural persons, the legal persons' responsibility is not specific as being a criminal liability, neither under the MAR, nor under the MAD II. Indeed, the Union legislator requires the Member States to provide responsibility for legal persons without establishing whether it shall be administrative or penal. Hence, it is up to the Member States to decide whether criminal liability of legal persons fits in their criminal justice system.

[247] MAD II, art 8(3).
[248] MAR, rec 40 and art 12(4).

4.5 Dual enforcement regime under the MAR and MAD II: requirements for the compliance of the EU Member States

Once analysed the content of the market manipulation prohibition as enshrined under article 12 MAR and to whom it applies, it is pivotal to look at the dual enforcement regime under the MAR and MAD II and clarify how the Union Member States have to enforce article 12 MAR to comply with the MAD II rules.[249] To that end, this section analyses the mandatory requirements that the Member States must comply with to implement the market abuse package properly.

The MAR currently envisages administrative sanctions that competent authorities shall apply to punish, *inter alia*, perpetrators of manipulative offences under article 12 MAR (ch II, sub-ss 4.4.1 and 44.2), regardless of whether the intent of such misconduct is proven or it is qualified as serious.[250] Such duty of the Union Member States stems from the fact that, as explained in sub-section 4.1.1 of chapter II, the MAR is a regulation; accordingly, it is directly applicable in its entirety for the Member States. It means that the MAR provisions have a general application, and they are directly applicable in the national legal order without infringing the principle of subsidiarity (ch II, s 3.3).[251] Then, the Member States have to adopt all the measures of national law necessary to implement legally binding acts.[252] However, implementing measures are not necessary to give the MAR its direct effect because it has direct effect itself. They are merely in the interest of the Member States for adapting their domestic legislative framework to the EU law.

The MAD II states that the Member States shall implement a minimum level of criminal penalties to apply to perpetrators of market manipulation, at least in serious cases and when market manipulation is committed with intent.[253] Then, in those cases, two conditions must be satisfied. First, the manipulative misconduct

[249] Basile, "Verso la riforma della disciplina Italiana del *market abuse*: la legge-delega per il recepimento della Direttiva 57/2014/UE" (n 29) 5.
[250] MAR, recs 71 and 88, and arts 30 and 38(a); MAD II, rec 23; Andrea Perrone, "EU Market Abuse Regulation: The Puzzle of Enforcement" (17 January 2020) vol 21 European Business Organization Law Review 380 <https://link.springer.com/article/10.1007/s40804-019-00171-x> accessed 13 May 2021.
[251] Klip (n 1) 69.
[252] TFEU, art 291.
[253] TFEU, art 83(2); MAD II, rec 10 and art 5(1).

must be serious, and the seriousness should refer to those particularly unacceptable misbehaviour that send a message to the public and potential offenders.[254] Second, the intent must be demonstrated. Furthermore, given the MAD II peculiarity of criminalizing market abuse at the Union level, many authors have opined whether fighting market manipulation necessarily requires the use of penalties or whether administrative sanctions might be sufficient to achieve this goal.

Someone believes that the Union legislator should introduce penalties to enforce laws on fighting market manipulation mainly because of the so-called "deterrence philosophy".[255] It provides that only penalties can prevent offenders from infringing market manipulation rules due to the criminal law's educative function. Criminal enforcement is associated with ultimate societal disapproval, with the unique capacity of criminal convictions amongst enforcement tools to stigmatize currently being recognized by the EU policymakers.[256] This stigmatization is associated with the loss of liberty of an individual and it aims to generate the unique ability of criminal penalties to alter behaviour through deterrence, as well as to punish.[257] Criminal law might thus represent a strong disincentive for other perpetrators to commit similar violations given the penalties' societal stigma attached.[258] Then, according to those authors, casting criminal liability widely, as provided under the MAD II with regard to market manipulation, should contribute to promote compliant behaviour with the EU law.

On the contrary, other authors strongly criticize the MAD II policy, because it seems to understate both the *ultima ratio*[259] and criminal law subsidiarity principles.[260] According to them, the Union legislator has proposed a distorted use

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[254] MAD II, rec 6.

[255] Jacob Öberg, "Is it "essential" to imprison insider dealers to enforce insider dealing laws?" (*SSRN*, 7 November 2013) 114 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346951> accessed 5 June 2021.

[256] Sarah Wilson, "The new Market Abuse Regulation and Directive on Criminal Sanctions for Market Abuse: European capital markets law and new global trends in financial crime enforcement" (October 2015) vol 16 ERA-Forum 443 <https://link.springer.com/article/10.1007/s12027-015-0384-1> accessed 23 July 2021.

[257] ibid.

[258] Öberg "Is it "essential" to imprison insider dealers to enforce insider dealing laws?" (n 256) 114.

[259] Giovanni Fiandaca and Enzo Musco, *Diritto penale, Parte generale* (8th edn, Zanichelli 2019) 28. See also Enrico Amati, "La disciplina degli abusi di mercato" in Gaetano Insolera and Filippo Sgubbi *La legislazione penale compulsiva* (CEDAM 2006) 203-32.

[260] Michael G Faure and Claire Leger, "The Directive on criminal sanctions for market abuse: a move towards harmonizing insider trading criminal law at the EU level" (2015) vol 9 ISS 2 art 1

of criminal law to tackle market manipulation by stressing the social recognition of the relevance of respecting the market abuse package's rules rather than on concretely safeguarding the fair functioning of financial markets.[261] By imposing penalties against those "who commit mistakes", the EU would not aim to effectively protect society from market manipulation but rather encourage investors' confidence in the financial markets.[262] Considering the purpose of improving operators' trust in the financial markets, these authors believe that the Union legislator should consider whether the traders' confidence in financial markets would improve by punishing market manipulation misconduct by imposing administrative sanctions, penalties, or both of them.[263] Finally, they stress that the optimal sanction to combat market manipulation would not necessarily correspond to a penalty,[264] because despite being particularly afflictive, criminal punishment may not contribute to repress market manipulation efficiently.[265]

Despite those concerns, by requiring the imposition of both administrative and criminal sanctions, the MAR and MAD II have established the dual enforcement regime within the market abuse legislative framework. The have radically inverted the previous market abuse legal discipline.[266] It signifies that as for natural persons, perpetrators of market manipulation shall be currently punished by employing administrative sanctions; in the case in which their conduct is serious and intentional pursuant to article 5(1) MAD II, they shall be punished through penalties.[267] Instead, as for legal persons, perpetrators of market manipulation shall be punished by administrative sanctions; in the case in which their behaviour is

Brooklyn Journal of Corporate, Financial & Commercial Law 404 <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1026&context=bjcfcl> accessed 14 May 2021.

[261] Sabella (n 73) 10-11.

[262] ibid.

[263] ibid.

[264] Faure and Leger (n 261) 401.

[265] Alberto Alessandri and Giorgio Seminara, *Diritto Penale Commerciale, I principi generali* vol I (1st edn, G. Giappichelli Editore 2018) 24. See also Amati, "La disciplina degli abusi di mercato" (n 260) 203-32.

[266] Luca Bettinelli and Sabrina Galmarini, "Manipolazione del marcato: come orientarci?" (May 2017) Ius letter 3 <https://iusletter.com/wp-content/uploads/Focus-market-abuse-4.pdf > accessed 28 June 2021.

[267] MAD II, art 7.

serious and intentional as provided in article 5(1) MAD II, they shall be punished through criminal or non-criminal fines, in accordance with national law.[268]

4.5.1 Requirements under the MAR: administrative sanctions

Previously, the MAD I required the Member States to adopt measures of an exclusively administrative nature.[269] It imposed on them the duty to issue the appropriate administrative sanctions against persons who infringed national rules concerning the MAD I implementation.[270] Instead, it left the Member States large discretion regarding criminal punishment.[271] Nowadays, the MAR still provides administrative sanctions that competent national authorities shall apply.[272]

The requirements that the Member States shall follow in imposing administrative sanctions to perpetrators of market manipulation are enshrined in articles 30 and 31 MAR.

Beginning with article 30 MAR, paragraph (1) states that the Member States shall provide for competent authorities to have the power to take appropriate administrative measures at least related to infringements of the prohibition of market manipulation under article 15 MAR. It means that the Member States shall act in a certain way pursuing the aim of fighting manipulative misconduct which affects the Union financial markets as prohibited under article 15 MAR. In this regard, it is of important to underline that article 30(1) MAR prescribes that administrative sanctions and measures can only be taken without prejudice to any criminal sanctions and without prejudice to the supervisory powers of competent authorities.[273] The reason behind this provision seems to be to ensure the supremacy of the criminal authorities and courts which lead to the EU Member States, to shift the proportions of sanctions in favour of criminal sanctions for certain infringements.[274] Furthermore, article 30(2) MAR affirms that the Member States

[268] ibid arts 8-9.
[269] Bettinelli and Galmarini (n 267) 3.
[270] ibid.
[271] MAD II, rec 2; Bettinelli and Galmarini (n 267) 3.
[272] MAR, recs 88 and art 38(a); Perrone (n 251) 380.
[273] Tamás (n 54) 372.
[274] ibid.

must establish a list of minimum administrative sanctions that competent national authorities shall have the power to impose in the event of violations of article 15 MAR. The most common administrative sanctions imposed to perpetrator of market manipulation within the Union include an order requiring the person responsible for the infringement to cease the conduct and to desist from a repetition of that conduct; the disgorgement of the profits gained, or losses avoided, due to the infringement insofar as they can be determined; and maximum administrative pecuniary sanctions of at least the amount of the profit gained, or losses avoided, because of the violation, if determinable.[275] Moreover, among the other administrative measures, article 30(2) MAR lists a public warning that indicated the person liable for having committed market manipulation; withdrawal or suspension of the authorisation on an investment firm; and a temporary ban of a person who is responsible for the violation of article 15 MAR from exercising management functions in investment firms or from dealing on own account.[276] Additionally, the MAR enshrines the amount below which the maximum of administrative pecuniary sanctions that the Member States must apply to natural and legal persons cannot go. Precisely, according to article 30(2)(i)(i) MAR, if a natural person sins market manipulation, the maximum of the administrative fine shall be at least EUR 5 million. In comparison, article 30(2)(j)(i) MAR states that if legal persons infringe the market manipulation prohibition, the maximum of the administrative fine must be at least EUR 15 million, or 15% of the total annual turnover of the legal person concerned according to the last available accounts approved by the management body.

Following with article 31 MAR, it establishes that the Member States shall consider all the relevant circumstances when determining the type and level of administrative sanctions to impose. Article 31(1) MAR gives the competent authorities examples of those circumstances.[277] For instance, they encompass the gravity and duration of the violation, the degree of liability of the person responsible for the infringement concerned, and previous violations by the person liable for the

[275] MAR, art 30(2)(a), (b) and (h).
[276] MAR, art 30(2)(c), (d), (e) and (g).
[277] Tamás (n 54) 372.

infringement.[278] Also, they embrace the financial strength of the person who has sinned market manipulation if determinable, the level of cooperation of such a person with the competent authority, and measures taken by the person responsible for the infringement to prevent its repetition.[279]

4.5.2 Requirements under the MAD II: criminal sanctions

Turning to the MAD II requirements, first of all, it seems relevant to stress that the MAD II represents a "pioneering" legislative measure, because it supplements the original market abuse legal framework by criminalizing market manipulation at the EU level. The MAD II is based on the assumption that the adoption of administrative sanctions by the Union Member States before the MAD II entry into force in 2014 has proven to be insufficient to ensure compliance with the rules on preventing and fighting market manipulation.[280] It requires the EU Member States to punish perpetrators of market manipulation by imposing penalties that demonstrate a stronger form of social disapproval compared to administrative sanctions.[281] By providing so, the MAD II thus aims to complement and ensure the effective transposition of the MAR.[282]

The requirements that the Member States shall follow in imposing criminal sanctions to whom commits market manipulation are enshrined in articles 7 and 9 MAD II respectively for natural and legal persons.

Concerning natural persons, article 7(1) MAD II requires that penalties must consist of effective, proportionate, and dissuasive criminal sanctions. Moreover, the Member States shall punish natural persons who infringe the market manipulation prohibition by a maximum term of imprisonment of at least four years.[283] Given those provisions, it follows that the Union legislator has complied with the principles of effectiveness, proportionality and dissuasiveness of penalties.[284]

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[278] ibid art 31(1)(a), (b) and (f).
[279] ibid art 31(1)(d), (e) and (g).
[280] MAD II, rec 5.
[281] MAD II, rec 6; Öberg, "The Legal Basis for EU Criminal Law Harmonisation: A Question of Federalism?" (n 117) 114.
[282] ibid.
[283] MAD II, art 7(2).
[284] Case *Greek maize* (n 143) par 43.

"Effective" means that, if violations of the Union law occur, the system is capable of responding to them without making it practically impossible or excessively difficult to impose those penalties.[285] The system is not rendered lame, but it can react to infringement of Union law.[286] "Proportionate" signifies, first, that penalties are sufficiently appropriate, without being excessively strict, to attain the legitimate goals pursued by them.[287] Second, it means that in choosing between several equally appropriate penalties, the Member States shall apply the least onerous.[288] Finally, "dissuasive" means that penalties must have the potential to deter persons from conducting themselves in an undesired manner and infringing the aims pursued and rules laid down by the Union Law.[289] Then, the criteria of proportionality and dissuasiveness are strictly connected because the severity of penalties must be commensurate with the seriousness of the infringements for which they are imposed, particularly by ensuring a genuinely deterrent effect, while respecting the general principle of proportionality.[290] Hence, the Member States shall provide under their domestic law the necessary measures to repress a certain offence without exceeding the limits of what is appropriate and needed to achieve the aims legitimately pursued by Union law.[291] As stated, the criterion of dissuasiveness may be discussed as the severity of the sanction provided; while proportionality seems to have a mitigating impact on the dissuasiveness character of penalties.[292]

Regarding legal persons, the Member States must adopt the necessary measures to ensure that they will be liable pursuant to article 8 MAD II if they commit manipulative misconduct.[293] Legal persons who infringe the market manipulation prohibition shall be subject to effective, proportionate, and dissuasive sanctions – within the above meaning –, including criminal or non-criminal fines

[285] Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi, Adelchi and Dell'Utri* [2005] ECLI:EU:C:2005:270, Opinion of AG Kokott, point 88.
[286] Klip (n 1) 76.
[287] Joined Cases *Berlusconi, Adelchi and Dell'Utri*, Opinion of AG Kokott, point 90; Klip (n 1) 78.
[288] ibid.
[289] Klip (n 1) 80.
[290] Case C-418/11 *Texdata Software* [2013] ECLI:EU:C:2013:588, paras 51-52.
[291] ibid.
[292] Klip (n 1) 79.
[293] MAD II, art 9.

depending on the Member States' legislation.[294] In addition to those administrative pecuniary sanctions, the Member States may impose other measures, such as exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from the practice or commercial activities, placing under judicial supervision, judicial winding-up, and temporary or permanent closure of establishments as used for committing the manipulative offence.[295]

4.6 Relevant aspects related to the dual enforcement regime under the MAR and MAD II

Clarified the requirements that the Member States shall respect in imposing administrative and penal sanctions to perpetrators of market manipulation, the author will now examine two relevant aspects related to how the Union Member States have to enforce article 12 MAR under the MAR and MAD II regime.

The former aspect relates to the attempt of committing market manipulation (ch II, sub-s 4.6.1). While the latter regards the borderline between criminal and administrative cases of market manipulation (ch II, sub-s 4.6.2).

4.6.1 Attempt of committing market manipulation

Beginning with the first aspect, it seems important to underline that the MAR also provides for a prohibition against attempting to engage in market manipulation.[296]

Recital 41 MAR states that pursuing the aim to complement the prohibition of market manipulation, the MAR should also embrace a prohibition against attempting to sin manipulative misconduct and differ it from behaviour that is likely to result in transaction or information manipulation.[297] Accordingly, such an attempt might encompass situations in which the activity is started, but it is not completed and it is to those situations that article 15 MAR refers to.[298] Moreover, the Member States shall also take the necessary measures to punish the attempt to

[294] ibid.
[295] ibid, art 9(a),(b),(c),(d) and (e).
[296] MAR, rec 41 and art 15.
[297] ibid.
[298] ibid.

commit serious and intentional market manipulation cases classified under the MAD II as a criminal offence.[299]

As stated, it is believed that the Union legislator has provided for punishing also attempting to engage in market manipulation as being an administrative offence or, alternatively, a criminal misbehaviour, because misconduct that does not really result in manipulated prices may otherwise fall outside the current EU regime of market manipulation.

4.6.2 Borderline between criminal and administrative cases of market manipulation

Following with the second aspect, it relates to drawing the line between criminal and administrative cases; it seems to be a very demanding task.[300]

Recital 12 MAD II enumerates some market manipulation misconduct to be considered as serious and, consistently, to punish by means of criminal sanctions. It states that misbehaviour of market manipulation as provided under article 12 MAR shall be considered to be "serious" within the meaning of article 5 MAD II in those cases in which one, or more, of the following elements are high: the impact on the integrity of the Union financial markets, the actual potential profit derived or loss avoided, the level of harm caused to financial markets, the level of alteration of the value of the financial instrument or spot commodity contract, or of the funds originally used. Also, recital 12 MAR establishes that misconduct of market manipulation must be considered as "serious" if the offence is sinned by a person employed or working in the financial sector or is a supervisory or regulatory authority.

As for many authors, the quantitative criteria provided by recital 12 MAD II are vague and challenging to apply *in concreto*. The reason is that it is unclear what precisely those criteria signify. [301] Likewise, it appears to be demanding to apply a test based on the actual or potential benefit derived or loss avoided because, in some situations, the economic profit gained by the perpetrator of market manipulation is easy to measure. For instance, it happens when the person liable for

[299] MAD II, art 7(2).
[300] Perrone (n 251) 383.
[301] ibid 383.

the infringement of article 15 MAR opens a position immediately before information is disclosed and closed it immediately after the dissemination. Instead, in other situations, the amount of the economic benefit gained by carrying out market manipulation or, alternatively, the loss avoided by perpetrating manipulative misbehaviour stems from many factors which make very difficult to measure the profit or loss concerned. Furthermore, the criteria regarding the overall value of the financial instrument traded, the level of alteration of the value of the financial instrument, or the amount of funds originally used seem to complicate the situation even further.

In addition to those issues related to recital 12 MAD II, several concerns also arise from the fact that the MAR and the MAD II refer to the "seriousness" in relation to both the misconduct itself, and to the effect and consequences of the manipulative miscount. For example, by looking at recital 12 MAD II, it can be observed that the "seriousness" is, firstly, referred to the high impact on the integrity of the Union financial markets.[302] Secondly, to the damage caused to the market which has led to an actual profit or avoided loss, or may lead to a potential profit or avoid loss for the perpetrator of market manipulation.[303] Then, as for the "seriousness" of the manipulative misbehaviour, it can be noticed that the Union legislator often refers to parameters within the misconduct itself without taking into consideration that, for each consequence of the misbehaviour concerned, those parameters shall be connected to the related misconduct, to demonstrate the link cause-effect required to demonstrate the liability of the perpetrator of market manipulation.

Given the foregoing, it follows that the current approach of the Union legislator for distinguishing from administrative and criminal manipulative misconduct seems to still generate misunderstanding.

[302] Sabella (n 73) 13-14.
[303] ibid.

4.7 Compliance of the dual enforcement regime under the MAR and MAD II with the principle of *ne bis in idem*

4.7.1 Rationale, sources and double dimension of the *ne bis in idem* principle

The principle of *ne bis in idem* was introduced to protect two different kinds of interest both related to the principle of certainty.[304]

First of all, it aims to safeguard the integrity of the ruling on a given matter: the *res judicata.* To that end, it ensures the prevention of later judgements on the same fact, the *idem factum*, in a case against the same person and, thus, represses the possibility of contradictory verdicts on the matter.[305]

Secondly, the *ne bis in idem* has the purpose of protecting individuals' interests.[306] In fact, it guarantees that a person whose trial has been finally disposed of is not prosecuted in other states for the same acts for having, *inter alia*, exercised his/her right to freedom of movement. In other words, the *ne bis in idem* ensures that decisions adopted in a certain country by the competent authorities will be then respected by public bodies of other states in both the interest of the first State and the individual concerned.[307]

Furthermore, the principle of *ne bis in idem* has many sources. At a supranational level, it is regulated by article 4 of the Protocol No. 7 of the ECHR[308] and article 54 of the Schengen Agreement (CISA)[309]. At the European level it is established under article 50 of the Charter[310]. Finally, at the domestic level, it is enshirined under national provisions.

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[304] Luchtman (n 74) 1718.
[305] ibid.
[306] ibid.
[307] ibid.
[308] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other those already included in the Convention and in the first Protocol thereto, as amended by Protocol No. 11 [1963].
[309] The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common Border [2000] OJ L239/19.
[310] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

Article 4(1) of the Protocol No. 7 ECHR states that no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which the person concerned has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. By providing so, article 4(1) of the Protocol No. 7 ECHR precludes both a second trial and a second penalty for the same fact already judged in the same country.

Article 54 CISA establishes that a person whose trial has been finally disposed of in a contracting state cannot be prosecuted in another contracting country for the same acts provided that the penalty imposed has been enforced, or is in process of being enforced, or cannot be enforced under the laws of the sentencing state. Hence, unlike article 4(1) of the Protocol No. 7 ECHR, article 54 CISA safeguards individuals only from double prosecution, no double sanction.

Article 50 Charter enshrines that anyone shall be tried or punished again in criminal proceedings for an offence for which the person concerned has already been finally acquitted or convicted within the Union in accordance with the law. Therefore, article 50 Charter provides for the same prohibition of article 4(1) of the Protocol No. 7 ECHR but extends it to the EU Member States.

Finally, the principle of *ne bis in idem* has a double dimension: procedural and substantive. The procedural dimension aims to guarantee the cost-effectiveness and legal certainty, and provides for the prohibition of opening a second trial for an act regarding which a final judgement has already been concluded. Instead, the substantive dimension aims to ensure the substantive justice and fairness, and enshirines the prohibition of duplicating sanctions in respect of the same act.

As mentioned in the previous section, article 4 of the Protocol No. 7 ECHR and article 50 Charter represent both of those dimensions, protecting the individual who has been acquitted or definitely convicted for the same act from a second trial on the one hand and from a second sanction on the other.

4.7.2 Preliminary concepts on the *ne bis in idem* principle: the "criminal" nature of charges, "*idem*" and "*bis*"

The complete understanding of the *ne bis in idem* principle in the context at stake requires to go through the scheme followed by courts to ascertain whether, in a given case, the *ne bis in idem* has been violated or not.

First of all, the courts verify whether the first sanction was criminal in nature. To that end, they apply the criteria established by the ECtHR in the *Engel* case to classify a certain charge as "criminal" in law.[311] According to the *Engel* ruling, there are three applicable criteria to determine whether a Member State vests a given charge with a disciplinary character which counts as "criminal" or not.[312]

The first criterion requires the competent authorities to investigate whether the provision defining the offence concerned belongs to criminal law, disciplinary law or both.[313] This first requirement merely represents a starting point to determine whether a charge is criminal or not because it constitutes only a formal and relative value which shall be examined in light of the legislation of the State concerned. For this reason, the legal characterization of the procedure under national law cannot be the sole criterion of relevance for the applicability of the principle of the *ne bis in idem*.[314] Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might be incompatible with the object and purpose of the ECHR.[315] Therefore, in addition to the belonging of the charged offence's definition to criminal law, the second criterion requires to examine the real nature of the offence.[316] Finally, as for the third criterion, competent authorities shall consider the degree of severity of the penalty that the individual concerned risks to incur.[317]

[311] *Engel and Others v. the Netherlands* App nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72 (ECtHR, 8 June 1976), paras 82-83. See also Case C-489/10 *Bonda* [2012] ECLI:EU:C:2012:319, par 37.
[312] ibid.
[313] ibid.
[314] *Zolotukhin* App no 14939/03 (ECtHR, 7 June 2007), par 52.
[315] ibid.
[316] *Engel and Others v. the Netherlands* (n 312) paras 82-83.
[317] ibid.

Those criteria imply that, even in the case in which it is not classified as "criminal" under the legislative system of the State concerned, a certain charge might be considered as "criminal" because of its notable severity and degree of detriment for the individual concerned.[318] Vice-versa, charges that consisted in the deprivation of liberty are always considered "criminal" under the Member States' legislation due to their considerable negative impact on persons, except if those charges cannot be appreciably detrimental for their nature, duration, or manner.[319]

One ascertained if the first imposed charge is criminal in nature or not, the courts verify whether the offences for which the person concerned was prosecuted were the same. By doing so, they thus ascertain the "*idem*".

In the *Zolotukhin* case law, the ECtHR stated that there are several approaches to determine the *idem*.[320] The first approach focuses on the same misbehaviour, irrespective of the classification in law given to that conduct.[321] The second is circumscribed to the same conduct as well, but the latter may constitute several offences, that may be tried in separate proceedings.[322] Finally, the third emphasis the essential elements of the two offences.[323] In the *Zolotukhin* dispute, the ECtHR thus opted for a harmonized interpretation of the notion of the "same offence".[324] It was affirmed that article 4 of the Protocol No. 7 ECHR shall be understood as prohibiting the prosecution or trial of a second offence in so far as it arises from identical facts or facts which are substantially the same.[325] Accordingly, to prove the *idem,* the courts shall focus on a set of concrete circumstances involving the same defendant and inextricably linked together in time and space; their existence must be demonstrated to secure a conviction or institute criminal proceedings.[326]

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[318] ibid.
[319] ibid.
[320] Case *Zolotukhin* (n 315) par 58.
[321] ibid 71.
[322] ibid 72.
[323] ibid 73.
[324] ibid 78.
[325] ibid 82.
[326] ibid 84. See also Case C-436/04 *Van Esbroeck* [2006] ECLI:EU:C:2006:614, paras 27, 32 and 36; Case C-150/05 *Van Straaten* [2006] ECLI:EU:C:2006:615, paras 41, 47 and 48; Case C-261/09 *Mantello* [2010] ECLI:EU:C:2010:683, par 39.

Finally, after having demonstrated the criminal nature of the first sanction and the *idem*, courts verify the "*bis*". Then, in those cases in which the *bis* is ascertained and it does not correspond to a dual proceeding within the meaning of the *A and B v. Norway* judgement[327] (below in sub-s 4.7.5), the principle of *ne bis in idem* shall be considered as being infringed.

4.7.3 The issue of the dual enforcement regime under the MAR and MAD II

Recital 77 MAR enshrines that the MAR shall comply with the principles provided under the Charter.[328] Consistently, the EU Member States shall interpret, apply, and enforce the prohibition of market manipulation under article 12 MAR in accordance with the principle of *ne bis in idem* as established under article 50 Charter.

As discussed in section 4.5 of chapter II, by requiring the imposition of both administrative and criminal sanctions, the MAR and MAD II have established the dual enforcement regime within the market abuse legislative framework.[329] They have thus radically inverted the previous market abuse legal discipline.[330] As a demonstration of that, article 30(1)(2) MAR states that nothing prevents the EU Member States from laying down rules for administrative and criminal sanctions for the same infringements and imposing both of them for the *idem factum* insofar as the national law permits it.

However, although the *ne bis in idem* had been generally applied in criminal cases over time, when the MAR and MAD II entered into force, there was uncertainty concerning the sanctions to apply and how to punish the infringements of the market manipulation prohibition.[331] The MAR requires the Member States to take measure to ensure that effective, proportionate, and dissuasive administrative sanctions and measures are taken in case of violations of rules under the MAD II, without prejudice to any criminal sanctions. Nevertheless, it does not provide a solution concerning how to impose both sanctions at the same time.[332] Accordingly,

[327] *A and B v. Norway* App nos 24130/11 and 29758/11 (ECtHR, 15 November 2016).
[328] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.
[329] Bettinelli and Galmarini (n 267) 3.
[330] ibid.
[331] Tamás (n 54) 376.
[332] ibid.

the main questions is how the Member States can apply both sanctions without infringing the principle of *ne bis in idem*.[333]

On the one hand, the *ne bis in idem* should guarantee a substantive justice, possible only by strictly interpreting the *matière pénale* of a substantive rather than formal nature. On the other, the Member States' domestic law should comply as much as possible with the judgements of both the CJEU and the ECtHR, without infringing principles enshrined under their national law. In addition, it is common that the administrative sanctions imposed to perpetrators of market manipulation have a significant degree of severity. Hence, they seem to be formally administrative, but substantially criminal within the meaning of the *Engel* case.

Given the foregoing, in the following sub-sections, the author will explain the pillar judgements of both the CJEU and the ECtHR regarding the compliance of the dual enforcement regime with the principle of *ne bis in idem* in the context of market abuse (ch II, sub-ss 4.7.4 – 4.7.7).

4.7.4 The *Fransson* case law

In 2009, Mr. Fransson was summoned to appear in criminal proceeding for fraud, because he had provided incorrect information in the tax declarations concerning his activities between 2004 and 2005.[334] Moreover, Mr. Fransson was also charged for having failed to communicate declarations regarding social security contributions of employers in the month of October of the same years.[335] However, in 2007, Mr. Fransson had already been punished for the same acts by means of administrative fines.[336]

As a result, the doubt as to whether the second trial in 2009 breached the *ne bis in ide*, arose. The question was referred to the CJEU for a preliminary ruling. It was asked whether article 50 Charter precluded a Member State from initiating a criminal proceeding for the same acts of fraud for which penalties had already been imposed against Mr. Fransson.[337]

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[333] Tamás (n 54) 376.
[334] Case C-617/10 *Fransson* [2013] ECLI:EU:C:2013:280, paras 12-14.
[335] ibid.
[336] ibid.
[337] ibid 15.

The CJEU stated that article 50 Charter does not precludes a Member State from imposing administrative and criminal charges to the same facts if the administrative fines are not criminal in nature within the meaning of the *Engel* criteria (ch II, sub-s 4.7.2).[338] Accordingly, the Member States are allowed to opt for a combination of administrative sanctions and penalties to safeguard the general interest of the EU.[339] However, it is prohibited when the previous administrative fines applied are criminal in nature and finally preclude criminal trials against the same person and on the *idem factum* of market abuse.[340]

4.7.5 The *Grande Stevens et al v. Italy* case law

Between 2002 and 2005, the joint stock company FIAT entered into a loan agreement with eight banks, establishing that if the loan was not repaid on time the banks would acquire FIAT shares as compensation.[341] At the time, the company EXOR spa controlled 30% of those shares. Therefore, if FIAT failed to repay the loan on time, EXOR spa would lost the control of 30% on the FIAT shares. For this reason, EXOR spa contacted a lawyer – Mr. Grande Stevens – to find a solution that allow him to retain control on the FIAT shares if the latter would not repay the banks.[342] Mr. Grande Stevens said that EXOR spa had before entered into an equity swap agreement with the bank Merri Lynch, whereby EXOR spa would have gained if its shares have increased in value, receiving money from the bank.[343] Otherwise, if its shares have decreased in value, the bank would have obtained a profit. Hence, a renegotiation of this agreement would have allowed EXOR spa to maintain control on the FIAT shares. Mr. Grande Stevens thus received from the CONSOB a positive answer about maintaining control of FIAT. However, he never mentioned the name of the bank involved, the Merri Lynch.[344] Hence, when the CONSOB asked EXOR to communicate to other investors the shares that it intended to take,

[338] ibid 34.
[339] ibid.
[340] ibid.
[341] *Grande Stevens et al v. Italy* App no 18640/10 (ECtHR, 4 March 2014), paras 6-52.
[342] ibid.
[343] ibid.
[344] ibid.

EXOR stated that it had no plans and that it only intended to maintain control of FIAT. Instead, it did not mentioned the equity swap signed with the Merri Lynch bank.[345]

As a result, the CONSOB accused FIAT for having perpetrated the administrative offence of market manipulation given the disseminated false information. At the same time, the case was also dealt with in criminal proceeding. At the end, Mr. Grande Stevens was condemned for the administrative offence. Instead, the EXOR liability was excluded. However, Mr. Grande Stevens's lawyers suspected a violation of the *ne bis in idem* under article 4 of the Protocol No. 7 ECHR. Hence, he appealed the ECtHR.[346]

The ECtHR stated that article 4 of the Protocol No. 7 ECHR was violated because the administrative fine imposed by the CONSOB to Mr. Grande Stevens have become final when criminal proceeding for the same facts was initiated against him.

Most importantly, the ECtHR established that, by considering the notable degree of severity of certain administrative sanctions and their punitive or deterrent aims, those measures shall be considered to be criminal in nature.[347] Therefore, they are equivalent to criminal charges within the meaning of the *Engel* criteria (ch II, sub-s 4.7.2).[348] Consistently, in those cases of criminal proceedings following the administrative ones, after the previous application of an administrative sanction that is criminal in nature within the meaning of the *Engel* criteria and finally precludes criminal trials against the same person and on the *idem factum* of market abuse, a criminal proceeding for the same conduct would violate the *ne bis in idem*. In other words, if taking into consideration the degree of severity and deterrent purposes of an imposed administrative sanction, the latter is criminal in nature, the subsequent initiation of a criminal proceeding or the imposition of a criminal penalty on the same facts and against the same person would violate the *ne bis in idem* principle. On the contrary, a criminal sanction can be applied to punish the same facts after

[345] ibid.
[346] ibid.
[347] ibid 99.
[348] ibid.

the imposition of an administrative sanctions which is not criminal in nature, without violating the *ne bis in idem*.[349]

4.7.6 The new approach of the ECtHR: the *A and B v. Norway* case law

The *A and B v. Norway* judgement represents a landmark ruling of the ECtHR since its conclusion considerable limited the application of the *ne bis in idem* principle.

The dispute involved a combination of tax and criminal proceedings, including punitive tax sanctions. The *A and B v. Norway* case law regard two subjects: Mr. A and Mr. B. Tax audits against them in 2005 were followed by reports to the judicial criminal authorities in 2007, leading to indictment for tax fraud at the end of 2008 and convictions in 2009.[350] Those convictions were upheld on appeal and, the criminal convictions became final in 2010. Meanwhile, the tax authorities amended the tax assessment and imposed tax penalties of 30% at the end of 2008.[351] The decision of the tax authorities was based in part on statements by the applicants, Mr. A and Mr. B, in the criminal proceedings. The tax decisions became final in 2008, less than two years before criminal proceedings.[352]

In detail, Mr. A, was arrested for not having declared profits of several financial transactions carried out abroad.[353] In 2008, criminal proceedings were brought against him for the offence of tax evasion. Later on, the tax authorities imposed him an administrative fine of 30% of the non-declared amount. Mr. A paid the fine and, thus, the administrative proceeding was concluded. In addition, in 2009, he was condemned for tax fraud through a criminal sanction. As a result, Mr. A suspected a violation of the *ne bis in idem* under article 4 of the Protocol No. 7 ECHR and he, thus, appealed the Supreme Court. The Court stated that the facts for which Mr. A had been accused were the same and that the administrative fine of 30% of the non-declared amount was criminal in nature within the meaning of the *Engel* criteria (ch II, sub-s 4.7.2).[354] Although, the Supreme Court also established

[349] ibid 92 and 229; Tamás (n 54) 377.
[350] Luchtman (n 74) 1725.
[351] ibid.
[352] ibid.
[353] Case *A and B v. Norway* (n 328) paras 14-30.
[354] ibid.

that the factual identity and the substantially criminal nature of the administrative penalties lead to a violation of the *ne bis in idem* principle if the proceedings are consecutive. Instead, in those cases in which the proceedings are simultaneous rather than consecutive an infringement of the *ne bis in idem* principle would be more challenging to demonstrate. In comparison, Mr. B, was accused by tax authorities for non-having declared profits gained from foreign transactions.[355] Hence, in 2009, those authorities issued against Mr. B an administrative fine of 30% of the non-declared amount. Later on, a criminal proceeding was brought against him for the same tax fraud for which he had been punished in 2009.[356] As a result, Mr. B suspected a violation of the *ne bis in idem* under article 4 of the Protocol No. 7 ECHR. He, thus, appealed the Norwegian Supreme Court. The latter replied what has been ruled by the Supreme Court against Mr. A. Therefore, both Mr. A and Mr. B appealed the ECtHR complaining a violation of article 4 of the Protocol No. 7 ECHR.

The ECtHR ruled that the Member States should be able to choose complementary legal responses to socially offensive conduct, by means of different procedures constituting coherent whole so as to address different aspects of the social problem involved. However there was a condition to follow: the accumulated legal responses shall not represent an excessive burden for the individual concerned.[357] On the basis of this premise, the ECtHR explicitly clarified that article 4 of the Protocol No. 7 ECHR does not prevent the Member States to conduce dual proceedings.[358] Hence, this provision does not prevent the Member States from adopting administrative and criminal sanctions for the same facts, provided that they comply with certain conditions. However, the ECtHR imposed to the Member States to convincingly demonstrate that the dual proceedings concerned are sufficiently closely connected in substance and time as to form a coherent whole.[359]

The sufficiently close connection in substance requires that the aims pursued by the proceedings and the means used to achieve them are complementary as to address different aspect of the social misconduct involved in *abstracto* and *in*

[355] ibid 30-40.
[356] ibid.
[357] ibid 121.
[358] ibid 130.
[359] ibid.

concreto.[360] The combined proceedings will more likely meet the criteria of complementarity and coherence if the sanctions to be imposed in the proceedings not formally classified as "criminal" within the *Engel* criteria (ch II, sub-s 4.7.2) are specific for the misbehaviour concerned and differ from the hard core of criminal law.[361] Second, the sufficiently close connection in substance imposed that the possible consequences of organizing the legal treatment of the conduct in a dual proceeding are foreseeable – both in law and in practice – by the person concerned.[362] Third, that the proceedings are carried out in a way to avoid as far as possible any duplication in the collection and subsequent assessment of evidence, and that the administrative and criminal authorities cooperate.[363] Fourth, that the sanction imposed in the proceedings which became final first is considered in those which become final last, in order to avoid that the person concerned receives an excessive punishment.[364]

Instead, the sufficiently close connection in time shall be always present. It requires that the proceedings do not make uncertain the future of the person concerned.[365] However, it does not need that the proceedings are carried out simultaneously from the beginning to the end. [366]

By providing so, the *A and B v. Norway* judgement enshirined a new approach for the application of the *ne bis in idem* principle. The reason behind this is that the ECtHR established that the "*bis*" is not applicable in those cases in which criminal and administrative proceedings are linked by a closed connection which leads to consider them as one and the same procedure, instead of two distinct procedures. Accordingly, in the Mr. A and Mr. B case, the ECtHR did not find a breach of the *ne bis in idem* principle, given the close sufficiently close connection in substance and time of the administrative and criminal proceedings concerned.[367] Such a connection was due to the different aims of the proceedings since the administrative has a deterrent goal, while the criminal a punitive purpose.

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[360] ibid 130 and 132.
[361] ibid 133.
[362] ibid 130 and 132.
[363] ibid 132.
[364] ibid.
[365] ibid 134.
[366] ibid.
[367] Case *A and B v. Norway* (n 328) paras 146-7 and 152-3.

Given the above, the *A and B v. Norway* dispute was, and still is, considered as a revolutionary case. It followed another pillar judgement: the *Zolotukhin* case law. On the one hand, the ECtHR appreciated that the *Zolotukhin* judgement (above in sub-s 4.7.2) had determined that to ascertain whether certain offences were the same a fact-base assessment shall be applied.[368] Instead, the formal assessment consisting of comparing the essential elements of the offences was irrelevant.[369] However, on the other hand, the ECtHR argued against the *Zolotukhin* decision that it did not, as it could have done, mirror the line of reasoning followed in some previous cases, providing non-exhaustive and wider range of factors with no indication of their weight or whether they were alternative or cumulative.[370] Moreover, the ECtHR stressed that, once the *ne bis in idem* has been found to be applicable, there is an evident need for a calibrated approach in regard to the manner in which the principle is applied to proceedings combining administrative and criminal penalties.[371] Finally, the Court pointed out that the *Zolotukhin* judgement offered little guidance for situations where the proceedings have not in reality be duplicated, but have rather been combined in an integrated manner as to form a coherent whole.[372] There, it can be found the revolutionary aspect of the *A and B v. Norway* judgement; the clear explanations of the conditions required to conduct a dual proceeding and, thus, avoid to violate the *ne bis in idem* principle.

Moreover, the *A and B v. Norway* case has been also criticized over time. Indeed, there were also scholars who did not agree with the reasoning of the ECtHR. First, someone has argued that the dividing line between the hard core of criminal law and other types of irregularities has always been a particularly demanding concern. That, specifically, in light of the consequences that may follow from this division in terms of the different levels of the fundamental rights' protection.[373] Second, the issue of foreseeability was considered as an empty shell, because what was considered as needed to be foreseeable was the double proceeding. But, any consideration was given by the majority to that condition and the choices to be made

[368] ibid 108.
[369] ibid.
[370] ibid 105.
[371] ibid 107.
[372] ibid 111.
[373] Luchtman (n 74) 1727.

by competent authorities in that respect.[374] Third, as for the offsetting mechanism to ensure that the overall amount of penalties was proportionate, this criterion can only be of assistance in those cases where the first setting of proceedings led to the application of sanctions.[375]

4.7.7 Applications of the *A and B v. Norway* judgement: the *Menci, Di Puma and Zecca* and *Garlsson Real Estate* case law

The *A and B v. Norway* judgement was followed by four cases, namely the *Menci*,[376] *Garlsson Real Estate*,[377] and *Di Puma* and *Zecca*[378] case law. They concerned compatibility of combinations of criminal and administrative punitive sanctions with the *ne bis in idem* principle as enshirined under article 50 Charter.[379] In particular, the *Menci* dispute was about the EU financial interest.[380] While, the joined cases *Di Puma* and *Zecca*, and the *Garlsson Real Estate* dispute regarded market abuse.[381]

a) The *Menci* case law

The *Menci* dispute regards an alleged failure to Mr. Menci to pay the value added tax (VAT) within the time limit.[382] He was thus ordered to pay the VAT that was due. The tax authorities also imposed on Mr. Menci an administrative penalty of almost EURO 85 000, representing 30% of the tax debt.[383] In 2014, criminal proceedings concerning the same facts were commenced, long after the tax proceedings had become final.[384] The question was thus whether this situation

[374] ibid.
[375] ibid 1728.
[376] Case C-524/15 *Menci* [2018] ECLI:EU:C:2018:197.
[377] Case C-537/16 *Garlsson Real Estate* [2018] ECLI:EU:C:2018:193.
[378] Joined Cases C-596/16 and 597/16 *Di Puma* and *Zecca* [2018] ECLI:EU:C:2018:192.
[379] Luchtman (n 74) 1729.
[380] ibid.
[381] ibid.
[382] Case *Menci* (n 377) paras 11-15.
[383] ibid.
[384] ibid.

contrasts article 50 Charter and whether this provision should be interpreted in the sense to preclude the possibility of conducting criminal proceedings concerning an act for which a final administrative penalty has been imposed on the defendant.[385]

The CJEU established that legal classification under national law of the facts and the legal interest protected were not relevant to determine the existence of the same offence.[386] This because the scope of the protection conferred under article 50 Charter cannot vary between the Member States.[387] Moreover, the CJEU states that, in the absence of the EU law harmonization, the proportionality of national legislation cannot be questioned because of the mere fact that the Member State concerned has made the choice to provide for the possibility of duplicating criminal and administrative proceedings and penalties.[388] Otherwise, the Member States' freedom of choice would be limited.[389]

On the basis of this premise, the CJEU reiterated the ECtHR's opinion in the *A and B v. Norway* dispute on the possibility of duplicating criminal proceedings and penalties and administrative proceedings and sanctions of a criminal nature.[390] Thus, it accepted the accumulation of proceedings or sanctions to guarantee the collection of VAT, as being a purpose of general interest.[391] But, in the same wording as the *A and B v. Norway* ruling, in leaving the Member States a margin of discretion for the appropriateness of their legislative choices, the CJEU imposed on them strict conditions to follow. First, it required the Member States to prove that the proceedings and sanctions have complementary aims and regard different aspects of the same unlawful conduct.[392] Second, that the Member States pursue the aim of general interest to combat VAT offences, as being capable of justifying a duplication of proceedings and penalties. Third, that the Member States provide clear and precise rules, so that individuals can predict which acts or omissions are liable to be subject to such a duplication of proceedings and penalties.[393] Fourth,

[385] ibid 16.
[386] ibid 36.
[387] ibid.
[388] ibid 47.
[389] ibid 48.
[390] ibid 42.
[391] ibid 44.
[392] ibid.
[393] ibid 49.

that the Member States' legislation encompasses rules that guarantee the coordination among proceedings, in order to limit their duplication to what is strictly necessary for the additional disadvantage resulted from it.[394] Hence, on the one hand, the possible consequences of the punishment concerned shall meet the proportionality requirement; the dual proceedings and penalties provided by national legislation shall not exceed what is appropriate and necessary in order to attain the objectives pursued by the legislation.[395] The Member States shall provide for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned. Then, if there is a choice between several appropriate measures, the least onerous must be imposed and the disadvantaged provoked must not be disproportionate to the pursued aims.[396] On the other, the administrative and criminal proceedings shall be conducted only as far as it is strictly necessary for achieving the objective of ensuring the collection of all the VAT.[397]

By ruling so, it can be observed that the CJEU adopted a different approach from the ECtHR in the *A and B v. Norway* judgement. Nevertheless, the result was the same, as also the *Menci* decision allowed for dual proceedings. The principle of *ne bis in idem* seems to protect the legal certainty of individuals and requires a common definition of consistent elements. But, it is not absolute. The national law can limit it but only under certain conditions and subject to the Court's supervision. It is thus up to the Member States to ask the Court to decide whether the actual disadvantage resulting for the person concerned is excessive in relation to the seriousness of the committed offence.[398]

Furthermore, as the *A and B v. Norway* judgement, the *Menci* decision was criticized as well, because no further criteria were given to the referring Court to deal with the possible excessive disadvantage attributed to the person concerned.[399] Moreover, there was room for combinations of proceedings that integrated

[394] ibid 46.
[395] ibid.
[396] ibid.
[397] ibid 52.
[398] ibid 59.
[399] Luchtman (n 74) 1732.

automatic system of sanctioning and proceedings that accumulate a more discretionary decision in the light of the criminal justice administration.[400]

For those reasons, it appeared that there were still uncertainties that the *Garlsson Real Estate* and joined cases *Di Puma* and *Zecca* tried to fix.[401]

b) The *Garlsson Real Estate* case law

Focusing on the *Garlsson Real Estate* dispute, it is about Mr. Rinucci.[402] At the same time, an administrative and criminal proceedings were brought against him for the same facts of market manipulation.[403] In 2007, Mr. Rinucci was punished through administrative sanction of over EURO 10 000 by the CONSOB.[404] Later on, appeals were lodged, but criminal proceedings were instituted in the meanwhile. They lead to a conviction, that became final with appeals on points of law in the administrative proceeding still pending.[405] Hence. Mr. Rinucci appealed the ECtHR for the suspect of an infringement of the *ne bis in idem* under article 4 of the Protocol No. 7 ECHR. It asked whether this provision precludes the possibility of conducting administrative proceedings in respect of an act for which the same person has been convicted by a decision that has the force of *res judicata*.[406]

The reasoning of the CJEU in the *Garlsson Real Estate* dispute followed the *Menci* decision. The Court accepted the need for dual proceedings as made in both the *A and B v. Norway* and *Menci* previous cases. In the same wording as the *Menci*, the CJEU accepted that a Member State may wish to dissuade and punish any violation, whether intentional or not, of the prohibition of market manipulation by employing administrative sanctions and, then, prevent and punish serious and intentional infringements of such a prohibition, with particularly negative effects on society, by imposing criminal penalties.[407] Moreover, an important addition to the *Menci* judgment was that, where administrative proceedings follow those of

[400] ibid 1733.
[401] ibid.
[402] Case *Garlsson Real Estate* (n 378) paras 11-19.
[403] ibid.
[404] ibid.
[405] ibid.
[406] ibid 20.
[407] ibid 47.

criminal justice, the bringing of those proceedings exceeds what is strictly necessary at least when the criminal proceedings are capable of punishing the committed offence in an effective, proportionate, and dissuasive manner.[408]

By providing so, it emerged from the *Garlsson Real Estate* judgement that the "concentric" approach of the ECtHR was confirmed. Then, where the criminal proceedings can address the core of the harm done to society, the necessity of subsequent administrative proceeding will be questionable.[409] For instance, it would happen when the market manipulation is of significant seriousness as the conviction include a custody sentence and a criminal fine in a range that corresponds to that applied in respect of the administrative penalty.[410] In that case, the criminal proceeding itself tackle the most serious elements of the actions concerned and offers adequate sanctions to address the provoked harm.[411]

However, although this addition to the *Menci* case, it was not still clear the Court's position about the order in which procedure shall be conducted and concluded.

c) The *Di Puma* and *Zecca* joined cases

Turning to the joined cases *Di Puma* and *Zecca*, Mr. Di Puma and Mr. Zecca were acquitted in 2014 from the criminal accuse of insider trading.[412] At the same time, in 2012, the respective administrative proceedings for the same facts were started and concluded with the imposition of administrative fine convicted by the CONSOB against Mr. Di Puma and Mr. Zecca.[413] Hence, they appealed the CJEU for a possible violation of the ne bis in idem principle as provided under article 50 Charter. They asked the Court whether this provision should be interpreted as precluding the initiation of criminal proceeding relating to the same facts the

[408] ibid 57.
[409] Luchtman (n 74) 1735-36.
[410] ibid.
[411] ibid.
[412] Case *Di Puma* and *Zecca* (n 379) paras 13-21.
[413] ibid.

penalties for which are essentially criminal if in those cases of definitive finding the conduct concerned constitute a criminal offence.[414]

The CJEU stated that the effects of the *res judicata* on the factual conclusions of a criminal judgement in relation to punitive administrative proceedings do not prevent the finding of violations of the legislation on market abuse, nor do they hinder effective punishment where the facts at issue are established.[415] However, according to the principle of proportionality, the *ne bis in idem* precludes punitive administrative proceedings where a final judgement of acquittal has concluded that the alleged acts of market abuse were not established.[416] In those case, the administrative processing clearly exceed what is necessary to achieve the objective of protecting the integrity of financial markets and public confidence in financial instruments.[417]

5. Summary on the prohibition of market manipulation in the EU

For the scope of the following chapters, it is relevant to summarize that, in 2014, the market abuse package composed of the MAR, MAD II, and MiFID II replaced the MAD I. The MAR and MAD II have prescribed for the first time a comprehensive legislative system including minimum rules on criminal offences and definition of the related administrative and criminal sanctions with regard to market manipulation as prohibited under article 12 MAR.[418]

First of all, article 12 MAR must be assessed according to article 3 MAR as contributing to depict the scope of the market manipulation prohibition as provided under article 12 MAR and as establishing the definitions of "financial instrument", "spot commodity contract", and "commodity derivatives". Financial instruments stand for binding monetary contracts between two or more operators who can trade, modify and settle financial instruments as they prove their ownership. They encompass options, futures, swaps, forwards, and any derivative contract relating to commodities that can be settled in cash at the option of one of the parties other

[414] ibid 22.
[415] ibid 34.
[416] ibid 43.
[417] ibid paras 42 and 44.
[418] Basile and Mucciarelli (n 11).

than by reason of default or other termination events;[419] options, futures, swaps, and any derivative contract regarding commodities traded on a regulated market and that can be physically settled;[420] and options, futures, swaps, forwards, and any derivative contract relating to commodities that can be physically settled not otherwise mentioned in section C (6) of Annex 1 MiFID II and not traded for commercial purposes, which have the peculiarities of other derivative financial instruments.[421] Spot commodity contracts are financial instruments for the supply of a commodity traded on spot markets which is delivered as soon as the transaction concerned is settled.[422] Finally, commodity derivatives are financial instruments whose value depend on that of a commodity.[423]

Moreover, article 12 MAR currently applies to financial instruments that can be traded on a regulated market or relating to which a request for admission to trading has been submitted.[424] Secondly, it encompasses financial instruments different from those provided in letters (a), (b), and (c) of article 2(1) MAR, whose price or value depends on, or impact, the price or value of a financial instrument covered by such letters, such as credit default swaps and contracts for difference.[425] Thirdly, article 12 MAR embraces spot commodity contracts where transactions, order or behaviour has or might affect the price or value of a financial instrument referred in article 2(1) MAR.[426] Fourthly, the prohibition of market manipulation applies to financial instruments for transferring credit risk where the transaction, order, bid or behaviour impact or may influence the price or value of a spot commodity contract where those price or value depend on those financial instruments' price or value (i.e. commodity derivatives).[427] Finally, article 12 MAR comprises financial instruments traded or admitted to trading or for which an admission demand has been sent to trading on a MTF and financial instruments traded on an OTF or an OTC.[428]

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[419] MiFID II, s C (5) Annex I.
[420] MiFID II, s C (6) Annex I.
[421] MiFID II, s C (7) Annex I.
[422] MAR, art 3(1)(15).
[423] "Commodities derivatives (MiFID definitions)" (*Glowacki Law Firm*) (n 189).
[424] MAR, art 2(1)(a).
[425] ibid (d).
[426] MAR, art 2(2)(a).
[427] ibid art 2(2)(b); Basile and Mucciarelli (n 11).
[428] MAR, rec 8 and art 2(1)(a) and (b).

In addition, article 12 MAR includes five prohibited activities consisting of market manipulation; three relate to the transaction manipulation and the other two concern the information manipulation.[429]

Operative manipulation consists in intentionally entering into transactions which give, or are likely to give, false or misleading signals as to the supply of, demand for, or price of financial instruments or related spot commodity contracts;[430] or which secure, or are capable of securing, the price of financial instruments or related spot commodity contracts at an abnormal or artificial level irrespective of how long the alteration of the price of financial instruments concerned would last;[431] or which affect, or might affect, the price of financial instruments or related spot commodity contracts by employing fictitious device or any other form of deception or contrivance.[432]

Informative manipulation refers to the following activities committed knowing, or having to know, that they were manipulative. Spreading information that gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of financial instruments or related spot commodity contracts; or that fixes, or is capable of fixing, the price of financial instruments or related spot commodity contracts at an abnormal or artificial level;[433] or transmitting false or misleading information, or input, relating to benchmarks.[434]

Furthermore, the prohibition of market manipulation as provided under article 12 MAR applies to both natural and legal persons.[435] The Member States shall enforce article 12 MAR by complying with rules provided in both the MAR and MAD II respectively for administrative and criminal law enforcement as follows.

With regard to natural persons, in cases in which their misconduct is serious and intentional, they shall be sanctioned through effective, proportionate, and dissuasive penalties whose maximum shall be at least four years imprisonment.[436]

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[429] Atto del Governo n. 25 (n 64) 2; Seminara (n 5) 94.
[430] MAR, art 12(1)(a)(i).
[431] MAR, art 12(1)(a)(ii); Case *IMC Securities* (n 226) par 30.
[432] MAR, art 12(1)(b).
[433] ibid art 12(1)(c).
[434] ibid, art 12(1)(d).
[435] MAD II, arts 7-8. See also art 15 MAR.
[436] MAD II, arts 5(1) and 7.

Instead, in other cases, the amount below which the maximum of administrative pecuniary sanctions that the Member States must apply to natural persons shall correspond to at least EUR 5 million.[437]

Concerning legal persons, the Member States must adopt the necessary effective, proportionate, and dissuasive sanctions to ensure that they will be liable under article 8 MAD II in cases in which legal persons commit intentionally serious cases of market manipulation.[438] In other cases, perpetrators of market manipulation must be punished by administrative fines whose maximum shall be at least EUR 15 million or 15% of the total annual turnover of the legal person according to the last available accounts approved by the management body.[439]

As for both natural and legal persons, if they commit market manipulation in cases other than those encompassed under article 5 MAD II, perpetrators of market manipulation shall be punished by means of the appropriate administrative sanctions related to infringements of the market manipulation prohibition under article 15 MAR.[440] The Member States shall ensure that competent authorities have the power to impose, *inter alia*, an order requiring the person responsible for the infringement to cease the conduct and to desist from a repetition of that conduct, the disgorgement of the profits gained or losses avoided due to the infringement insofar as they can be determined, and maximum administrative pecuniary sanctions of at least the amount of the profit gained or losses avoided because of the violation, if determinable.[441]

Finally, in enforcing article 12 MAR pursuant to the MAD II rules, the Member States shall also punish the attempt to commit market manipulation and observe the *ne bis in idem.*[442] The latter refers to the prohibition of being tried and punished twice for the same offence.[443] Nothing prevents the Member States from laying down rules for administrative and criminal sanctions for the same infringements and imposing both of them for the *idem factum* insofar as the national

[437] MAR, art 30(2).
[438] MAD II, art 9.
[439] MAR, arts 5(1), 8 and 9; MAD II, art 30(2).
[440] MAR, art 30(1).
[441] ibid art 30(2)(a), (b) and (h).
[442] ibid recs 41 and 77.
[443] Charter, art 50. See also Protocol No. 7 ECHR, art 4(1) and CISA, art 54.

law permits it.[444] Hence, a Member State might wish to dissuade and punish market manipulation by employing administrative sanctions and then prevent and punish serious and intentional cases of market manipulation by imposing penalties.[445]

However, administrative sanctions with punitive or deterrent aims and a notable degree of severity are equivalent to a "criminal charge" within the meaning of the *Engel* criteria – namely the belonging of the definition of the offence charged to criminal law, the very nature of the offence, and the degree of severity of the penalty that the person concerned risks incurring.[446]

Therefore, after the previous application of an administrative sanction that is criminal in nature and finally precludes criminal trials against the same person and on the *idem factum* of market abuse, a criminal proceeding for the same conduct would violate the *ne bis in idem*, save where the administrative and criminal sanctions concerned are, at least, sufficiently closely connected in substance and time.[447] Likewise, administrative proceedings are forbidden when, in criminal proceedings concerning the same facts of market abuse, an individual has already been acquitted or convicted, insofar as the penalty effectively, proportionally, and dissuasively punishes that offence and address the core of the harm done to society.[448]

[444] MAR, rec 72 and art 30(1)(2).
[445] Case *Garlsson Real Estate* (n 378) par 47.
[446] *Engel and Others v. the Netherlands* (n 317) paras 82-83; *Grande Stevens et al v. Italy* (n 342) par 99.
[447] Case *A and B v. Norway* (n 328) par 130; Case *Fransson* (n 335) par 34; Perrone (n 251) 380.
[448] Case *Garlsson Real Estate* (n 378) par 57; Joined Cases *Di Puma and Zecca* (n 380) paras 42-44; Luchtman (n 74)1735-36.

CHAPTER III

PROHIBITION OF MARKET MANIPULATION UNDER THE EU LAW IN RELATION TO THE ITALIAN WHOLESALE ELECTRICITY MARKET (IPEX)

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1. Introduction of chapter III

Chapter III aims to discuss the prohibition of market manipulation at the EU level in relation to the field on which the MAR and MAD II applicability will be examined in chapter IV: the Italian Wholesale Electricity Market, or the IPEX.

First of all, given the purpose of chapter IV to answer whether the prohibition of market manipulation under article 12 MAR and the MAD II – explained in chapter II – can be applied to the IPEX, the latter represents another building block of this contribution. For this reason, it seems crucial to provide a proper overview of it. Then, being the IPEX a wholesale electricity market, the author will first explain the meaning of "wholesale market" as a legal term in relation to electricity, its structure, and how it works (ch III, s 2.1). Following this, since the author is looking at the Italian situation and the IPEX is the wholesale electricity market based in Italy, the author will describe the IPEX and its functioning (ch III, s 2.2). Moreover, she will discuss the IPEX peculiarities, due to the specific commodity it is related to: electricity (ch III, s 2.2). Illustrating those characteristics is needed because they impact whether the MAR and MAD II may apply to the IPEX.

Second, to understand whether the prohibition of market manipulation under the MAR and MAD II is applicable to the IPEX, it seems relevant to analyse those legislative instruments in relation to this market. Accordingly, the author will apply definitions provided in section 4.2 of chapter II to the IPEX (ch III, s 3.1). Next, she will confine the scope of article 12 as examined in section 4.3 of chapter II to this financial market (ch III, s 3.2). Finally, the author will discuss the prohibition of market manipulation under article 12 MAR as depicted in section 4.4 of chapter II in relation to the IPEX (ch III, s 3.3).

Third, as mentioned in section 2 of chapter I, to complete the picture of market manipulation at the EU level and understand whether it is applicable to the

IPEX, it is essential to also consider the REMIT. The reason behind this it that the REMIT aims to repress manipulative misconduct committed in the wholesale electricity market. Thus, the MAR and REMIT provisions might accumulate, particularly under the post-MiFID II regime. Therefore, the author will provide a general overview of the REMIT (ch III, s 4.1). Then, she will examine the REMIT applicability as confined to the repression of market manipulation under article 1 REMIT in relation to the IPEX (ch III, s 4.2). Next, the author will look at the prohibition of market manipulation under article 2(2) REMIT, and she will compare it with the prohibition of market manipulation under article 12 MAR in Table 1 (ch III, s 4.3).

Finally, the author will illustrate the existent links among the MAR, MAD II, and REMIT (ch III, s 5.1), to then analyse how the entry into force of the MiFID II has influenced the relationship between the MAR and MAD II on the one hand, and the REMIT on the other, concerning the EU regime of market manipulation (ch III, s 5.2).

2. Wholesale electricity market and IPEX

2.1"Wholesale market" meaning in relation to electricity

The expression "wholesale markets" stands for those markets on which professional and institutional investors operate by carrying out transactions with a high unit value.[449]

The wholesale markets encompass the wholesale energy markets. There, qualified operators trade financial instruments having as object several forms of energy. They were and still are very significant in Europe. Indeed, billions of euros are invested within them each year.[450] Moreover, they are unique compared with other commodities financial markets since they always require physical delivery of energy to end-consumers. In comparison, financial markets of hard commodities

[449] Glossario Finanziario (*Borsa Italiana*) (n 180).
[450] Gordon E Kaiser, "Energy Market Manipulation: A New Regulatory Regime" (*GCR*, 22 February 2018) <https://globalcompetitionreview.com/guide/the-guide-energy-market-manipulation/edition-1/article/energy-market-manipulation-new-regulatory-regime> accessed 8 July 2021.

different from energy – i.e. ethanol, natural gas, and petrol – provide for, in addition to the physical energy delivery, the related cash settlement.[451]

Being electricity a form of energy, the wholesale energy markets include the wholesale electricity market. The latter involves electricity trading exclusively and has a specific meaning and features, explained in the next sub-section.

2.1.1 Legal meaning of the wholesale electricity market

Regarding the legal meaning of the wholesale electricity market, the REMIT prescribes an autonomous framework for them. It defines those markets by making distinctions concerning their different kinds. This is the reason why the Union legislator has defined the wholesale energy markets by referring to both elements, electricity and gas, in article 2(6) REMIT. As explained in section 2 of chapter I, the author will focus on electricity for the scope of this thesis.

Article 2(6) REMIT explains the wholesale energy markets as those markets where the trade of wholesale energy products takes place within the Union. In turn, article 2(4)(a) and (c) REMIT states that the wholesale energy products are contracts for the electricity supply and relating to electricity transportation throughout the Union. Also, article 2(4)(b) and (d) REMIT enshrines that the wholesale energy products include derivatives concerning electricity production, trading or delivery, and derivatives relating to electricity transportation throughout the Union.[452]

Then, the legal meaning of the term "wholesale electricity markets" can be extrapolated by linking article 2(6) REMIT to both the definition of the wholesale energy products as provided under article 2(4) REMIT and literature. The wholesale electricity market is the virtual venue within the Union where professional operators constantly trade contracts for the electricity's supply or its transportation and derivatives relating to electricity's production, trading, distribution or shipping. Concisely, the wholesale electricity market is the financial market where

[451] Guarnieri (n 15) 30-31.
[452] REMIT, art 2(4).

transactions related to electricity occur.[453] Primarily, suppliers and distributors trade electricity directly or through intermediaries. Then it is delivered to individuals, households or businesses as being end-consumers.[454]

2.1.2 Structure and functioning of the wholesale electricity market

As for the structure and functioning of the wholesale electricity market, it can be observed that the electricity pricing and trading within the wholesale electricity market reflect two components, namely the electricity's physical phenomenon and the functioning of the wholesale electricity market.

Focusing on the electricity's physical phenomenon, physical laws and constraints of electricity's production and transportation impact electricity trading.[455] Accordingly, each operator who trades electricity within the wholesale electricity market has to deal with physical laws, electricity generation, and shipping constraints. The physical phenomenon related to electricity consists of five stages: electricity generation, dispatching, transmission, distribution, and sale.[456] Electricity generation corresponds to electricity's production by transforming primary sources within power plants or self-generation systems.[457] Second, as mentioned in section 2 of chapter I, the dispatching of electricity consists in managing the electricity flows along the power grid so that supply and demand are always balanced to ensure the continuity and safety of the electricity service provided.[458] By doing so, the electricity's dispatching service ensures 24/7 electricity supply to end-consumers and its constant balancing with electricity demand.[459] It requires the monitoring of electricity flows and application of the provisions necessary to coordinate operations of the electricity production plants,

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[453] Wholesale electricity market (*Commission de régulation de l'énergie*, 21 January 2021) <https://www.cre.fr/en/Electricity/Wholesale-electricity-market/wholesale-electricity-market> accessed 16 May 2021.
[454] ibid.
[455] ibid.
[456] Federica Giallombardo, "Italian power exchange: analisi e previsione dei prezzi dell'elettricità" (University of Padova 2005) 12.
[457] ibid 9.
[458] Dispatching (*Terna*) <https://www.terna.it/en/electric-system/dispatching> accessed 12 July 2021.
[459] Testo Unico Ricognitivo della produzione elettrica (*ARERA*) (n 19) 117.

transmission grid, and auxiliary services.[460] Third, the electricity transmission represents the intermediate step between electricity production and its distribution to end-consumers on low voltage power grids.[461] Thus, electricity transmission is defined as the electricity's shipping over long distances on high voltage power grids.[462] It occurs by employing for each Member State an infrastructure that connects all together the electricity production points established within the Member States. Fourth, electricity distribution refers to the delivery of electricity to end-consumers on low voltage power grids.[463] It is divided on the basis of geographical areas. Each area is overseen by an operator, that transforms electricity from a high voltage into low voltage. Finally, the electricity sale is a purely commercial activity consisting in offering electricity's services to end-users.[464]
For what concerns the functioning of the wholesale electricity market, two aspects require attention: how transactions occur on and who trades those transactions within the wholesale electricity market.

With regard to how transactions occur on the wholesale electricity market, the electricity generated at power plants is bought and sold several times in the wholesale electricity market before reaching end-users.[465] Those sales usually occur in large quantities of electricity and involve energy producers, investment banks, and many electricity consumers. Nowadays, several hundred companies are involved in electricity wholesale in the EU, and more than 10 000 transactions occur every day.[466]

In financial markets of hard-commodities other than electricity, transactions in securities or shares between buyers and sellers occur on the Stock Exchange. In the past, the latter was a physical location. Instead, nowadays, it is a virtual, electronic financial market. Likewise, in the wholesale electricity market, transactions between electricity's buyers and sellers take place on the Power Exchange, the virtual venue where wholesale electricity supply and market demand

[460] Dispatching (*Terna*) (n 459).
[461] Giallombardo (n 457) 10-11.
[462] ibid.
[463] ibid.
[464] ibid.
[465] Energy (*EC*) <https://ec.europa.eu/energy/topics/markets-and-consumers/wholesale-energy-market/general-market-framework_en> accessed 23 June 2021.
[466] ibid.

meet.[467] It thus corresponds to the meeting point between electricity offer and request, respectively represented by the electricity's producers and suppliers, which then put the supply service on the market to benefit end-consumers. Despite this similarity, unlike in the Stock Exchange, only traders with a high level of specialization are allowed to operate on the Power Exchange.

As for who trades on the wholesale electricity market, four categories of operators act within the wholesale electricity market: the electricity generators, suppliers, demand-side management operators, and traders *strictu sensu.* In detail, primarily, electricity generators trade and sell the output from their power plants. Secondly, electricity suppliers are involved in trading and sourcing electricity to sell it to end-users. Thirdly, demand-side management operators profit from their consumers' avoided consumption. Fourthly, traders *strictu sensu* purchase to sell or vice-versa within the Power Exchange.

The author's analysis will be confined only to traders *strictu sensu,* because, as explained in sub-section 4.4.4 of chapter II, the prohibition of market manipulation under article 12 MAR and the MAD II applies only those operators who trade financial instruments, related spot commodity contracts, or commodity derivatives within the EU. Therefore, the other three categories of actors involved in the wholesale electricity market appear to be irrelevant for the scope of this thesis.

2.2 The IPEX

The Italian electricity markets facilitate the meeting between electricity supply and demand.[468] Moreover, they ensure competition among electricity's operators, namely electricity's buyers and sellers, in the same way as it occurs in financial markets of hard commodities different from electricity.[469]

In Italy, transactions between electricity buyers and sellers occur on the Italian Wholesale Electricity Market. It corresponds to a specific sub-section of the Italian Stock Exchange, which is called the "Italian Power Exchange". As

[467] Glossario (*GME*) (n 14).
[468] Guarnieri (n 15) 30-31.
[469] ibid.

mentioned in section 3 of chapter I, the Italian Power Exchange is technically shortened by using the acronym "IPEX".

The IPEX is defined as the Italian financial market where qualified electricity wholesalers trade financial instruments in the form of contracts for the electricity's supply and transportation throughout Italy by means of telematic platforms accessible via the Internet.[470]

Given the purpose of analysing whether the prohibition of market manipulation as established under article 12 MAR and the MAD II (ch II) may apply to fight the IPEX manipulation, describing the IPEX is essential for the scope of this contribution. Therefore, in the following sub-sections, the author will provide a historical background of the IPEX (ch III, sub-s 2.2.1). Next, since electricity's peculiarities impact the way electricity contracts are traded at the IPEX, the author will explain those features (ch III, sub-s 2.2.2). Following this, she will discuss who are traders allowed to operate on the IPEX, which is the object of the IPEX transactions, where those transactions occur, how the IPEX works (ch III, sub-s 2.2.3), and which authorities oversee it (ch III, sub-s 2.2.4).

2.2.1 Historical background of the IPEX

The IPEX was established in 1999 by the d.lgs. 79/1999,[471] known as the Bersani Decree, to transpose the Directive 96/92/EC[472] on common internal market electricity rules for the liberalization of the energy sector.[473]

The process to the entry into force of the Bersani Decree in 1999 was not immediate. Indeed, it was the result of a lengthy and challenging process. It began with the National Hydrocarbon Corporation (ENI) in 1953, established for supplying energy throughout Italy and contributing to its industrial development.[474]

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[470] Adrien de Hauteclocque, Jones, Kjølbye, Landes, Salerno and Sandberg (n 15) 13-14; Guarnieri (n 15) 31-32; PUN: cos'è e come determina il costo dell'energia (*Sorgenia*) (n 15). See also Profilo Aziendale (*GME*) (n 15).

[471] Decreto Legislativo 16 marzo 1999, n.79, Attuazione della direttiva 96/92/CE recante norme comuni per il mercato dell'energia elettrica.

[472] Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1997] OJ L27/20.

[473] Terna, "Come funziona il mercato elettrico" <https://www.terna.it/it/sistema-elettrico/mercato-elettrico>.

[474] Legge 10 Febbraio 1953, n. 136, Istituzione dell'Ente Nazionale idrocarburi (E.N.I.), art 1.

It followed with the enactment of the d.lgs. 164/2000,[475] known as the Letta Decree, to implement the Directive 98/30/EC[476] and ended with the Bersani Decree in 1999.

The Bersani Decree represents the first Italian legal instrument with the purpose of harmonizing the Italian legislative framework regulating the electricity sector with the EU law.[477] It aims to fully implement the Union directives on the liberalization of energy market and introduce a structural reform of the electricity sector responding to the following needs.[478] First, separating each stage of the physical phenomenon related to electricity.[479] Second, enabling the participation of new operators into the various segments of the electricity market.[480] Third, promoting competition in electricity production and wholesale to establish the so-called "free market", in which electricity producers and wholesalers operate on a competitive basis to supply electricity to all end-users.[481] Fourth, encouraging maximum transparency and efficiency in dispatching services related to electricity by promoting more information for end-consumers.[482] Finally, setting up a virtual place where electricity supply and demand meet. This latter purpose resulted in the establishment of IPEX.[483]

2.2.2 Electricity peculiarities in relation to the IPEX

Overall, commodities are fungible and interchangeable goods traded on the market with other goods of the same type. Although commodities represent a very heterogeneous group of products with diversified uses and characteristics, it is possible to distinguish two macro-categories of commodities. The former includes

[475] Decreto Legislativo 23 Maggio 2000, n. 164, Attuazione della direttiva n. 98/30/CE recante norme comuni per il mercato interno del gas naturale, a norma dell'articolo 41 della legge 17 Maggio 1999, n. 144.
[476] Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas [1998] OJ L204/1.
[477] Enrico Schenato, "Recenti tendenze in tema di liberalizzazione del mercato dell'energia" (*Diritto.it*, 10 Luglio 2014) <https://www.diritto.it/recenti-tendenze-in-tema-di-liberalizzazione-del-mercato-dell-energia/> accessed 22 July 2021.
[478] ibid.
[479] Lorenzo Baroni, "Il Mercato elettrico italiano: funzionamento, formazione dei prezzi e strumenti di copertura" (Politecnico di Torino, 2020) 10.
[480] ibid.
[481] ibid.
[482] ibid.
[483] Schenato (n 478).

the so-called "soft commodities". While the latter embraces the so-known "hard commodities".

Electricity belongs to the group of hard commodities, but is unique compared with the others. Since the IPEX operators trade contracts for the electricity supply and transportation throughout Italy, the IPEX is thus unique compared with other wholesale markets. Then, the way operators trade electricity contracts within the IPEX depends on those features, as follows.

First, electricity is an essential commodity for humans more than any other one, given its "tremendous" impact on the development and wealth of today's society.[484] Any other commodity in the history of human beings has been pivotal as electricity.[485] Consistently, for most of the people, life without it would be unimaginable.[486] Since end-consumers daily require a certain amount of electricity to satisfy their needs, preserving the electricity's production, distribution and, most importantly, dispatching is crucial for individuals and society as well.

Second, electricity storage and transportation are tough and challenging to make economically.[487] Indeed, in most cases, both of them are very expensive as involving high costs and waste. Being the electricity's storage so expensive, the balance between the electricity supply and demand, or rather its input and output, must be maintained constant along the electrical transmission grid. Hence, difficulties in storing electricity imply that it must be produced in real-time based on the market demand. Then, it shall be capped in the short run and, finally, used immediately.[488] By doing so, electricity results to be generated and used simultaneously. The balance between the electricity's supply and demand, namely the electricity's dispatching service, must be maintained constant along the Italian electrical transmission grid because it is essential to ensure the IPEX well-

[484] Panagiotis Tsangaris, *Capacity Withdrawals in the Electricity Wholesale market, Between Competition Law and Regulation* (1st edn, Springer 2017) 3.
[485] ibid.
[486] Energy (*EC*) (n 466); Tsangaris (n 485) 3; Patrick Mcdaniel and Bahman Zohuri, *Advanced Smaller Modular Reactors* (1st edn, Springer 2019) 1.
[487] CESR and ERGEG advice to the EC in the context of the Third Energy Package, Response to Question F.20-Market Abuse (*ESMA*) (n 25) paras 15 and 7; Andrew N Kleit, *Modern Energy Market Manipulation* (1st edn, Emerald Publishing Limited 2018) 6.
[488] Mark G Lijesen, "The real-time price elasticity of electricity" (17 August 2006) vol 19 Energy Economics <https://www.academia.edu/45275076/The_real_time_price_elasticity_of_electricity> accessed 22 July 2021.

functioning. As mentioned in section 2 of chapter 1, the electricity dispatching component basis on costs of the electricity's dispatching service. It has a significant impact on the electricity bill that users have to pay. Therefore, it should be fairly determined. The electricity's dispatching service at the IPEX is based on the so-called "economic merit" criterion. According to this criterion, the electricity supply and purchase are respectively ordered increasing and decreasing so that the IPEX guarantees the satisfaction of end-consumers demand at the minimum cost requested by producers. In this way, the electricity's dispatching service permits to "translate" purchase and sale commercial positions into commitments for operators regarding the electricity's injection and withdrawal into/from the power grid.[489]

Third, electricity is a secondary energy source. It is produced by transforming other diversified primary energy sources available in nature – i.e. natural gas and oil – also known as "fuel mix". Moreover, despite being an extremely homogeneous commodity and impossible to differentiate, electricity's generation is highly heterogeneous and variable over time. In fact, it involves several technologies,[490] that might cause considerable discrepancies in production costs.[491] If electricity derives from renewable energy sources – i.e. hydro, solar, and wind energy – it may be generated by reducing production prices almost to zero.[492] Instead, if electricity is produced using non-renewable sources – i.e. coal, methane, and petrol – production costs could be higher than in the previous case.

Nevertheless, such differences in the electricity generation's prices do not represent a drawback within the wholesale electricity market because the electricity's dispatching service represents an efficient mechanism to guarantee the balance between electricity's demand and supply and face this differentiation. The electricity's dispatching service occurs thanks to the fuel mix. As explained above, allowing the instant-by-instant determination of the generation set that must feed electricity into power grids allow to use different sources to the market request at

[489] Testo Unico Ricognitivo della produzione elettrica (*ARERA*) (n 19) 117.
[490] Tsangaris (n 485) 4.
[491] ibid.
[492] Sven Bode and Helmuth Groscurth, "Incentives to Invest in Electricity Production from Renewable Energy under Different Support Schemes" (*Institut für Energie und Klimapolitik*, March 2008) 14 <https://www.arrhenius.de/uploads/media/arrhenius_DP_1E.pdf> accessed 21 July 2021.

the cheapest likely generation cost.[493] Precisely, the electricity's dispatching service is capable of using some powers plants – the so-called "basic plats" – to act constantly and cover the electricity base demand as much as possible.[494] The "base demand" corresponds to the minimum level of request below which the electricity's demand never falls. Usually, basic plants are low-cost power plants due to their affordable price.[495] For instance, power plants that issue electricity from hydro or wind energy operate as basic plants because the marginal production cost is almost zero. In comparison, other plants are involved in electricity production only in peak hours.[496] These are power plants fuelled by sources like natural gas or oil that are very expensive.[497] For this reason, they are deactivated as soon as the market demand decreases.[498] To date, most of the storage capacity is due to pumped-storage hydroelectric plants. Those plants, at night, use excess supply on the system to pump water from downstream to upstream. During the day, they use water pumped at night to meet peak electricity requests.

Finally, the fourth electricity's peculiarity corresponds to its price elasticity, since it is significantly low. Indeed, the electricity's price elasticity comes close to zero in short periods.[499] Also, the electricity's request is highly volatile and fluctuates daily, weekly, and seasonal patterns.[500] Even on the same day, the amount of electricity required by consumers might change from day to night. Therefore, the electricity's cost shall be at least flexible enough to face the frequent fluctuation in the electricity's demand.[501] Hence, to significant volatile request in the short term must correspond an equally flexible supply. Physically, the transformation of energy sources into electricity must occur at the exact moment it is required. Dispatching operations are thus indispensable to balance the electricity's demand

[493] Giallombardo (n 457) 9.
[494] Malgorzata Sadowska, "Energy Liberalization in an Antitrust Straitjacket: A Plant Too Far?" (2011) vol 34 n 3 World Competition 19 <https://heinonline.org/HOL/LandingPage?handle=hein.kluwer/wcl0056&div=32&id=&page=> accessed 16 July 2021.
[495] Tsangaris (n 485) 5
[496] Sadowska (n 495) 19.
[497] Tsangaris (n 485) 5.
[498] Sadowska (n 495) 19.
[499] CESR and ERGEG advice to the EC in the context of the Third Energy Package, Response to Question F.20-Market Abuse (*ESMA*) (n 25) paras 15 and 7.
[500] Kleit (n 488) 4.
[501] ibid.

and supply on the network at any time. That is the only way to avoid blackouts and grid congestions, which would provoke uncontrolled positive price peaks. Being the electricity's price elasticity significantly low, possibilities to manipulate the price of an abnormal level are low, but they still exist.

2.2.3 The IPEX functioning

Being the IPEX the Italian wholesale electricity market and the latter a financial market (ch III, s 2.1), the IPEX is a financial market. As mentioned above, the IPEX can be defined as the non-physical financial market where qualified operators trade financial instruments as contracts for the electricity's supply and transportation through the Italian power grid by using telematic platforms accessible via the Internet.[502]

The section at stake seeks to explain what is meant by the term "qualified operators", which is the object of the IPEX transactions, where they occur, and how the IPEX works. Those are the aspects that must be figured out to provide a proper overview of the IPEX and understand whether the prohibition of market manipulation under the MAR and MAD II can be applied to fight manipulative misconduct at the IPEX that will be provided in chapter IV.

The expression "qualified operators" signifies that the IPEX involves only highly specialized traders; only Italian and other EU Member States' qualified operators are allowed to trade contracts to purchase and sell electricity at the IPEX.[503] The IPEX traders are electricity wholesalers.[504] They can trade on the IPEX only as they have adequate professionalism and expertise.[505] The electricity's wholesalers buy and sell wholesale electricity quantities that will then be used for the supply service intended for end-consumers.[506] They might be electricity

[502] Adrien de Hauteclocque, Jones, Kjølbye, Landes, Salerno and Sandberg (n 15) 13-14; Guarnieri (n 15) 31-32; PUN: cos'è e come determina il costo dell'energia (*Sorgenia*) (n 15). See also Profilo Aziendale (*GME*) (n 15).
[503] Profilo Aziendale (*GME*) (n 15); PUN: cos'è e come determina il costo dell'energia (*Sorgenia*) (n 15).
[504] Guarnieri (n 15) 31-32.
[505] ibid.
[506] Profilo Aziendale (*GME*) (n 15); Giannella F, "Italian Power Exchange" (*DMBI consultants*) <https://www.dmbi.org/news/italian-power-exchange-due-chiacchiere-sulla-borsa-elettrica/> accessed 24 May 2021.

producers and suppliers at the same time, or they can purchase electricity without being producers.

Nowadays, around fifteen companies – i.e. Edison, Enel, and Sorgenia – produce, trade, and distribute electricity within the IPEX.[507] The IPEX also comprehends others corporations that trade electricity regardless of their involvement in producing and distributing it. Then, 284 companies are currently allowed to trade within the IPEX as listed on the official website of the GME.[508]

As concerns the object of the IPEX transactions, the IPEX operators enter into contracts to purchase and sell electricity.[509] They can trade only financial instruments as contracts for the electricity supply and transportation through the Italian power grid.[510] Such agreements include spot electricity and forward contracts, respectively traded on the Italian electricity spot and forward market, both part of the IPEX.

The spot electricity contracts regard the trading of spot suppliers of electricity.[511] The Italian spot electricity market (MPE) comprises three sub-phases, the day-ahead market, the infra-day market, and the dispatching service. Given that the author has already explained the dispatching service (ch I, s 2 and ch III, sub-s 2.2.2), she will now examine the day-ahead and infra-day markets. The day-ahead market hosts most of the electricity trading transactions. There, operators trade a huge quantity of electricity per hour as required for the following day. Traders participate by submitting offers in which they indicate the amount of electricity and the maximum and minimum price at which they are willing to buy and sell electricity. By doing so, the curves of electricity's supply and demand for each considered period on the one side, and the electricity's equilibrium price and production level on the other are determined on the basis of the intersection between the supply and demand curves.[512] The day-ahead market is then an auction market managed by the GME rather than a continuous trading market (ch I, s 2). In

[507] Ciardullo (n 35).
[508] Elenco degli operatori ammessi al mercato energetico ai sensi ai sensi dell'articolo 16, comma16.3, del Testo integrato della Disciplina del mercato elettrico approvato con D.M. 19/12/2003 e ss.mm.ii (*GME*) (n 36).
[509] Guarnieri (n 15) 31-32.
[510] ibid.
[511] Glossario (*GME*) (n 14).
[512] Giallombardo (n 457) 13.

comparison, the infra-day market is the trading venue for the purchasing and selling of electricity for each hour of the following day to modify the electricity input and output as scheduled on the day-ahead market. It allows operators to manage their offers of sale and purchase made on the day-ahead market if the latter have changed over time.

The forward contracts concern future electricity's supplies.[513] Unlike the spot market, the forward market is a unique venue established to negotiate electricity futures contracts which determine the operators' obligation to purchase and sell electricity.

Furthermore, it must be recalled that the electricity's demand is highly volatile (ch III, sub-s 2.2.2). Such volatility impacts the electricity pricing at the IPEX. Hence, the financial risks related to the electricity's volatility is managed by operators by means of electricity derivative contracts.[514] As explained in sub-section 3.2.3 of this chapter, derivative contracts are not contracts because the contracts contain the legal obligation to supply or transport electricity throughout Italy. Electricity derivatives are other contracts about the contracts to deliver supply or transport electricity throughout Italy. They are derived from the spot and forward contracts, and their function consists in trading the risks associated with the electricity's volatility over time.

The price of electricity derivatives depends on the electricity's average price formed on the IPEX, the so-called "National Single Price" (PUN).[515] The PUN trend is not fixed, but it fluctuates based on the relationship between electricity supply and demand.[516] In turn, the PUN is influenced by the electricity derivatives' price. It signifies that if the electricity derivatives' price is manipulated, the electricity's pricing at the IPEX might result to be manipulated as a consequence. Therefore, the close connection between the electricity's pricing at the IPEX and the electricity derivatives' price seems to be crucial for this thesis' scope.

In this context, it must be pointed out that electricity derivatives are not traded on the IPEX. They are traded on the Italian Derivatives Energy Market

[513] Glossario (*GME*) (n 14).
[514] Torrente and Schlesinger (n 179) 751.
[515] Glossario (*GME*) (n 14).
[516] ibid.

(IDEX). The IDEX corresponds to the segment of the Italian Derivatives Market (IDEM) organized and managed by the Italian Stock Exchange, where financial electricity derivatives contracts are traded.[517] Nevertheless, extending the analysis of the applicability of the market manipulation prohibition as provided under article 12 MAR and the MAD II to the IDEX would be unfeasible to address within the objective limits of this contribution. Therefore, the author has opted for examining such applicability by confining the analysis to the IPEX, but, at the same time, considering the electricity derivatives contracts given their strict relationship with the spot and forward contracts traded on the IPEX. Otherwise, discussing the applicability of the market manipulation prohibition under the MAR and MAD II to the IPEX without taking into consideration that electricity's prices formed at the IPEX depends on those formed at the IDEX, and vice-versa, would be incomplete.

As concerns the location where the IPEX transactions occur, they are carried out only on non-physical and telematic platforms, accessible to operators via the Internet.[518]

Finally, with regard to how the IPEX works, the IPEX functioning is based on a simplified mechanism whereby all electricity's producers benefit from the equilibrium price between electricity supply and demand.[519] It consists in the meeting point between electricity supply and demand, represented by electricity producers on the one hand and electricity suppliers on the other one. Then, the electricity suppliers issue the electricity service on the market for end-consumers.[520]

2.2.4 The Energy Markets Manager (GME) and the Italian Regulatory Authority for Energy, Networks and Environment (ARERA)

As mentioned in the previous section, at the IPEX, professional corporations can buy and sell contracts for the electricity's supply and transportation. They can do this, pursuing the sole objective to profit from electricity price changes over time.

[517] ibid.
[518] Profilo Aziendale (*GME*) (n 15); PUN: cos'è e come determina il costo dell'energia (*Sorgenia*) (n 15).
[519] ibid.
[520] ibid.

Accordingly, adopting speculative behaviours is fair.[521] However, as explained in section 2 of chapter I, issues arise when those companies enter into the IPEX transactions by carrying out manipulative misconduct to make their profits.

Due to the possibility to make illegal profits by committing market manipulation at the IPEX, as mentioned in section 2 of chapter I, the Italian legislator has mainly provided for establishing the GME and the ARERA.

Focusing on the GME, it was set up by the Energy Services Manager (GSE), a corporation wholly owned by the Italian Ministry of Economy and Finance. As part of the process of the electricity market's liberalization (ch III, s 2.2.1), the GME is vested with the organization and economic management of the wholesale energy market. It carries out its activities under the guidelines given by the Italian Ministry of Ecological Transition and the regulatory provisions issued by the ARERA.[522] The GME organizes and oversees the IPEX. Unlike the ARERA, it has merely monitoring powers with regard to the IPEX and no sanctioning ones. However, it plays a fundamental role in market monitoring. It cooperates with the National Regulatory Authorities, such as the Italian judicial authorities and ARERA, whose role has been strengthened by the REMIT.[523] By doing so, the GME oversees the IPEX efficiency and its correct functioning according to the principles of neutrality, transparency, objectivity, and competition.[524] Furthermore, the GME manages the PUN and, if there is grid congestion, it separates the IPEX into different zones to bring electricity transits back to the available technical limits.[525] By doing so, the GME acts to re-establish the balance between electricity supply and demand within each zone, and thus face any grid congestion.[526]

Turning to the ARERA, it was established by Law 481/1995.[527] The ARERA carries out regulatory and supervisory activities in the sector of electricity.[528] It is an independent administrative authority and operates in full

[521] See Amati, *Abusi di mercato e sistema penale* (n 73) 36-40.
[522] Profilo Aziendale (*GME*) (n 15).
[523] REMIT, art 1(1); Profilo Aziendale (*GME*) (n 15).
[524] Profilo Aziendale (*GME*) (n 15).
[525] ibid.
[526] Giallombardo (n 457) 35.
[527] Legge 14 Novembre 1995, n. 481, Norme per la concorrenza e la regolazione dei servizi di pubblica utilità. Istituzione delle Autorità di regolazione dei servizi di pubblica utilità.
[528] About the Authority (*ARERA*) <https://www.arera.it/it/inglese/index.htm> accessed 27 July 2021.

autonomy within the general policy guidelines enshrined by the Italian Government, Parliament, and the EU. The ARERA aims to guarantee the promotion of competition and efficiency in public utility services – such as the electricity one – with adequate levels of quality, under conditions of cost-effectiveness and profitability. Moreover, it aims to define and update a clear and transparent tariff system based on certain criteria. Also, it aims to promote and safeguard the interests of consumers and end-users. The ARERA performs those functions by balancing operators' economic and financial objectives with general social objectives for environmental protection and the efficient use of resources. Furthermore, the ARERA cooperates with other bodies, such as the GME, and, unlike the latter, it may impose sanctions as those mentioned in section 2 of chapter I. With regard to the sanctioning power, in particular, the ARERA carries out investigations and inspections on the conduct of operators required to comply with regulatory provisions, such as the IPEX corporations.[529] Accordingly, the ARERA has the power to impose administrative sanctions *ex officio* in the event of violations of the rules provided in the electricity sector.[530]

3. The MAR and MAD II in relation to the IPEX

Clarified what the IPEX is and how it works (ch III, s 2.2), to understand whether the prohibition of market manipulation as provided under the MAR and MAD II can be applied to fight the IPEX manipulation, it seems relevant to analyse the MAR and MAD II in relation to the IPEX. Accordingly, in the following sub-sections, the author will apply definitions of "financial instruments", "spot commodity contracts", and "commodity derivatives" as provided in section 4.2 of chapter II to the IPEX (ch III, s 3.1). Next, she will confine the scope of article 12 MAR as examined in section 4.3 of chapter II to the IPEX (ch III, s 3.2). Finally, the author will discuss the prohibition of market manipulation under article 12 MAR as depicted in section 4.4 of chapter II in relation to the IPEX (ch III, s 3.3).

[529] ibid.
[530] See for examples of administrative sanctions imposed by the ARERA those mentioned in section 2 of chapter I issued in 2016 and 2020.

3.1 Defining concepts under article 3 MAR in relation to the IPEX

Regarding the definition of "financial instruments" under article 3(1)(1) MAR (ch II, sub-s 4.2.1) in relation to the IPEX, the following considerations can be made.

In sub-section 2.2.3 of chapter II, the author has stated that the IPEX operators trade financial instruments in the form of spot and forward electricity contracts within it and electricity derivatives within the IDEX. Accordingly, among the definitions of financial instruments enshrined under Section C of Annex I MiFID II, those provided under points (5), (6) and (7) seems to be the only applicable to the IPEX.

Concerning the definition of "spot commodity contracts" under article 3(1)(15) MAR (ch II, sub-s 4.2.2) in relation to the IPEX, the author will exclude from her analysis spot commodity contracts which are not financial instruments because, at the IPEX, operators can only trade contracts in the form of financial instruments (ch III, sub-s 2.2.3). Instead, spot commodity contracts classified as financial instruments under article 3(1)(15) MAR seems to encompass the IPEX.

Finally, as for the definition of "commodity derivatives" under article 3(1)(24) MAR (ch II, sub-s 3.2.3) in relation to the IPEX, there, the value of traded instruments qualified as electricity contracts is determined on the basis of the value of other agreements related to electricity as traded on it: the electricity derivatives (ch III, sub-s 2.2.3). Then, the definition of commodity derivatives as provided under article 3(1)(24) MAR seems to embrace the IPEX.

3.2 Applicability of article 12 MAR under article 2 MAR in relation to the IPEX

As clarified the meaning of financial instruments, spot commodity contracts, and commodity derivatives in relation to the IPEX, the author will now circumscribe to the IPEX the applicability of article 12 MAR as provided under article 2 MAR (ch II, s 4.3).

First, the IPEX is classified as a regulated market within the meaning of article 3(1)(6) MAR. This classification is due to the fact that the IPEX is a specific sub-section of the Italian Stock Exchange, which is a regulated market for three

reasons. First, the d.lgs. 58/98,[531] known as the Italian Consolidated Law of Finance, strictly regulates it. Second, the Italian Stock Exchange is constantly overseen by the Italian Ministry of Economy and Finance, the Bank of Italy, and the Italian Commission for companies and Stock Exchange (CONSOB).[532] Third, other National Regulatory Authorities, such as the ARERA and GME, supervise the Italian Stock Exchange.[533] Given the foregoing, article 2(1)(a) MAR seems to apply to the IPEX as being a regulated market. Instead, article 2(1)(b) and (c), and recital 8 MAR do not, because they respectively concern MTFs, OTFs, and OTCs, and the IPEX is exclusively classifiable as a regulated market for the above reasons.

Second, the kind of financial instruments to which article 2(1)(d) MAR relates are traded on the IPEX (ch III, sub-s 2.2.3). Hence, this provision seems to apply to the IPEX, except for the part regulating emission allowances; the IPEX traders do not carry out transactions related to emission allowances.

Third, since the IPEX operators trade spot electricity contracts (ch III, sub-s 2.2.3), article 2(2)(a) MAR seems to embrace the IPEX.

Fourth, in the IDEX, companies trade electricity derivatives. It means that transactions within electricity derivatives markets can manipulate prices of spot electricity markets and vice-versa (ch III, sub-s 2.2.3). Therefore, article 2(2)(b) MAR seems to encompass the IPEX.

Finally, benchmarks to which article 2(2)(c) MAR relates are not traded on the IPEX. Accordingly, this provision does not apply to the IPEX.

3.3 Misconduct of market manipulation under article 12 MAR in relation to the IPEX

As confined the scope of article 12 MAR to the IPEX, the author will now assess which kind of manipulative misconduct as provided under this provision (ch II, sub-ss 4.4.1 and 44.2) can be perpetrated at the IPEX. Then, she will examine the

[531] Decreto Legislativo 24 Febbraio 1998 n. 58, Testo unico disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge 6 febbraio 1996 n. 52, 14 Ottobre 2020.
[532] Torrente and Schlesinger (n 179) 751.
[533] Profilo Aziendale (*GME*) (n 15).

liability of the IPEX operators as stemmed from the commission of market manipulation at the IPEX and the related nature.

Beginning with the misconduct of market manipulation, in sub-sections 4.4.1 and 4.4.2 of chapter II, the author has described five misbehaviours of market manipulation under article 12 MAR. The one enshrined under article 12(1)(d) MAR regards the activity of transmitting false or misleading information, or inputs, on a benchmark with the purpose of manipulating its calculation. The benchmarks are not traded at the IPEX (ch III, sub-s 2.2.3). Hence, the IPEX traders cannot commit the manipulative misconduct provided under article 12(1)(d) MAR at the IPEX. For this reason, the author will exclude from her analysis the market manipulation prohibition enshirined under article 12(1)(d) MAR. Instead, the other prohibitions pursuant to article 12(a)(i), (a)(ii), (b), and (c) can be committed at the IPEX. Thus, those provisions seem to apply to this market.

Moreover, the considerations made in sub-sections 4.4.1 and 4.4.2 of chapter II concerning the *mens rea* in the market manipulation prohibition under article 12(1)(c) MAR seem to be even more valuable at the IPEX. The reason is that, at the IPEX, only the high qualified operators listed on the GME website are allowed to trade on it (ch III, sub-s 2.2.3). Hence, being professional operators, the IPEX traders should know if a certain piece of information is false or misleading. In other words, being the IPEX operators qualified corporations, it appears to be hard to think of the transactions depicted under article 12(1)(c) MAR to be executed by them without manipulative intent. Therefore, if an IPEX trader, in the role of an electricity's producer, seller, or producer and seller, disseminates information knowing or ought to have known that it was false or misleading, it would be liable for having committed market manipulation under article 12(1)(c) MAR.

Turning to the liability of the IPEX operators for having violated the prohibition of market manipulation under article 12 MAR, it is important to recall that those traders correspond to the 284 Italian and EU Member States' companies as listed on the official GME website (ch III, sub-s 2.2.3). Being corporations, they are qualified as legal persons. Applying article 25-*sexies* d.lgs. 231/2001 to the

IPEX,[534] the legal persons who trade on the IPEX are liable for the commission of market manipulation.[535]

In Italy, there is no strict criminal liability for legal persons. With this regard, it seems of importance to reiterate that, historically, the Italian legal system has been diffident toward the principle of corporate criminal liability, due to the principle *societas delinquere non potest*, established by article 27(1) of the Italian Constitution.[536] This principle enshrines that criminal imputation necessarily requires a psychological connection and that the liability is filtered through subjective components.[537] In brief, criminal liability presupposes a natural person. Consequently, until the d.lgs. 231/2001, the principle *societas delinquere non potest* has been viewed as an insuperable obstacle to legitimize criminal liability for corporations, covered by a huge net of immunity.[538] It did not permit the courts to punish companies for having perpetrated crimes, even in the most serious cases, such as serious and intentional commission of market manipulation.[539]

Later on, the notably spread of corporation crime, particularly the white collar crimes related to market abuse, led the Italian legislator to issue the d.lgs. 231/2001.[540] It has introduced a model of direct administrative responsibility for corporations.[541] Precisely, with the d.lgs. 231/2001, the Italian legislator has enshrined that legal persons can be administratively liable for committing unlawful administrative acts relating to criminal offences committed by one or more natural persons who have a leading position within them.[542] Hence, nowadays, in Italy, legal persons are exclusively punishable through administrative sanctions.

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[534] Decreto Legislativo 8 Giugno 2001, n.231, Disciplina della responsabilità amministrative delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 Settembre 200, n.300.
[535] Désirée Fondaroli, "La responsabilità dell'ente" in Désirée Fondalori, Sgubbi Filippo and Andrea Francesco Tripodi *Diritto penale del mercato finanziario: abuso di informazioni privilegiate, manipolazione del mercato, ostacolo alle funziona di vigilanza Consob, falso in prospetto: lezioni* (2nd edn, CEDAM 2013) 195. See also Enzo Musco, *I nuovi reati societari* (3 edn, Giuffrè Editore 2007) 28.
[536] Cristina De Maglie, "Country report: Italy" in Gobert J. and Pascal A. (eds) *European Developments in Corporate Criminal Liability* (Taylor & Francis Group 2011) 252.
[537] Costituzione della Repubblica Italiana del 27 Dicembre 1947, art 27(1); De Maglie (n 537) 352.
[538] De Maglie (n 537) 352.
[539] ibid.
[540] ibid.
[541] D.lgs. 231/2001, art 1; De Maglie (n 537) 353. See also Enrico Amati and Nicola Mazzacuva, *Diritto penale dell'economia* (Kluwer 2020) 36-39.
[542] D.lgs. 231/2001, art 1. See also Amati and Mazzacuva (n 542) 39-45.

However, despite the "administrative" label used for legal persons' responsibility and the related sanctions, two aspects require attention. Firstly, the establishment of legal persons' liability depends on the criminal liability established in relation to one, or more, natural persons who have a leading position within the legal persons concerned. Secondly, in light of the *Engel* criteria (ch II, sub-s 4.7.2), legal persons' responsibility and the related sanctions as provided under the d.lgs. 231/2001 are considered to be formally administrative, but substantially criminal.[543] The reasons behind that are three. First, the legal persons' responsibility arises upon a criminal act perpetrated by one, or more, natural persons who have a leading position within the legal person concerned.[544] Second, the legal persons' liability is established in the criminal proceeding concerning the one or more natural persons who have committed the criminal misconduct as its perpetrators, inciters or accessories, and with the application of the related legal guarantees.[545] Finally, if the legal persons' liability is established, the legal person concerned will be punished by means of administrative sanctions with a very high degree of severity.[546]

Given the foregoing, it follows that, in Italy, if legal persons perpetrate unlawful administrative acts relating to the crime of market manipulation committed by one, or more, natural persons who have a leading position within them, they are liable according to article 25-*sexies* d.lgs. 231/2001.[547] Their liability is then labelled as "administrative", but the related administrative sanctions are accepted to have a punitive nature by applying the *Engel* criteria (ch II, sub-s 4.7.2).[548] In the author's line of reasoning, even though liability is still administrative and not officially criminal, through the administrative sanctions

[543] *Engel and Others v. the Netherlands* (n 312) paras 82-83; Giacomo Maria Cremonesi, Maria Francesca Cucchiara and Maddalena Neglia, "Italian Legislative Decree No. 231/2001: A model for Mandatory Human Rights Due Diligence Legislation?" (*HRIC*, 15 Novembre 2019) 7 <https://www.humanrightsic.com/post/italian-legislative-decree-no-231-2001> accessed 3 June 2021; Federico Lucariello and Maria Hilda Schettino, *La difesa degli enti e dagli enti nel d.lgs.231/2001: dal modello organizzativo al procedimento penale* (1st edn, Giuffrè Francis Lefebvre 2019) 6-7.
[544] Lucariello and Schettino (n 544) 6-7.
[545] MAD II, art 8(3) MAD II; Lucariello and Schettino (n 544) 6-7.
[546] ibid.
[547] Fondaroli, "La responsabilità dell'ente" (536) 202-03.
[548] Cremonesi, Francesca Cucchiara and Neglia (n 544) 7. See also Amati and Mazzacuva (n 542) 78-82.

currently applied to legal persons, Italy can achieve more or less the same result achieved through penalties according to the *Engel* criteria (ch II, sub-s 4.7.2). Therefore, the author thinks that the way the EC has drafted article 8 MAD II represents a perfect example that the way this provision is drafted would help Italy to implement the MAD II properly. Consistently, Italy can still meet the MAD II criteria by punishing legal persons with administrative sanctions whose effects are, however, the same as criminal penalties as meeting the *Engel* criteria (ch II, sub-s 4.7.2).

By applying the given considerations to the IPEX, it can be concluded that if an IPEX corporation commits an unlawful administrative act relating to market manipulation within the meaning of article 12 MAR, perpetrated by one, or more, natural persons who have a leading position within the legal person concerned, it is administratively liable under article 8 MAD II. Therefore, the IPEX legal person will be punished through administrative sanctions; those meet the *Engel* criteria (ch II, sub-s 4.7.2) for having a punitive nature and, then, are considered as criminal penalties in terms of severity and effects.

4. The REMIT in relation to the IPEX

4.1 The REMIT

The REMIT came into force in 2011 to support open and fair competition in the European wholesale energy markets.[549]

Recital 1 REMIT states that it is of importance to safeguard that consumers and other wholesale energy markets participants can trust the integrity of those markets. In addition, it establishes that prices formed within them reflect a fair and competitive interplay between energy supply and demand. Also, recital 1 REMIT requires that no unlawful profits can be drawn from the commission of market abuse. Accordingly, the REMIT aims to set the ground for increased transparency

[549] REMIT-Regulation on wholesale energy markets integrity and transparency (*ARERA*, 3 July 2018) <https://www.arera.it/it/inglese/remit_eng.htm> accessed 24 July 2021.

and integrity of the EU markets, guarantee trust in the functioning of those markets, and safeguard the interests of the Union companies and consumers.[550]

The REMIT covers the entire energy market. It encompasses the wholesale electricity market and establishes rules regarding its functioning and the prohibition of abusive practices affecting it, such as market manipulation.[551] Therefore, the leading goal of the REMIT in relation to the wholesale electricity market is to profile an overall regulatory framework focused on it, its structure, and how it works. Furthermore, it includes rules to prevent manipulative behaviour within only the wholesale electricity market, such as article 5 REMIT.

4.2 The REMIT applicability under article 1 REMIT in relation to the IPEX

According to article 1(1) REMIT, that Regulation enshrines rules prohibiting abusive practices affecting wholesale energy markets which are coherent with the rules applicable in financial markets and with the proper functioning of those wholesale energy markets whilst taking into account their specific characteristics.

Article 2(6) REMIT states that the term "wholesale energy markets" refers to the venue where operators trade wholesale energy products. This definition is huge because it embraces both commodity and financial wholesale energy markets.[552] By examining the REMIT applicability in relation to the IPEX, where operators only trade electricity contracts (ch III, sub-s 2.2.3), the meaning of wholesale energy markets can be confined to the wholesale electricity markets.

The EU Agency for the Cooperation of Energy Regulators (ACER) has listed some examples for identifying the wholesale electricity markets.[553] For instance, they encompass balancing and day-ahead markets for the trading of electricity with delivery in the Union; markets for the transportation capacities of electricity throughout the Union; derivatives markets relating to electricity

[550] REMIT, rec 2; REMIT-Regulation on wholesale energy markets integrity and transparency (*ARERA*) (n 551).
[551] REMIT, rec 1 and art 1(1).
[552] Guidance on the application of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (*ACER*, 17 June 2016) 16.
[553] Corlu (n 55) 3.

produced, traded or delivered in the Union; and derivatives markets concerning the electricity transportation in the Union.[554] Nevertheless, this list is not exhaustive; it does not establish a comprehensive analysis of the wholesale electricity markets.

According to many authors, firstly, the ACER's list does not examine the geographic aspects of electricity markets. Instead, it should be taken into account, because the demarcation of the wholesale electricity markets mostly depends on the availability of electricity transmission networks. As a result, some wholesale electricity products are exclusively confined to sub-national markets. In comparison, others might be supplied in national or even regional wholesale electricity markets.

Secondly, ACER does not address how the wholesale electricity markets may differentiate or converge on the basis of the time period when the wholesale electricity products are supplied. Instead, it should be considered given that, in general, during hours when the demand for electricity is low, the wholesale electricity markets might embrace wider geographic areas. While, in peak hours, when electricity demand is considerably high, the wholescale electricity markets become national or even sub-national depending on the congestion levels at national power transmission grids.

In this respect, it can be argued that the ACER's list merely wishes to provide examples about what corresponds to the wholesale electricity markets, and it does not aim to provide a detailed and complete analysis of factors that determine their scope. Although, several authors believe that considering the factors that impact the interplay and demarcation of the wholesale electricity markets is pivotal for evaluating market abuse prohibitions, such as market manipulation repression.[555]

Furthermore, some attention must be paid on article 2(6) REMIT. It refers to wholesale energy products – including wholesale electricity products – to define the wholesale energy markets. Therefore, clarifying the meaning of "wholesale electricity products" seems to be relevant for the scope of this contribution.

[554] ibid.
[555] ibid.

As mentioned in section 2.1 of chapter II, article 2(4)(a) and (c) REMIT establishes that the expression "wholesale electricity products" comprises contracts for the electricity's supply and transportation where delivery occurs in the Union. Moreover, article 2(4)(b) and (d) REMIT provides that wholesale electricity products encompass derivatives concerning electricity generated, traded or delivered in the Union and regarding its transportation throughout it.

Overall, the definition of wholesale electricity products enshrined under article 2(4) REMIT raises many questions regarding the scope of the REMIT provisions. Those concerns are due to the fact that derivatives are also contracts, and the ground on which article 2(4) REMIT distinguishes them from other contracts seems to base on whether the electricity subject to contracts or derivatives is physically settled.[556] However, this interpretation appears to be challenging because, despite being financial instruments, derivatives might also lead to physical delivery in electricity transactions. Accordingly, demarcating the difference between derivatives and other contracts on the basis of physical delivery raises many issues concerning the REMIT applicability. Moreover, the fact that the ACER's list (above) appears to not be useful in this regard complicates the understanding of the REMIT scope even further. [557]

4.3 The prohibition of market manipulation under article 5 REMIT in relation to the IPEX

In 2011, manipulative practices committed in the wholesale electricity market represented a relevant concern for the EU; they distorted prices and damaged investors' trust in the Union markets. For those reasons, the EC decided to include two specific provisions to fight manipulative misconduct perpetrated within the wholesale electricity market: articles 2(2) and 5 REMIT. Currently, the prohibition of market manipulation under those articles constitutes a pillar of the new legal framework enshrined under the REMIT.

[556] ibid.
[557] ibid.

Article 2(2) REMIT provides for two categories of market manipulation prohibited under article 5 REMIT: the transaction and information manipulation. They must be interpreted in light of recitals 13 and 14 REMIT, which provide examples of market manipulation.

In transaction manipulation (ch III, sub-s 4.3.1), perpetrators enter into transactions to manipulate the wholesale electricity markets by giving false or misleading signals to the markets' operators regarding the level of electricity supply and demand and the availability of production, storage or electricity transportation capacity.[558]

In information manipulation (ch III, sub-s 4.3.2), the existence of a transaction for the perpetration of market manipulation is not required. There, operators manipulate the wholesale electricity markets by spreading false or misleading information that may result in erroneous implications as to the important aspects of the wholesale electricity market concerned for other market participants.[559]

4.3.1 Prohibition of transaction manipulation under article 5 REMIT in relation to the IPEX

Article 2(2)(a)(i), (ii), and (iii) REMIT enumerates three misconduct of transaction market manipulation, implicitly required to be committed with intent.

First, market manipulation consists in the misbehaviour of entering into a transaction or issuing an order to trade in wholesale electricity products that provides, or is likely to provide, false or misleading signals as to the supply of, demand for, or price of wholesale electricity products.[560]

With regard to the *actus reus*, the ACER gives three schemes of market manipulation as examples of transactions determined by false or misleading information. They are wash trades, improperly matched orders, and placing an order

[558] ibid 10.
[559] ibid.
[560] REMIT, art 2(2)(a)(i).

with no intention of executing them.[561] Wash trades occur in those cases in which market participants enter into transactions with no material effects. Those transactions thus involve no economic exchange, yet mislead other operators into thinking that the trading volume of the significant wholesale electricity product has increased and that grated trading activity is taking place. The latter results in price movements within the wholesale electricity market as to the product concerned.[562] Improperly matched orders embrace the situation where some actual trading does not occur in the market yet an offsetting trade succeeds the order for the same price and volume in a way that no change in financial benefits occurred between the parties of the transaction.[563] Finally, placing an order with no intention of executing it constitutes a common practice in both physical and financial markets as such transactions allow their parties to manage financial risks arising from vulnerabilities in the market prices as the result of inefficiencies.[564]

Second, market manipulation encompasses the misconduct of entering into transaction or issuing an order to trade in wholesale electricity products which fixes, or tries to fix, the price of one or more wholesale electricity products at an artificial level.[565]

Concerning the *actus reus*, examples of unlawful price positioning are marketing the close, the abusive squeeze, cross-market manipulation, and actions undertaken by operators who artificially cause prices to be at a level not justified by market forces of supply and demand.[566] The market the close consists in engaging several transactions near the close of the market to affect the closing or settlement price of the relevant wholesale electricity product.[567] The abusive squeeze regards the misbehaviour of taking a large long position as to the relevant

[561] Guidance on the application of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (*ACER*) (n 553) 37; Corlu (n 55) 11.
[562] Guidance on the application of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (*ACER*) (n 553) 37.
[563] ibid.
[564] Corlu (n 55) 11.
[565] REMIT, art 2(2)(a)(ii).
[566] Guidance on the application of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (*ACER*) (n 553) 38-39.
[567] Corlu (n 55) 12.

wholesale electricity product or accumulating large futures contracts with certain delivery dates, that leads other operators who have short positions to physically deliver the wholesale electricity product concerned.[568] Cross-market manipulation embraces trading in a primary market that impact the prices of a wholesale electricity product in a connected market. In the latter, traders hold a position whose value benefits from the action in the primary market.[569] Traders thus enter into a transaction at a loss in the primary market. Finally, actions undertaken by operators who artificially cause prices to be at a non-justified level by market forces of supply and demand regards the practice of physical withholding, in which the generator of electricity or wholesale supplier of electricity, or an owner of transmission or storage infrastructure, does not offer its capacity to the market to conduce the price of the relevant wholesale electricity product higher. Hence, the operator concerned can profit from the market in exchange for creating imbalances between the electricity products demand and supply.[570]

Third, market manipulation refers to the misbehaviour of entering into a transaction or issuing an order to trade in wholesale electricity products that employs, or try to employ, a fictitious device or another form of deception or contrivance that provides, or is likely to provide, false or misleading signals concerning the supply of, demand for, or price of wholesale electricity products.[571]

Regarding the *actus reus*, examples of this third manipulation typology are scalping, pump and dump, circular trading, and pre-arranged trading. Scalping concerns employing false or misleading information to move prices in a favourable direction to the position held or a transaction planned by the disseminating market participant.[572] Pump and dump regards the misconduct of buying a large volume of wholesale electricity products and then spreading false information that increases the relevant wholesale electricity product's price.[573] Circular trading consists in

[568] ibid.
[569] ibid.
[570] CESR and ERGEG advice to the EC in the context of the Third Energy Package, Response to Question F.20-Market Abuse (*ESMA*) (n 25) par 32.
[571] REMIT, art 2(2)(a)(iii).
[572] Guidance on the application of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (*ACER*) (n 553) 38.
[573] ibid.

knowing that an offsetting long position is ready to be held and taking a short position with respect to a wholesale electricity product.[574] Similarly to wash traded and improper marched order (above), there are no financial risks for parties in circular trading. Therefore, transactions are carried out to affect market prices with the impression that trading takes place as to the relevant wholesale electricity product.[575] Finally, pre-arranged trading refers to the situation where two operators agree to exclude another market participant from the market and, then, carry out the pre-arranged trading pursuing this scope.[576]

4.3.2 Prohibition of information manipulation under article 5 REMIT in relation to the IPEX

Article 2(2)(b) REMIT provides for a misconduct of information manipulation, explicitly required to be perpetrated with intent.

It consists in disseminating information through the media, or by other means, that provides, or is likely to provide, false or misleading signals regarding the supply of, demand for, or price of wholesale electricity products, knowing, or having to know, that the information concerned was false or misleading.[577] In this regard, even a mere spreading of false or misleading information through the media, failing to disclose price sensitive information, or market misconduct that does not correspond to the concept of a transaction, can be considered as market manipulation within the meaning of the dissemination of false or misleading information under article 2(2)(b) REMIT.[578]

[574] ibid.
[575] Corlu (n 55) 13.
[576] Guidance on the application of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (*ACER*) (n 553) 38-39.
[577] REMIT, art 2(2)(b).
[578] Corlu (n 55) 13.

4.3.3 Comparison between the prohibition of market manipulation under article 5 REMIT and article 12 MAR in relation to the IPEX

Clarified the prohibition of market manipulation as provided under article 2(2) REMIT (ch III, sub-ss 4.3.1 and 4.3.2), comparing it with the prohibition of market manipulation pursuant to article 12 MAR is pivotal for delineating the applicability of the MAR and MAD II to the IPEX.

Overall, it can be noted that article 2(2) REMIT provides for two categories of market manipulation prohibited under article 5 REMIT as article 12(1) MAR does. Therefore, the way manipulative misconduct under the REMIT is defined under article 2(2) REMIT follows the same structure of the MAR as explained in sub-sections 4.4.1 and 4.4.2 of chapter II.

As stated, Table 1 pursues the aim of comparing the prohibition of market manipulation as respectively provided under articles 12(1) MAR and 2(2) REMIT by analysing both the *actus reus* and *mens rea* concerned.

Market manipulation under article 2(2) REMIT	Market manipulation under article 12(1) MAR	Comparison
Actus reus Entering into transaction or issuing an order to trade in wholesale electricity products which:	*Actus reus* Entering into transaction or placing an order to trade which:	
• gives, or might give, false or misleading signals as to the supply of, demand for, or price of	• gives, or might give, false or misleading signals as to the supply of, demand for, or price of	The REMIT refers to the price of wholesale electricity products. Instead, the MAR refers to the price of financial

wholesale electricity products;[579]	financial instruments or related spot commodity contracts;[582]	instruments and spot commodity contracts.
• secures, or attempts to secure, the price of wholesale electricity products at an artificial level;[580]	• secures, or might secure, the price financial instruments or related spot commodity contracts at an abnormal or artificial level;[583]	The REMIT refers only to artificial level of the wholesale electricity products' price. Instead, the MAR refers to both abnormal or artificial level of financial instruments or related spot commodity contracts' price.
• employs, or attempts to employ, device or any other form of deception or contrivance which provides, or might provide, false or misleading signals as to the supply of, demand for, or price of wholesale	• employs device or any other form of deception or contrivance which affects, or might affect, the price of financial instruments or related spot commodity contracts.[584]	The REMIT requires to provide false or misleading signals. Instead, the MAR requires to alter the price of financial instruments or related spot commodity contracts.

[579] REMIT, art 2(2)(a)(i).
[580] REMIT, art 2(2)(a)(ii).
[582] MAR, art 12(1)(a)(i).
[583] MAR, art 12(1)(a)(ii).
[584] MAR, art 12(1)(b).

electricity products.[581] *Mens rea* Implicit intention.	 *Mens rea* Implicit intention.	 Same under article 2(2) REMIT and article 12 (1) MAR.
Actus reus Disseminating information which: • gives, or might give, false or misleading signals as to the supply of, demand for, or price of wholesale electricity products.[585]	*Actus reus* Disseminating information which: • gives, or might give, false or misleading signals as to the supply of, demand for, or price of financial instruments or related spot commodity contracts;[586] • secures, or might secure, the price of financial instruments or related spot commodity contracts at an abnormal or artificial level.[587]	 The REMIT refers only to the wholesale electricity products. Instead, the MAR refers to financial instruments or related spot commodity contracts' price. Not provided under article 2(2) REMIT.

[581] REMIT, art 2(2)(a)(iii).
[585] REMIT, art 2(2)(b).
[586] MAR, art 12(1)(c).
[587] ibid.

Mens rea Explicit intention.	*Mens rea* Explicit intention.	Same under article 2(2) REMIT and article 12 (1) MAR.

Table 1: Prohibition of market manipulation under articles 2(2) REMIT and 12(1) MAR.

By looking at Table 1, it can be concluded that there are some deviations between the REMIT and the MAR. For instance, Table 1 shows that the misconduct of disseminating information which secures or might secure, the price of financial instruments or related spot commodity contracts at an abnormal or artificial level as provided under the second part of article 12(1)(c) MAR is not enshrined under article 2(2) REMIT. Those deviations have as a consequence that the scope of the market manipulation prohibition under article 12 MAR seems to be broader than the scope of the market manipulation prohibition under article 2(2) REMIT.

5. Relationship among the MAR, MAD II and REMIT in relation to the IPEX

After the REMIT adoption, a regulation that gives a general framework to combat market abuse at financial markets was adopted, the MAR. However, as the author has demonstrated in section 3 of chapter III, the MAR seems to be also applicable to the wholesale electricity market and the IPEX in particular. In this respect, the Union legislator wished to connect the MAR to the REMIT.

The MAR refers to the REMIT in its preamble.[588] Therefore, being the IPEX the Italian wholesale electricity market and part of financial markets, figuring out how rules settled in the REMIT are related to article 12 MAR and the MAD II is crucial to understand whether the prohibition of market manipulation under the MAR and MAD II can apply to the IPEX.

For this reason, section 5 of this chapter aims to explain links among the MAR, MAD II, and the REMIT (ch III, s 5.1), as well as the relationship between them (ch III, s 5.2). Furthermore, as explained in section 2 of chapter I, the MiFID

[588] See MAR, recs 18, 20, 44 and 51.

II has impacted the MAR, MAD II, and REMIT relationship. Hence, must be analysed in light of the main novelties introduced by the MiFID II entry into force in January 2018.

5.1 Links among the MAR, MAD II and REMIT

The reform of financial markets resulted in the MAR and MAD II came after the adoption of the REMIT in 2011. For this reason, there are no references to the MAR nor the MAD II in the REMIT. Although, several elements suggest that the Union legislator wished to connect the MAR, MAD II, and REMIT.

The cornerstone of the relationship between the MAR and MAD II on the one hand and the REMIT on the other is recital 20 MAR. It enshrines that trading in financial instruments, including commodity derivatives, may be used to manipulate related spot commodity contracts, and spot commodity contracts may be used to manipulate related financial instruments trading. By providing so, recital 20 MAR underlines the importance of capturing the close connection between financial instruments, including both categories of commodity derivatives and spot commodity contracts, to combat market manipulation. But, in section 4.2 of chapter III, the author has explained that commodity derivatives are also encompassed under the REMIT scope.[589] Therefore, by including recital 20 within the MAR, the Union legislator has connected the REMIT to the MAR by establishing that spot and financial markets – where also derivatives are traded – are interdependent. Thus, it signifies that one can manipulate the price of derivatives by manipulating the spot markets' price, and vice-versa.

Recital 20 also refers to the REMIT by stating that the Member States' competent authorities should consider the features of the REMIT definitions when they apply the meaning of market manipulation to financial markets related to wholesale electricity products within the meaning of article 12 MAR. Those features stem from the characteristics of wholesale electricity products, which encompass contracts related to electricity. In turn, electricity's peculiarities – i.e. electricity's volatility –impact the trading of wholesale electricity products and,

[589] REMIT, arts 1(1) and 2(4).

accordingly, the functioning of the wholesale electricity markets within which they are traded. Therefore, it seems that that the Union legislator has employed recital 20 MAR to highlight that the REMIT definitions related to electricity should be carefully considered by the Member States' authorities to apply the significance of market manipulation under article 12 MAR (ch II, s 3.4) to financial instruments related to wholesale electricity products.

In addition to recital 20 MAR there are other MAR provisions that link the MAR to the REMIT. They can be explained as follows. Article 3(1)(22) MAR defines wholesale electricity products by recalling the meaning of wholesale electricity products as provided under article 2(4) REMIT. Also, article 2(2)(a) MAR refers to wholesale electricity products under article 2(4) REMIT significance to define the applicability of articles 12 and 15 MAR to spot commodity contracts. Likewise, article 1(4) MAD II recalls wholesale electricity products as defined by article 2(4) REMIT to provide for the applicability of article 5 MAD concerning market manipulation as a criminal offence.

Finally, there are other references to the REMIT within the MAR and MAD II. For example, recital 44 MAR about the benchmarks' manipulation and recital 51 MAR regarding emission allowance market. However, the author will not deepen into them, because they concern specific topics that do not relate to the kinds of financial instruments traded on the IPEX (ch III, sub-s 2.2.3).

In view of the foregoing, there is no doubt about the Union legislator's awareness of the relevance of setting up a relationship between the MAR and MAD II, and the REMIT. Thus, it means that the Union legislator has not ignored the wholesale electricity products' peculiarities as explained in sub-s 2.2.2 of this chapter. On the contrary, by mentioning the REMIT within the MAR and MAD II, it has required the Member States to, firstly, consider those peculiarities in enforcing the market manipulation prohibition as enshrined in article 12 MAR under their domestic legal frameworks. Secondly, to pay attention in concretely figuring out whether to apply the MAR and MAD II or the REMIT to avoid misinterpretation.

Nevertheless, as mentioned above (ch I, s 2 and ch III ss 1 and 5.1), the MiFID II has complicated the relationship between the MAR and MAD II, and

REMIT. At the same time, the Union legislator has not provided for any clear guidelines that the Member States authorities may follow to handle the possible overlap that they might encounter in applying the MAR, MAD II, and REMIT to fight market manipulation. Therefore, the next section wishes to clarify the MAR, MAD II, and REMIT relationship in light of the main novelties that the MiFID II has introduced.

5.2 Relationship between the MAR, MAD II and REMIT under the post-MiFID II regime

Overall, the REMIT and the MAR represent the leading legislative instruments concerning manipulative misconduct committed in wholesale electricity and financial markets.[590] They respectively apply to the trading of wholesale electricity products and financial instruments.[591] The general rule is that article 5 REMIT, as prohibiting market manipulation in the Union wholesale electricity market, does not apply if the market manipulation offence relates to financial instruments subject to the MAR applicability.[592] Before the MiFID II, the REMIT also applied to derivatives to supply and transport electricity throughout the Union, irrespective of whether they were traded on regulated or non-regulated markets.[593] In this respect, the MAR applicability would not have affected the REMIT.

However, in January 2018, the entry into force of the MiFID II complicated the financial markets' regulation by establishing a broader legislative system regarding the EU regime of market manipulation. Specifically, the current financial markets' regulatory framework as changed by the MiFID II applies to all financial instruments as listed under Section C of Annex I MiFID II. As mentioned in sub-section 4.2.1 of chapter II, Section C of Annex I MiFID II refers to, *inter alia*, derivatives relating to commodities that might be settled in cash at the option of one

[590] Giacomo Amato, "MAR, REMIT e MiFID II: la discutibile finanziarizzazione del trading energetico. Profili di incoerenza complessiva dell'impianto normativo" (*Diritto Bancario*, 19 December 2018) <http://www.dirittobancario.it/approfondimenti/market-abuse/mar-remit-e-mifid-ii-la-discutibile-finanziarizzazione-del-trading-energetico-profili-di-incoerenza> accessed 26 June 2021.
[591] ibid.
[592] ibid.
[593] ibid.

of the parties other than because of default or another termination event;[594] derivatives traded on a regulated market and that can be physically settled; [595] and derivatives that can be physically settled not otherwise mentioned in Section C of Annex 1 (6) MiFID II, without commercial purposes and with other derivative financial instruments' peculiarities.[596]

By providing so, the MiFID II has extended the financial instrument's meaning as stated in article 3(1)(1) MAR to commodity derivatives.[597] Being electricity a commodity, the MiFID II has thus indirectly expanded the MAR applicability to electricity derivatives. But, the REMIT already regulated wholesale electricity products in the form of derivatives (ch III, s 4.2).[598] Therefore, with regard to electricity derivatives traded on regulated markets, or any other trading venue as relevant for the MAR applicability, the applicable legislative instrument is the MAR, no the REMIT.[599]

As recapped by Table 2 (below), the market manipulation prohibition under the MAR is then currently applicable to wholesale electricity derivatives as traded on regulated markets and relating to which the physical electricity's delivery is not mandatory but might occur. Moreover, it applies to spot electricity contracts that impact or might impact, financial instruments' price or value.[600] Instead, the market manipulation prohibition under the REMIT currently applies to wholesale electricity derivatives relating to which the physical electricity's delivery is mandatory. Furthermore, it applies to spot electricity contracts that cannot affect financial instruments' price or value.[601]

[594] MiFID II, Section C (5) Annex I.
[595] ibid (6).
[596] ibid (7).
[597] Amato (n 591).
[598] REMIT, rec 5 and art 2(4).
[599] Amato (n 591).
[600] ibid.
[601] ibid.

Object of manipulated transaction	Applicable legislative instrument
Wholesale electricity derivative traded on a regulated market and that can be physically settled.	MAR
Wholesale electricity derivative that must be physically settled.	REMIT
Spot electricity contract that impacts, or might impact, financial instruments' price or value.	MAR
Spot electricity contract that cannot impact financial instruments' price or value.	REMIT

Table 2: Applicable legislative instruments to manipulative misconduct under the post-MiFID II regime.[602]

To conclude, as for the author's analysis, three situations might arise.

First, both article 12 MAR and article 2(2) REMIT can be applicable. In this case, article 12MAR should prevail because, as showed by Tables 1 and 2, the MAR has a broader scope than the REMIT.

Second, the misconduct of market manipulation regards wholesale electricity derivatives where physical electricity's delivery is mandatory or regarding spot electricity contracts that cannot affect financial instruments' price or value. As for this situation, only article 2(2) REMIT applies.

Finally, neither article 12 MAR nor article 2(2) REMIT can be applied. In this case, the manipulative behaviour remains unpunished, because, to date, there are no other applicable regulations to those cases.

[602] Simplified version of the table in Amato (n 591).

6. Concluding remarks on the prohibition of market manipulation at the IPEX under the EU law

For the scope of chapter IV, it must be reiterated who trades on the IPEX, which contracts are traded there, and where the IPEX transactions occur.

The IPEX involves 284 highly qualified companies listed on the official GME website.[603] They can trade only financial instruments as contracts for the electricity's supply and transportation through the Italian power grid.[604] These contracts are spot electricity contracts concerning the trading of spot electricity suppliers and forward contracts related to future electricity suppliers.[605] The price of those spot and forward contracts determines the price of electricity delivered to end-consumers. It depends on the price of electricity derivative contracts traded on the IDEX and vice-versa.[606] If the price of electricity derivatives is manipulated, the electricity pricing at the IPEX might result to be manipulated as a consequence. The IPEX transactions occur on non-physical and telematic platforms accessible by operators via the Internet.[607] Issues arise when the IPEX companies enter into those transactions by carrying out manipulative misconduct to make their profits, which result to be illegal.

To fight the IPEX manipulation, the prohibition of market manipulation under article 12 MAR and the MAD II may be applicable. In this respect, in sections 3.3 of this chapter, the author has demonstrated that the prohibition of market manipulation as enshrined under article 12(1)(a)(i), (a)(ii), (b), and (c) MAR may apply to the IPEX for two reasons. Firstly, the definitions of financial instruments, spot commodity contracts, and commodity derivatives, respectively provided under Section C (5), (6) and (7) of Annex I MiFID II, article 3(1)(15) MAR and article 3(1)(24) MAR, embrace the IPEX. Secondly, article 2(1)(a) and (d) MAR, save

[603] Elenco degli operatori ammessi al mercato energetico ai sensi ai sensi dell'articolo 16, comma16.3, del Testo integrato della Disciplina del mercato elettrico approvato con D.M. 19/12/2003 e ss.mm.ii (*GME*) (n 36); Profilo Aziendale (*GME*) (n 15); PUN: cos'è e come determina il costo dell'energia (*Sorgenia*) (n 15).
[604] Guarnieri (n 15) 31-32.
[605] Glossario (*GME*) (n 14).
[606] ibid; Torrente and Schlesinger (n 179) 751.
[607] Profilo Aziendale (*GME*) (n 15); PUN: cos'è e come determina il costo dell'energia (*Sorgenia*) (n 15).

emission allowances, and article 2(2)(a) and (b) MAR, which define the applicability of article 12 MAR, encompass the IPEX.

In addition to the prohibition of market manipulation under article 12 MAR and the MAD II, also article 2(2) REMIT on the prohibition of market manipulation within the wholesale electricity markets may apply to the IPEX (Table 1). However, the entry into force of the MiFID has led to a significant recalibration in the REMIT scope concerning the market prohibition in financial, wholesale electricity markets.[608] This phenomenon is called the "carve-out" due to the shift of financial instruments from the REMIT to the MAR scope (Table 2).[609]According to the author's analysis, by comparing the scope of the MAR and REMIT under the post-MiFID II regime, the MAR has a broader scope than the REMIT but no other way around. Thus, the MAR seems to have an added value compared to the REMIT for the following two reasons.

Firstly, the MAR currently applies to all manipulative misconduct under article 12 MAR (ch II, sub-ss 4.4.1 and 4.4.2 and Table 1) as involving relevant financial instruments for the MAR applicability (ch II, s 4.3 and Table 2), save for manipulative misbehaviour related to wholesale electricity derivatives where physical electricity's delivery is mandatory or regarding spot electricity contracts that cannot affect financial instruments' price or value (ch III, s 5.2 and Table 2). It means that three situations might arise. First, both the MAR and REMIT can be applicable; the MAR should prevail because it has a broader scope than the REMIT. Second, the misconduct of market manipulation regards wholesale electricity derivatives where physical electricity's delivery is mandatory or regarding spot electricity contracts that cannot affect financial instruments' price or value; only the REMIT applies. Finally, neither the MAR nor the REMIT can be applied; the manipulative behaviour remains unpunished.

Secondly, as explained in section 4.5 of chapter II, the MAR establishes an enforcement regime by means of the MAR and MAD II rules, respectively, for administrative and criminal law enforcement. Instead, the REMIT does not. The MAR and MAD II rules enshrine the mandatory requirements – depicted in section

[608] Corlu (n 55) 11 and 53.
[609]Amato (n 591).

4.5 of chapter II –, that the Member States shall follow to comply with the prohibition of market manipulation under article 12 MAR in their national legislative frameworks.

In light of the foregoing, it seems more challenging for a trader who aims to manipulate the wholesale electricity market to circumvent the MAR, rather than the REMIT. For this reason, this thesis investigates on article 12 MAR and the MAD II applicability to combat market manipulation at the IPEX rather than on article 2(2) REMIT possibility to apply.

CHAPTER IV

APPLICABILITY OF THE MAR AND MAD II TO THE IPEX

1. Introduction of chapter IV

The IPEX is the non-physical Italian financial market where the highly qualified companies listed on the official website of the GME trade contracts for the electricity supply and transportation throughout Italy by using telematic platforms accessible via the Internet (ch III, s 2.2).[610] Unfortunately, experience has shown that manipulative misconduct still affects the IPEX if there are no Italian Government's effective repressive measures (ch I, s 2). Over time, that has resulted, and still might result, in requiring the Italian end-consumers to pay unfair electricity prices.

As the author has demonstrated in section 3 of chapter III, according to the interpretation of definitions and scope of article 12 MAR, this provision is theoretically applicable to manipulative behaviour at the IPEX. But, it is also needed to investigate whether the Italian legislator has properly enforced the prohibition of market manipulation under article 12 MAR by complying with the MAR and MAD II requirements as explained in section 4.5 of chapter II. This assessment is crucial because if that is the case, the author can establish then that article 12 MAR is also practicably applicable to fight market manipulation at the IPEX. For this reason, chapter IV aims to explain how the Italian legislator has amended the national law to put article 12 MAR into effect by criminalizing violations under article 12 MAR according to the MAR and MAD II provisions.

The author will confine her analysis to the Italian Consolidated Law of Finance (TUF), the primary, domestic source regulating the Italian financial markets.[611] First, this chapter will provide a general overview of the TUF (ch IV, s

[610] Adrien de Hauteclocque, Jones, Kjølbye, Landes, Salerno and Sandberg (n 15) 13-14; Guarnieri (n 15) 31-32; PUN: cos'è e come determina il costo dell'energia (*Sorgenia*) (n 15). See also Profilo Aziendale (*GME*) (n 15).

[611] Federico Parmeggiani, "(TUF) Testo Unico sulla Finanza" (*Treccani*, 2012) <https://www.treccani.it/enciclopedia/tuf_%28Dizionario-di-Economia-e-Finanza%29/> accessed 16 June 2021.

2.1). Next, the author will look at the historical background of the d.lgs.107/2018[612] that Italy has issued to modify the TUF to observe the MAR and MAD II provisions (ch IV, s 2.2). Clarified those building blocks, the author will discuss how the d.lgs.107/2018 has modified Title I-*bis* of Section V TUF – regulating market abuse in the Italian financial markets – to enforce article 12 MAR by implementing rules enshrined in both the MAR and MAD II, respectively, for administrative and criminal law enforcement (ch II, s 4.5).[613] Later on, she will examine some of the existing criticisms under the TUF as resulted from the d.lgs.107/2018 amendments, particularly the *ne bis in idem* (ch IV, s 2.3).

Once clarified whether Italy has complied with the MAR and MAD II requirements (ch II, s 4.5) in modifying Title I-*bis* of Section V TUF on the market manipulation prohibition in the Italian financial markets, being the IPEX a financial market based in Italy, the author will evaluate whether the MAR and MAD II are applicable to it (ch IV, s 3).

2. Article 12 MAR enforcement and the MAD II implementation in Italy

2.1 The TUF

The Consolidated Law of Finance, known as the "TUF", was introduced in 1998 by the d.lgs. 58/1998. It was drafted on the basis of the Law 52/1996,[614] which delegated to the Italian legislator the task of issuing a consolidated act to coordinate the various laws regulating the specific areas of financial market law at the beginning of the '90s in an organic legislative instrument.[615] The TUF entered into force in July 1998. Later on, it was modified several times to guarantee the proper

[612] Decreto Legislativo 10 Agosto 2018, n. 107, Norme di adeguamento della normativa nazionale alle disposizioni del regolamento (UE) n.596/2014, relativo agli abusi di mercato e che abroga la direttiva 2003/6/CE e le direttive 2003/124/UE, 2003/125/CE e 2004/72/CE.
[613] Irene Bui, Andrea Sacco Ginevri and Paolo Valensise, "L'adeguamento della normative nazionale alle disposizioni europee sugli abusi di mercato (MAR)" (*Diritto Bancario*, 24 September 2018) <https://www.dirittobancario.it/approfondimenti/market-abuse/adeguamento-della-normativa-nazionale-alle-disposizioni-europee-sugli-abusi-di-mercato> accessed 3 June 2021.
[614] Legge 6 Febbraio 1996, n. 52, Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italian alle Comunità europee – legge comunitaria 1994.
[615] Parmeggiani (n 612).

functioning of the Italian financial markets and prevent their manipulation.[616] Among the other amendments, the TUF was modified in 2018 by the d.lgs.107/2018 to comply with the MAR and MAD II provisions.

The TUF is currently the primary source regulating traders' activities within the Italian financial markets.[617] It regulates the interactions between subject operating on the Italian financial markets – i.e. intermediaries and issuers – and financial intermediations that occur within them. The TUF is of fundamental importance as it brings together most of the primary legislation concerning financial markets enacted over the last few decades. Specifically, the TUF represents a significant improvement in the Italian financial markets because it, first, unifies the two pillars of the financial sector's legislation, namely the Eurosim Decree[618] and the CONSOB regulation on the provision of investment services. Second, it rationalizes this primary legislation and makes it compatible with the EU legislative framework on financial markets. Moreover, it is binding and directly applicable from the National Regulatory Authorities, such as the CONSOB, ARERA, and GME, throughout Italy.[619]

The leading novelties of the TUF are the following. First, the realization of a simple legislation, setting only general principles, leaving the technical details to regulations and self-regulatory codes of the financial markets. Second, the strengthening of corporate governance, defining tasks and obligations without limiting contractual autonomy or hindering the production of wealth. Third, the creation of an Italian regulation that is consistent and competitive with the other regulations of the EU Member States. Finally, the introduction of several innovative provisions concerning the financial intermediaries, favouring the establishment of new entities within the Italian financial markets.

[616] ibid.
[617] Glossario Finanziario (*Borsa Italiana*) (n 180).
[618] Decreto Legislativo 23 Luglio 1996, n. 415, recepimento della direttiva 93/22/CEE del 10 Maggio 1993 relativa ai servizi di investimento nel settore dei valori mobiliari e della direttiva 93/6/CEE del 15 Marzo 1993 relativa all'adeguatezza patrimoniale delle imprese di investimento e degli enti creditizi.
[619] ibid.

As for the structure, the TUF consists of six parts and regulates an extremely wide and varied range of entities, activities, and conduct related to the financial sector.[620]

Section I TUF concerns the common provisions; it sets out provisions common to all sections of the TUF, regarding definitions of the subject manner, relationship with the EU law, and coordination with foreign supervisory authorities.

Section II TUF regards the regulation of intermediaries; it contains a comprehensive set of rules on financial intermediaries, including, firstly, the rules on supervision, which entrusted the CONSOB and the Bank of Italy and, secondly, those on the investment services and the related activities. Therefore, Section II TUF regulates the entities authorised to provide these services, the way they are carried out, the special regime for their cross-border and off-premises offers, and the applicability of class actions to the investors' interests. In addition, Section II TUF lays down the provisions concerning collective assets management and regulates the crisis situations of intermediates, and injunctions against them.

Section III TUF is about the regulation of markets; it deals with the markets and centralised administration of financial instruments. Also, it establishes the rules on the various kinds of regulated markets and their alternatives, such as MTFs and OTFs. Furthermore, it concerns the specific activities of centralised securities management and the regulation of the companies in charge of it.

Section IV TUF enshrines the regulation of issuers; it encompasses the rules on issuers of financial instruments and companies with listed shares, laying down specific rules on periodic disclosure, ownership structures, shareholders' rights, corporate governance, and statutory audit.

Section V TUF concerns the sanctions; it depicts all the criminal misconduct that may be committed in the Italian financial markets – i.e. market manipulation – and the respective criminal and administrative sanctions.

Finally, Section VI regards the transitional and final provisions.

For the scope of this thesis, the author will focus on Title I-*bis* of Section V TUF, since it regulates market abuse in the Italian financial markets. Particularly, the Title I-*bis* of Section V TUF is composed of five sub-titles. The author will

[620] Parmeggiani (n 612).

circumscribe her attention on the norms of Sub-Title I about common provisions related to market manipulation and those of Sub-Titles II and III, respectively, about criminal and administrative sanctions applicable to perpetrators of manipulative misconduct, as amended by the d.lgs.107/2018. The reason for this limitation is that to understand whether the prohibition of market manipulation under article 12 MAR and the MAD II is applicable to the IPEX, it is necessary to investigate whether the Italian legislator has enforced that prohibition by complying properly with the MAR and MAD II requirements, respectively, for administrative and criminal law enforcement (ch II, s 4.5).

2.2 Historical background of the d.lgs.107/2018

The dual enforcement regime enshrined under the MAR and MAD II to fight market manipulation (ch II, s 4.5) has impacted the Italian legislator's approach of amending the national legal framework to enforce article 12 MAR by complying with the the MAR and MAD II requirements. The major obstacle that this regime has led to consists of making concretely feasible the execution of article 12 MAR by implementing the MAD II.[621] In addition, the significant discretion left to the Italian legislator regarding the measures to introduce in accordance with the MAR and MAD II further complicates this process.

In 2014, the Italian executive branch – the Government – submitted a draft bill to the Italian legislative branch – the Parliament – regarding the transposition of several directives, save the MAD II.[622] Indeed, it did not provide for any amendments of the national legislative framework to put the MAR and MAD II into effect.[623] According to the explanatory memorandum of that proposal, any change was necessary because the Italian legal framework already complied with the MAR and MAD II rules.[624] By doing so, the Government seemed to have overlooked all

[621] Basile, "Verso la riforma della disciplina Italiana del *market abuse*: la legge-delega per il recepimento della Direttiva 57/2014/UE" (n 29) 1.
[622] Basile (n 77) 5; Bettinelli and Galmarini (n 267) 3.
[623] Bettinelli and Galmarini (n 267) 5.
[624] Basile, "Una nuova occasione (mancata) per riformare il comparto penalistico degli abusi di mercato?" (n 78) 2.

the structural modifications of domestic law required for the execution of the market abuse package.[625]

In 2015, the Parliament reversed the Government's challenging position by means of the 2014 European Delegation Act on Market Abuse (EDA I)[626]. The Italian legislative branch thus required the executive to enact the MAD II transposition law in 18 months and leading down criteria to follow.[627]

Article 11(1)(a) EDA I entrusted the Government to implement the market abuse package in its entirety by modifying the TUF provisions through the amendments and additions necessary to give the MAR and MAD II full effect, and repealing the rules of the national legislation concerned if needed.[628]

Second, article 11(1)(h) EDA I stated that, to establish the type and level of the administrative sanctions for infringements of the MAR provisions, it was mandatory to consider the relevant circumstances listen under article 31 MAR. For example, the gravity and duration of the violation, the degree of liability of the person responsible for the infringement concerned, and previous violations by the person liable for the infringement (ch II, s 4.5).

Third, article 11(1)(i) EDA I required to identify serious and intentional misconduct of market manipulation to punish by means of penalties by considering, at the same time, an effective, proportionate, and dissuasive administrative system of sanctions.

Finally, article 11(1)(l) EDA I provided that the identification of serious and intentional misconduct of market manipulation shall be determined on the basis of the criteria listed under the MAD II, such as the subjective qualification of the offenders.

In addition, the EDA I sought to follow the few Union guidelines, and both the CJEU and ECtHR judgements on the dual enforcement regime on the market manipulation prohibition as provided under the MAR and MAD II (ch II, s 4.7).[629]

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[625] Bettinelli and Galmarini (n 267) 5.
[626] Legge 9 luglio 2015 n.114, Delega al Governo per il recepimento delle direttive europee e l'attuazione di altri atti dell'unione europea – Legge di delegazione europea 2014.
[627] Basile, "Una nuova occasione (mancata) per riformare il comparto penalistico degli abusi di mercato?" (n 78) 2; Basile and Mucciarelli (n 11).
[628] EDA I, art 11.
[629] Basile, "Verso la riforma della disciplina Italiana del *market abuse*: la legge-delega per il recepimento della Direttiva 57/2014/UE" (n 29) 19.

Precisely, article 11(1)(m) EDA I enshirined the mandatory compliance with the *ne bis in idem* by avoiding the duplication of accumulation of criminal sanctions and administrative penalties for the same illegal act. To that end, article 11(1)(m) EDA I provided two alternative approaches. On the one hand, distinguishing between criminal and administrative offences.[630] On the other hand, providing rules that allow only the most afflictive sanctions' applicability or require the judicial authority to consider the punitive measure already issued when imposing another sanction.[631]

Someone thought that only differentiating criminal from administrative offences guarantees the full observance of the *ne bis in idem* principle because the second approach would safeguard such principle only when a second proceeding would occur (*ex post*). Thereby, it would not consider that the *ne bis in idem* also encompasses the prohibition of double trial (*ex ante*), rather than merely forbidding being penalized twice for the *idem factum*.[632] Therefore, circumscribing such a principle to the punitive measures' dimension would be insufficient to prevent contrasts between the *ne bis in idem* and the Italian discipline on the market manipulation prohibition.[633]

Overall, the EDA I seemed to have some drawbacks. Many aspects of the criminal law system that the Union legislator had left to the discretion of the Member States were not taken into account.[634] Furthermore, the provided guidelines were vague and imprecise to raise serious doubts as to the legitimacy of those measures.[635] In this respect, the EDA I seemed to allow the Government to use the absolute lack of guidelines provided for it regarding the issuance of criminal laws transposing the MAR and MAD II rules. Indeed, the provided discretion leaved to the Government delegated almost exclusively to it the choices concerning the *quomodo* of the incrimination, including the measure of penalty, rather than the

[630] EDA I, art 11(1)(m).
[631] ibid.
[632] Basile, "Verso la riforma della disciplina Italiana del *market abuse*: la legge-delega per il recepimento della Direttiva 57/2014/UE" (n 29) 19.
[633] ibid.
[634] Mucciarelli (n 170) 3.
[635] ibid.

an.[636] To make an example, the mentioned article 11 EDA I represented a paradigmatic case of the so-known "blank mandate", due to the huge discretionary power leaved to the Government for the purpose of transposing the Union legislative framework on market abuse.[637]

By providing so, the EDA I approach appeared to be inconsistent with the Law 52/1996 on the basis of which the TUF was drafted (ch IV, s 2.1).[638] Although it included sufficiently clear guidelines on both the type of afflictive measures and the sanctioning framework, they were never entirely left to the discretion of the Italian legislator. The Law 52/1996 merely granted to the Italian legislator the discretion to coordinate the punitive system, having to choose between administrative and criminal sanctions on the basis of the offensiveness of the unlawful misconduct, and complying with the minimum and maximum of penalties established under the Law 52/1996. The EDA I approach thus resulted in several issues regarding the compliance with the legitimacy of those measures and, particularly, with the legality principle as enshirined under article 25 of the Italian Constitution.[639]

In this regard, someone could argue that the Parliament had enshirined principles and criteria *per relationem*, by referring to the MAR and MAD II rules. Accordingly, the Government would be left the room for acting within the framework of the MAR and MAD II. However, this interpretation did not appear to be well-founded. The reason is that the Union legislator has left wide discretion to the Member States as to the concrete way through which achieving the aims of protection by means of criminal penalties.[640] Then, the unfeasibility of finding clear guidelines under the MAR and MAD II should have suggest to the Parliament to be particularly cautious in entrusting the Government to give to the market abuse package full effect into the Italian legislative framework.

Given those concerns, the Government completely ignored the Parliament's request laid down in the EDA I. Then, the MAR transposition date expired without

[636] Basile, "Verso la riforma della disciplina Italiana del *market abuse*: la legge-delega per il recepimento della Direttiva 57/2014/UE" (n 29) 14.
[637] ibid 16.
[638] ibid 13.
[639] ibid 14.
[640] ibid 17.

any initiative being taken on the crimes enshirined under the market abuse package and the MAR entered into force on the 3rd July 2016.[641]

In 2016, the Parliament enacted the 2016-2017 European Delegation Act on Market Abuse (EDA II).[642] It entrusted the Government to give the market abuse package full effect into the Italian legal system by enacting the necessary transposition laws in 6 months.[643]

Article 8(3)(a) EDA II required the Government to comply with the definitions provided under the MAR and adopt the necessary amendments to the existing domestic provisions, including those derived from the Union law. The main purpose of those requests was to achieve the best coordination with the existing legislative instruments on the one hand and ensure an appropriate level of investors' protection and safeguard the stability and integrity of financial markets on the other.[644]

Moreover, article 8(3)(b) EDA II appealed the Government to make the necessary modifications and additions to the TUF to enforce the MAR.

Overall, the EDA II appeared to have partially solved the inactivity of the Italian Government.[645] However, someone believed that it has represented a significant regression compared with the 2014 Parliament's guidelines, because it included only procedural aspects, leaving out the substantial ones (i.e. *ne bis in idem*).[646] In other words, the EDA II seemed to be exclusively focused on the enforcement of the MAR provisions and on their coordination with the Italian legal framework on market abuse. By contrast, article 8 EDA II did not contain any reference to the MAD II.[647] Second, it completely forgot the MAR and MAD II mutual integration that seeks to prevent the commission of market manipulation and the infringement of the *ne bis in idem*.[648] Therefore, Italy seemed to still have

[641] MAR, art 39(2); Basile and Mucciarelli (n 11).
[642] Legge 15 Ottobre 2017 n.163, Delega al Governo per il recepimento delle direttive europee e l'attuazione di altri atti dell'Unione europea – Legge di delegazione europea 2016-21017.
[643] EDA II, art 8(1).
[644] EDA II, art 8(3)(a).
[645] Basile, "Una nuova occasione (mancata) per riformare il comparto penalistico degli abusi di mercato?" (n 78) 4.
[646] ibid 1.
[647] Mucciarelli (n 170) 3.
[648] ibid 5.

the so-called "matter of overspill" in terms of punishment, given that criminal and administrative sanctions were frequently cumulative rather than alternative.[649]

Later on, the Government presented a new proposal regarding the transposition of several EU measures. It affirmed that the domestic legal framework complied with the MAD II for criminal law's aims, but required some changes to be consistent with the MAR.[650] Then, the Parliament enacted the d.lgs.107/2018. It modified Title I-*bis* of Section V TUF as regulating market abuse in the Italian financial markets to enforce article 12 MAR by transposing the MAR and MAD II rules (ch II, s 4.5). Due to the author's purpose of answering whether article 12 MAR and the MAD II can be applicable to fight the manipulation of the IPEX, the next section will examine articles of Title I-*bis* of Section V TUF as amended by the d.lgs.107/2018 to enforce article 12 MAR and the MAD II.

2.3 The TUF amendments to enforce article 12 MAR and the MAD II under the d.lgs.107/2018

Overall, Title I-*bis* of Section V TUF is specifically tailored for the market abuse regime in the Italian financial markets. This law establishes a prohibition of market manipulation that can be found in article 185 TUF. Moreover, by defining the expression "financial instruments", article 180 TUF enshrines the applicability of the market manipulation prohibition under article 185 TUF. Furthermore, the enforcement regime applicable to manipulative misconduct as provided in article 185 TUF is regulated by articles 185(1), 187-*ter* (1), 187-*quarter*, 187-*quinquies*, and 187-*terdecies* TUF.

Table 3 (below) compares the respective rules concerning the applicability of the market manipulation prohibition, the misconduct of market manipulation, and the related sanctions provided under Title I-*bis* of Section V TUF with those under the MAR and MAD II. The purpose of Table 3 is to provide an overview of the compliance between the norms under Title I-*bis* of Section V TUF on the one hand and those pursuant to the MAR and MAD II on the other, before deepening into their detailed explanation.

[649] Basile and Mucciarelli (n 11).
[650] ibid.

Following Table 3, the author will look at the scope of the market manipulation prohibition under article 185(1) TUF (ch IV, s 2.4), the *actus reus* and *mens rea* enshirined under this provision (ch IV, s 2.5), to whom article 185(1) TUF applies (ch IV, s 2.6), and the applicable sanctions to perpetrators of the manipulative misconduct under it (ch IV, s 2.7).

Title I-*bis* of Section V TUF rules	MAR and MAD II rules	Do they match?
Article 180 TUF Market manipulation prohibition under article 185(1) TUF applies to:	Article 2 MAR Market manipulation prohibition under article 12 MAR applies to:	
i) financial instruments admitted to traded or for which application has been submitted for admission to trading on an Italian regulated market;	i) financial instruments traded on regulated markets or relating to which a request for admission to trading has been submitted;	✓
ii) financial instruments other than those under i) whose price or value depends on the price or value of a financial instrument mentioned therein or has an effect of this price or value (i.e. derivative contracts);	ii) financial instruments other than those under i) whose price or value depends or influences the price or value of those financial instruments; iii) derivative contracts;	✓ ✓

iii) spot commodity contracts.	iv) spot commodity contracts.	✓
Article 185(1) TUF • Misconduct - Information manipulation *Actus reus* Significantly altering financial instruments' prices by disseminating false information. *Mens rea* Implicit intention.	Article 12(1) MAR • Misconduct - Information manipulation *Actus reus* Altering financial instruments or related spot commodity contracts' prices by disseminating information that gives (or might give) false or misleading signals regarding supply of, demand for, or price of financial instruments, or related spot commodity contracts, or secures (or might secure) prices of financial instruments, or related spot commodity contracts, at an abnormal or artificial level. *Mens rea* Explicit intention.	✓ (but the signals under the MAR have a broader scope than the information under the TUF) ✓ (despite being differently provided)

- Transaction manipulation *Actus reus* Significantly altering financial instruments' prices by carrying out sham transactions or other devices. *Mens rea* Implicit intention. • Applicable to: Natural and legal persons.	- Transaction manipulation *Actus reus* Entering into transactions and giving (or trying to give) false or misleading signals regarding supply of, demand for, or price of financial instruments, or related spot commodity contracts; or securing (or trying to secure) prices of financial instruments, or related spot commodity contracts, at an abnormal or artificial level; or affecting (or trying to affect) prices of financial instruments, or related spot commodity contracts, through fictitious device or any other form of deception or contrivance. *Mens rea* Implicit intention. • Applicable to: Natural and legal persons.	✓ (but the *actus reus* under article 185(1) TUF is more simplified than under article 12(1) MAR and, unlike the MAR, it does not include securing financial instruments' prices). ✓ ✓
Article 187-*bis* (6) read in light of article 56 of the Italian Penal Code	Article 15 MAR	

Attempt to commit market manipulation.	Attempt to commit market manipulation.	✓
Article 185(1) TUF Criminal sanction to apply to natural persons: Maximum of imprisonment of at least 6 years.	Article 7(2) MAD II Criminal sanction to apply to natural persons: Maximum of imprisonment of at least 6 years.	✓
Article 187-*ter* (1) TUF Administrative sanction to apply to natural persons: Maximum of administrative fine of at least 5 million.	Article 30(2)(i)(i) MAR Administrative sanction to apply to natural persons: Maximum of administrative fine of at least 5 million.	✓
Article 187-*quinquies* TUF Administrative sanction to apply to legal persons: Maximum of administrative fine of at least 15 million or 15% of the last available legal person's total annual turnover.	Article 30(2)(j)(i) MAR Administrative sanction to apply to legal persons: Maximum of administrative fine of at least 15 million or 15% of the last available legal person's total annual turnover.	✓

Table 3: MAR and MAD II rules vs. Title I-*bis* of Section V TUF rules.

2.4 Applicability of article 185(1) TUF under article 180 TUF

Regarding the applicability of the market manipulation prohibition under article 185(1) TUF, the d.lgs.107/2018 has expanded its scope to the new categories of

financial instruments under article 2 MAR (ch II, s 4.3), by modifying some of the pre-existing paragraphs of article 180 TUF and adding to it new parts.

The expression "financial instruments" currently stands for financial instruments "admitted to trading or for which application has been submitted for admission to trading" on an Italian regulated market; financial instruments not contemplated in the previous category "whose price or value depends on the price or value" of a financial market mentioned therein, "or has an effect of this price or value" (i.e. derivative contracts); and spot commodity contracts within the meaning of article 3(1)(15) MAR.[651]

2.4.1 Comparison between the applicability of market manipulation prohibition under article 185(1) TUF and article 12 MAR

As discussed in section 4.3 of chapter II, article 2 MAR states that article 12 MAR applies to financial instruments that can be traded on a regulated market or relating to which a request for admission to trading on it has been submitted; financial instruments, other than the previously mentioned, whose price or value depends or influences the price or value of those financial instruments; derivatives contracts; and spot commodity contract.[652]

In the author's opinion, as modified by the d.lgs.107/2018, article 180 TUF complies with the content of article 2 MAR to combat the Italian financial markets' manipulation.

2.5 Prohibition of market manipulation under article 185(1) TUF

The misconduct of market manipulation under article 185(1) TUF is defined as the offence committed by any person who disseminates false information, or sets up sham transactions or employs other devices concretely capable of resulting in a significant alteration of financial instruments' price.

[651] TUF, art 180(1)(a)(1), (2-*ter*), (b), and (b-*quater*).
[652] MAR, art 2(1)(a),(b),(d) and (2)(a),(b).

The protected interest under article 185(1) TUF consists in the fair functioning of the Italian financial markets and the information efficiency within them as being the premises to safeguard financial markets' investors.[653] Article 185(1) TUF thus pursues the aim of preventing that the investors' trust in financial markets fail due to misbehaviours capable of affecting and altering the financial instruments' price.[654]

Clarified the "new" applicability of the market manipulation prohibition under article 185(1) TUF (ch IV, s 2.4), it is now relevant to discuss the origins of this prohibition (ch IV, sub-s 2.5.1), the *actus reus* (ch IV, sub-ss 2.5.2 and 2.5.3) and *mens rea* in information and transaction manipulation under article 185(1) TUF (ch IV, sub-s 2.5.4), and the attempt of committing market manipulation (ch IV, sub-s 2.5.5).

2.5.1 Historical background of the prohibition of market manipulation under article 185(1) TUF

The origins of the prohibition of market manipulation under article 185(1) TUF can be found in the law reform of corporate offenses carried out by the d.lgs. 61/2002.[655] It provided for a new offence of market-rigging in article 2637 of the Italian Civil Code (cc).[656] This provision, jointly with article 501 of the Italian Penal Code (cp),[657] replaced articles 2628 cc and 181 TUF.[658]

Later on, in implementing the MAD I, the Law 62/2005[659] introduced the offence of market manipulation in article 185(1) TUF.[660] However, this provision did not replaced article 2367 cc. It is still in effect but only regarding unlisted

[653] Seminara (n 5) 90; Filippo Sgubbi, "La manipolazione del mercato" in Désirée Fondalori, Sgubbi Filippo and Andrea Francesco Tripodi *Diritto penale del mercato finanziario: abuso di informazioni privilegiate, manipolazione del mercato, ostacolo alle funziona di vigilanza Consob, falso in prospetto: lezioni* (2nd edn, CEDAM 2013) 73.
[654] Sgubbi (n 654) 74.
[655] Decreto Legislativo 11 Aprile 2002, n. 61, Disciplina degli illeciti penali e amministrativi riguardanti le società commerciali, a norma dell'articolo 11 della legge 3 Ottobre 2001, n. 366.
[656] Codice Civile, Regio Decreto 16 Marzo 1942, n. 262.
[657] Codice Penale, Regio Decreto 19 Ottobre 1930, n. 1398.
[658] Seminara (n 5) 88.
[659] Legge 18 aprile 2005, n.62, Disposizioni per l'adempimento di obblighi derivanti dall' appartenenza dell'Italia alla Comunità europea. Legge comunitaria 2004.
[660] Seminara (n 5) 88.

financial instruments or those for which no request for admission to trading on a regulated market has been submitted.[661]

Moreover, the term "market-rigging", in Italian "*aggiotaggio*", derives from the French word "*aggio*". The latter was used in Italy to indicate the positive price differential connected to a currency exchange operation.[662] The "*aggiotaggio*" stood for the conduct of a person who artificially alter the value of goods or securities for speculative purposes.[663] Nevertheless, in 2005, the Italian legislator replaced this term with the expression "market manipulation". The aim was to comply with the wording of the MAD I, which provides for the term "market manipulation".

2.5.2 The *actus reus* in information manipulation under article 185(1) TUF

Information manipulation under article 185(1) TUF consists in a dissemination of false information made by any means and in any form to an undifferentiated public or to huge categories or groups of people, to consider in relation to the size of the market within which the manipulation is committed, concretely likely to cause a notable alteration in the price of financial instruments.[664]

Accordingly, the *actus reus* in information manipulation under article 185(1) TUF is about considerably altering prices of financial instruments by spreading relevant information other than the truth of the facts to a large public.[665]

The expression "dissemination" stands for any kind of communication, written or oral, transmitted by any means, such as television, radio, public speeches, and the Internet.[666] An important requirement is that the spreading of information shall be directed to an undetermined number of people. With this regard, it is controversial whether communication to a single person or to a limited group of people should be qualified as spreading information within the meaning of article 185(1) TUF or as an artifice. In the first case, the consummation of the offence is

[661] ibid; Sgubbi (n 654) 74.
[662] Seminara (n 5) 89.
[663] Seminara (n 5) 89.
[664] ibid 90.
[665] ibid.
[666] Sgubbi (n 654) 75. See also Sgubbi (n 654) 78.

postponed until the moment when the information is sufficiently disseminated.[667] Instead, in the second case, it is to be considered as immediate.[668] Nowadays, the first option seems to be preferable in those case in which the communication of information will result in a dissemination, in accordance to the way it has been made and the qualities of recipients.

Moreover, concerning the object of the disseminated information, it is not required that it regards the economic or financial situation of the issuer. The information can concern any fact or event capable of altering the price of the financial instrument concerned, irrespective of its source and content. The offence may also be perpetrated in those cases in which the information is about facts that are not unknown by recipients, but which are disclosed with a significant degree of credibility as resulting in the same effects provided under article 185(1) TUF, due to the reputation or the authority of the source, or of the chosen mean to disseminate it.[669] Given this suitability, it may happen that the facts concerned are known by recipients as being the object of previous communications made by the same issuer. Their repetition seems thus to be a confirmation and it is then capable of deepening and amplifying the previous deception.[670]

In addition, it is not required that the information has as object facts that have already occurred.[671] It may regards also facts that are occurring in the present, or others that will occur in the future. Hence, it is only required that the information is false as regarding facts that appear to be true. On the contrary, the prohibition of market manipulation under article 185(1) TUF is not infringed if the dissemination regards appreciations, assessments, or conjectures disclosed as opinions, in the absence of a false representation of facts.

Also, the falsity of the disseminated information shall consist in a divergence from the truth deductible from the content of the information itself or the way by means of which it is broadcasted. According to some authors, the concept of "false information" must be understood on the basis of the general provided framework, highlighting the criminal distorting effect of reality that it

[667] Seminara (n 5) 90-91.
[668] ibid.
[669] ibid.
[670] ibid.
[671] ibid 91-92.

produces, regardless of the nature within which it is carried out. In this perspective, not only "intrinsic" false information goes under article 185(1) TUF; also information that appears to be "exaggerated", such as that characterized by a significant alteration of essential elements of reality.[672] Likewise, article 185(1) TUF encompasses information that seems to be "biased", in the sense that, despite being based on real facts, it has a strong, aggressive, and deceived capability, because of the way it is disseminated and the related context.[673] Instead, according to a different opinion, the dissemination of "exaggerated" or biased" information can only be considered as the fulfillment of "other devices" within the wording of article 185(1) TUF.[674]

Furthermore, article 185(1) TUF requires the concrete capability of the conduct to provoke a sensible alteration of the price of one or more financial instruments.[675] In the past, there were doubts as to the abstract or concrete nature of the danger characterising the offence of market manipulation under article 185(1) TUF. [676] In favour of the risk *in abstracto*, it was invoked the challenging capability of isolating the operational potential of the individual conduct with respect to the multitude of competing factors that govern the meeting between supply and demand. Instead, in favour of the risk *in concreto*, it was underlined the impossibility of establishing the manipulative capacity of the conduct regardless of the market situation in which it took place. Therefore, the express provision of article 185(1) TUF of the concrete capability of altering the financial instruments' price excludes the possibility of demonstrating a merely abstract danger.[677]

However, it cannot be denied that the offence of market manipulation has the nature of a danger that only tend to be concrete if the requirement of concreteness, on the one hand, lends itself to exclude the integration of the offence when the absence of danger is demonstrable and, on the other hand, does not go so

[672] Sgubbi (n 654) 79.
[673] ibid.
[674] Anna Lisa Maccari, "Aggiotaggio" in Fausto Giunta *I nuovi illeciti penali ed amministrativi, riguardanti le società commerciali. Commentario del d.lgs. 11 aprile 2002, n.61* (Torino 2002)198; Maria Beatrice Magro, *Manipolazione dei mercati finanziari e diritto penale* (Giuffrè Editore 2012) 282 ; Musco (n 536) 278.
[675] Sgubbi (n 654) 94. See also Federico Consulich, *La giustizia e il mercato. Miti e realtà di una tutela penale dell'investimento mobiliare* (Giuffrè Editore 2010) 315.
[676] Seminara (n 5) 98. See also Sgubbi (n 654) 95-105.
[677] Seminara (n 5) 98.

far as to require an impossible empirical demonstration of the probability of the alteration of prices in the given situation. [678] The assessment of the danger must be made on the basis of an *ex ante* judgement. It must be carried out on the basis of the situation of the market in which the action was carried out, the means employed and their extent, and the characteristics of the financial instrument concerned, assessing the capacity to alter the normal trading or to influence the decisions of a reasonable investor.[679]

The sensitivity of the alteration of the prices of financial instruments, namely the "price sensitivity", provided under article 185(1) TUF, therefore acts as a selective filter of the facts that are relevant under the TUF. On the one side, it postulates the identification of a correct or normal price prior to the manipulation. On the other, it assumes that the effects of manipulation are isolated from the action of any competing factor.

Finally, the offence is consummated when false information is disseminated. The consummation shall thus be referred to the moment of the dissemination of the false information to a huge number of people.[680] To determine the moment of consummation and the territorial jurisdiction, the same rules can be applied irrespective of whether the communication is oral, made through the Internet, or by any other mean. The mean by which the information is placed on the market is the Network Information System within the Italian Stock Exchange, that connects the latter with the news agencies. The offence is then consummated from the moment the information is disclosed by the news agencies.

More conducts of information's dissemination perpetrated simultaneously constitutes a concurrence of offences in the case in which to every dissemination corresponds an amplified effect of the previous falsity.[681]

[678] ibid.
[679] Seminara (n 5) 99.
[680] ibid 103.
[681] ibid 103-04.

2.5.3 The *actus reus* in transaction manipulation under article 185(1) TUF

Transaction manipulation under article 185(1) TUF consists in setting up sham transactions or employs other devices concretely capable of causing a significant alteration in the price of financial instruments.

Accordingly, the *actus reus* in transaction manipulation under article 185(1) TUF is about considerably altering prices of financial instruments by entering into sham transactions or employing other devices.[682]

Sham transactions are purchases and sales with only an apparent change of beneficial ownership.[683] In other words, they consists in the trading of fictitious financial instruments or with only apparent change or economic owner capable of inducing imitative effects in the public. Moreover, the expression "sham transactions" shall be interpreted in order to include both absolute and relative sham transactions.[684] The absolute sham transactions are those that the parties do not certainly intend to carry out. Instead, the relative sham transactions stand for those transactions that appear to be different from those that the parties intend to carry out. For example, the so-called "wash sales" are sham transactions by which a natural or legal person simultaneously offers for sale and purchases the same security in large volumes, without changing the ownership situation. Also, the so-known "improper matched orders" are sham transactions by which several people simultaneously place orders on the market to buy and sell the same quantities of securities at the same price, creating the appearance of an active market without real consequences in the ownership securities; and so on.

The equivalence of sham transactions and device under article 185(1) TUF makes it clear that fraud is the constant element of the misconduct of market manipulation.[685] It does not take into account the lawfulness or illegality of acts, nor the agent's aim. However, the misconduct shall be sought in the manner of carrying out the behaviour, in the context in which it is made and, only after, in the result.[686]

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[682] TUF, art 185(1).
[683] Seminara (n 5) 95.
[684] Sgubbi (n 654) 80.
[685] Seminara (n 5) 95.
[686] ibid.

Finally, the offence is consummated when the sham transaction or device is realized. Being a risk offence, the occurrence of the event is irrelevant to the end of the offence's consummation.[687] The consummation shall thus be referred to the onset of the risk of altering the price of the financial instrument intended as the result of the misconduct. That risk shall be ascertained on the basis of the type of the employed device. Consistently, the consummation of the offence may refer to the placing of purchase or sale orders into the electronic circuit of the Italian Stock Exchange or to the execution of the related transactions.

Moreover, if the capacity to alter the price of the financial instrument is due to several operations connected by the same manipulated design, the offence shall be considered as a single offence that is consummated when the conduct concretely represents a risk of damaging the regular performance of the market. [688]

2.5.4 The *mens rea* in market manipulation under article 185(1) TUF

The *mens rea* in market manipulation under article 185(1) TUF implicitly requires that the misconduct concerned is perpetrated with intent.[689] In other words, article 185(1) TUF provides for the consciousness to give false information or to carry out sham transactions or other devices, together with the awareness of their suitability to determine a significant alteration in the price of financial instruments.[690] By a close examination, it can be observed that article 185 (1) TUF merely requires a general intent consisting in the intention to disseminate false information, or carry out sham transactions or other devices being aware that they are likely to alter the price of one or more financial instruments.[691]

The relevance of the eventual intent and the requirement of a general intent, instead of a specific intent, are intended to strengthen the protection of the mechanisms of market functioning, excluding the need of demonstrate that the

[687] ibid 104.
[688] ibid.
[689] Seminara (5) 102.
[690] Sgubbi (n 654) 106.
[691] Seminara (5) 102.

agent pursues a specific aim.[692] This signifies that in both cases in which the agent has acted to gain a profit or pursuing a different goal, being aware of the potential effects of altering financial instruments' prices, the offence of market manipulation is in any event punishable under article 185 (1) TUF. However, the absence of specific intent must be counterbalanced by the objective harmfulness of the fact.

2.5.5 Attempt of committing market manipulation under article 185(1) TUF

By looking at Title 1-*bis* of Section V TUF, there is only a provision concerning the attempt to perpetrate market abuse. That is article 187-*bis* (6) TUF. However, it refers to insider dealing rather than market manipulation. Hence, according to the wording of the TUF, the Italian legislator has not enshrined a prohibition against attempting to engage in market manipulation.

Nevertheless, many scholars suggest that despite this prohibition is not explicitly provided under the TUF, the attempt to commit market manipulation should be considered encompassed under the TUF in those cases in which actions concerned are suitable and unambiguously directed to alter financial instruments' prices but they do not really result in altering those prices.[693] Consistently, the attempt to perpetrate market manipulation may occur when the agent carries out acts that are unambiguously suitable and headed to result in the alteration of financial instruments' prices but which do not end in the consummation of the offence. [694]

For example, it can happen for the failure of the market management company to publish the false information or for the failure of the intermediary to execute the order. Moreover, the attempt to perpetrate market manipulation may occur when the agent carries out acts that are unambiguously suitable and headed to result in the alteration of financial instruments' prices, but which have lost their damaging capacity for reasons other than the agent's control. For instance, it can

[692] Alessandro Melchionda, "Art. 2637 cc e art. 185 d.lgs. 58/1998" in Alessio Lanzi, Alberto Cadoppi *I reati societari* (Padova 2007) 280; Seminara (5) 102.
[693] ibid 103.
[694] ibid 105.

occur for the simultaneous dissemination of information of an opposite sign, capable of neutralizing the false information.

Given those considerations, the author agrees with this interpretation because it is clearly in accordance with article 56 cp, that regulates the general framework on attempt in the Italian law; it refers to those persons who intentionally commit acts which are unequivocally directed to perpetrate an offence without the action concerned is concretely carried out, or the event does not really occur.

2.5.6 Comparison between the misconduct of market manipulation under article 185(1) TUF and article 12 MAR

As explained in sub-sections 4.4.1 and 4.4.2 of chapter II, article 12 MAR distinguishes between information and transaction manipulation.

The *actus reus* in informative manipulation under article 12(1)(c) MAR consists of altering prices of financial instruments, or related spot commodity contracts, by disseminating information that gives (or might give) false or misleading signals regarding supply of, demand for, or price of financial instruments, or related spot commodity contracts, or fixes (or might fix) prices of financial instruments, or related spot commodity contracts, at an abnormal or artificial level.

Instead, the *actus reus* in trade manipulation under article 12(1)(a) and (b) MAR corresponds to enter into transactions which give (or may give) signals that do not ("false"), or might do not ("misleading"), correspond to the truth of facts regarding supply of, demand for, or price of financial instruments, or related spot commodity contracts; or secure (or may secure) prices of financial instruments, or related spot commodity contracts, at an abnormal or artificial level; or affect (or may affect) prices of financial instruments, or related spot commodity contracts, by employing fictitious device or any other form of deception or contrivance.

Furthermore, the *mens rea* under the MAR requires that misbehaviours consisting of market manipulation under article 12 MAR are perpetrated intentionally; article 12(1) MAR refers to intent explicitly as for information manipulation and implicitly as for transaction manipulation.

Finally, as discussed in sub-section 4.6.1 of chapter II, recitals 41 and article 15 MAR provides for a prohibition against the attempt to commit market manipulation, encompassing situation where the misconduct is started but it is not completed.[695]

Given the foregoing, it can be observed that, by distinguishing between information and transaction manipulation, article 185(1) TUF follows the structure of article 12 MAR.

In addition, the market manipulation prohibition under article 185(1) TUF is less detailed than the one pursuant to article 12(1) MAR. For example, article 12(1) MAR explicitly refers to spot commodity contracts and instruments' supply and demand, while article 185(1) TUF does not. As for the author's line of reasoning, it means that article 185(1) TUF has a more general and simplified approach than article 12(1) MAR. Indeed, firstly, concerning information manipulation, signals encompassed under article 12(1) MAR have a broader scope than information under article 185(1) TUF. Secondly, regarding transaction manipulation, the *actus reus* under article 185(1) TUF does not comprise securing financial instruments' prices, which is, instead, encompassed under article 12(1) MAR. However, in the author's opinion, despite those discrepancies, article 185(1) TUF seems to endorse the *actus reus* and *mens rea* provided under article 12(1) MAR (ch II, sub-ss 4.4.1 and 4.4.2) anyway.

Moreover, the TUF seems to follows the MAR requirement to punish not only the consumed conduct of market manipulation, but also the attempt to perpetrate it.

Finally, as the author will explain below, the Italian legislator has also sought to follow the enforcement regime provided under the MAR and MAD II rules, by profiling enforcement regarding the prohibition of market manipulation through several norms within the TUF, such as articles 187-*ter* (1), 187-*quarter*, 187-*quinquies*, and 187-*terdecies* TUF.

[695] MAR rec 41 and art 15.

2.6 Applicability of article 185(1) TUF to natural and legal persons

Clarified the *actus reus* and *mens rea* in the market manipulation prohibition under article 185(1) TFEU, the author will now discuss to whom this prohibition applies.

The expression "any person" under article 185(1) TUF establishes that the active subject of the manipulative misconduct concerned might be one or more natural or legal persons.[696]

In comparison, recital 18, articles 7, and 8 MAD II provide for establishing the liability of both natural and legal persons for infringements of the market manipulation prohibition under article 12 MAR (ch II, sub-s 4.4.4). Therefore, article 185(1) TUF complies with those MAD II requirements.

2.7 Applicable administrative and criminal sanctions to perpetrators of market manipulation under article 185(1) TUF

The TUF distinguishes between criminal and administrative sanctions, as required under recital 23 and article 5(1) MAD II (ch II, sub-s 4.5.1 and 4.5.2). In this respect, it is crucial to reiterate that, despite under the Italian law legal persons are punished by means of administrative sanctions with a punitive nature as to be considered criminal sanctions, in Italy, criminal sanctions are officially applicable only to natural persons (ch III, s 3.3).[697] Instead, administrative sanctions apply to both natural and legal persons. For this reason, the author's explanation will distinguish between natural and legal persons only regarding administrative sanctions.

As for criminal sanctions applicable to natural persons, article 185(1) TUF provides for imprisonment from one to six years and a criminal fine ranging from EUR 20,000 to 5 million. Article 7(2) MAD II enshrines that the maximum of detention shall be at least four years. Under article 185(1) TUF the maximum corresponds to six years. Hence, this TUF provision complies with article 7(2) MAD II.

[696] Seminara (n 5) 90; Sgubbi (n 654) 74.
[697] Costituzione della Repubblica Italiana del 27 Dicembre 1947, art 27(1); De Maglie (n 543) 352.

Concerning administrative sanctions applicable to natural persons, article 187-*ter* (1) TUF requires the competent national authorities to impose an administrative fine between EUR 20,000 and 5 million.[698] Article 30(2)(i)(i) MAR states that the maximum of administrative pecuniary sanction for natural persons shall be at least EUR 5 million. Under article 187-*ter* (1) TUF, the maximum corresponds to EUR 5 million. Therefore, the TUF provision at stake follows the content of article 30(2)(i)(i) MAR. Also, the d.lgs.107/2018 has amended article 187-*quater* TUF by listing a wide range of accessories administrative sanctions based on article 30(2) MAR. For instance, it mentions the temporary or permanent ban on performing administrative, management or supervisory functions within listed companies or corporations belonging to the same group as listed companies.[699]

Regarding administrative sanctions applicable to legal persons, article 187-*quinquies* TUF refers to an administrative fine ranging from EUR 20,000 to 15 million or 15% of turnover when this amount is more than EUR 15 million, and it can be determined.[700] By providing so, article 187-*quinquies* TUF agrees with article 30(2)(j)(i) MAR that establishes the maximum of administrative fines for legal persons to at least EUR 15 million or 15% of the last available legal person's total annual turnover if determinable.

2.8 Compliance of the TUF as amended by the d.lgs.107/2018 with the principle of *ne bis in idem*

Before answering whether article 12 MAR and the MAD II can be applied to prohibit market manipulation at the IPEX, a final aspect requires attention: the compliance of the TUF as modified by the d.lgs.107/2018 with *ne bis in idem* principle.

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[698] See Désirée Fondaroli, "Illecito amministrativo di manipolazione del mercato" in Désirée Fondalori, Sgubbi Filippo and Andrea Francesco Tripodi *Diritto penale del mercato finanziario: abuso di informazioni privilegiate, manipolazione del mercato, ostacolo alle funziona di vigilanza Consob, falso in prospetto: lezioni* (2nd edn, CEDAM 2013) 136-48.
[699] TUF art 187-*quater* (1)(b).
[700] Fondaroli (n 536) 204.05. See also Fondaroli "Illecito amministrativo di manipolazione del mercato" (n 699) 204-08.

In this respect, before the d.lgs.107/2018 amendments, article 187-*terdecies* TUF provided that when a pecuniary administrative sanction had been imposed on an entity or a natural person, at the time of the enforcement of the pecuniary sanction or the sanction related to the criminal offence, the latter was limited to the part exceeding that had been already collected by the administrative authority. It means that the previous version of article 187-*terdecies* TUF was circumscribed to pecuniary sanctions. Thus, it did not extend the provision to other types of charges. At the same time, when the second pecuniary sanction of criminal nature within the meaning of the *Engel* criteria (ch II, sub-s 4.7.2) was collected, it bound the offsetting to the previous administrative penalty only. Instead, the reverse situation was not provided.

Later on, the d.lgs.107/2018 fully substituted the content of article 187-*terdecies* TUF about the applicability and enforcement of criminal and administrative sanctions to perpetrators of market manipulation. As modified by the d.lgs.107/2018, article 187-*terdecies* TUF currently states that when the judicial authority and the CONSOB are required to impose sanctions within their competence, they shall take into account punitive measures that have already been applied against the same person and regarding the *idem factum*.[701] Moreover, article 187-*terdecies* TUF establishes that the collection of the criminal or administrative fine shall be limited to the part exceeding that collected by the administrative or judicial authority.[702]

By providing so, the TUF seems to observe the *ne bis in idem.* However, it is needed to analyse whether article 187-*terdecies* TUF as modified by the d.lgs.107/2018 complies with the jurisprudence of the CJEU and ECtHR, explained in sub-sections 4.7.4 to 4.7.7 of chapter II. In this regard, the CJEU seems to recognize the proportionality of the sanctioning framework under article 187-*terdecies* TUF in the provided *ex ante* and *ex post* compensation. Thus, *ex ante*, the proportionality is ensured in the part of article 187-*terdecies* TUF in which it is enshrined that the judicial authority and the CONSOB must consider the previously imposed sanction before proceed to apply the charge for which they are responsible.

[701] TUF art 187-*terdecies* (1)(a).
[702] ibid (b).

Instead, *ex post*, the proportionality is guaranteed in the part of article 187-*terdecies* TUF in which it is stated that the collection of the pecuniary sanction is limited only to the part exceeding that already collected.

Nevertheless, there are still concerns on article 187-*terdecies* TUF as amended by the d.lgs.107/2018. The most quoted interpretation suggests that the part corresponding to the sanction already imposed should be deducted from the penalty to apply. However, how to interpret the expressions "take into account" and "already imposed" under article 187-*terdecies* (1)(a) TUF appears to be still vague.[703] For example, the expression "already imposed" might mean a definitive sanction no longer subject to ordinary means of appeal, or also a definitive sanction still appealable. In addition, article 187-*terdecies* (1)(a) TUF refers only to the content of applicable sanctions by leaving out the *ne bis in idem* procedural dimension.[704]

As for the author's analysis, by modifying article 187-*terdecies*, the Italian legislator wishes to act in accordance with the *ne bis in idem* and, thus, with the MAR and MAD II requirements to comply with it. But, it should improve such provision. Firstly, to clarify how the judicial authority has to impose sanctions within its competence without infringing the *ne bis in idem*. Secondly, with the purpose of guiding the judicial national authority and the CONSOB in determining *in concreto* the sanctions to apply, particularly by considering the notable degree of severity currently attached to administrative ancillary measures.[705]

3. Concluding remarks on article 12 MAR and the MAD II applicability to fight the IPEX manipulation

In this last section, the author wishes to clarify whether article 12 MAR and the MAD II are applicable to prohibit market manipulation at the IPEX. To that end, she needs to make some conclusive considerations.

Firstly, in section 3 of chapter III, the author has demonstrated on the basis of the interpretation of key definitions as financial instruments, financial markets,

[703] Mucciarelli (n 172) 21.
[704] ibid.
[705] Basile, "Una nuova occasione (mancata) per riformare il comparto penalistico degli abusi di mercato?" (n 78) 10.

and so on, that article 12 MAR is applicable to the forms of market manipulation at the IPEX. However, as discussed in section 5.2 of chapter III, in the cases related to wholesale electricity derivatives that shall be physically settled and spot electricity contracts that cannot impact financial instruments' price or value, the MAR is not applicable; there, only the REMIT applies.

Secondly, as explained in section 2.2 of chapter III, the IPEX is a regulated financial market based in Italy, where the 284 highly qualified corporations listed on the official website of the GME trade financial instruments as contracts for the electricity supply and transportation throughout Italy. Those contracts encompass financial instruments traded on the IPEX or relating to which a request for the admission to trading on it has been submitted, and spot and forward electricity contracts whose value depends on the price of electricity derivative contracts. For these reasons, as proved in section 3.2 of chapter III, article 12 applies to the IPEX.

Thirdly, according to the author's analysis provided in section 6 of chapter III the MAR has an added value compared to the REMIT for two reasons. Primarily, it has a broader scope than the REMIT, but no other way around. Furthermore, unlike the REMIT, the MAR establishes an enforcement regime by means of the MAR and MAD II rules. Those rules provide for mandatory requirements that, *inter alia*, Italy shall comply with to execute the prohibition of market manipulation under article 12 MAR under its domestic legislative framework. As stated, it seems more challenging for an IPEX company that aims to manipulate the IPEX to circumvent the MAR than the REMIT.

Finally, in sections 2.3 to 2.6 of chapter IV, the author has demonstrated that, in amending Section V (Title I-*bis*) TUF about the prohibition of market manipulation in the Italian financial markets, the Italian legislator has implemented article 12 MAR by concretely complying with the MAR and MAD II rules (Table 3). By doing so, the Italian legislator has led to the legitimacy of applying article 12 MAR and the MAD II to perpetrators of manipulative misconduct in the Italian financial markets. Those financial markets include the Italian wholesale energy markets, which, in turn, encompass the Italian wholesale electricity market: the IPEX.

According to the author's line of reasoning, the fact that the Italian legal system currently complies with the MAR and MAD II requirements results in the possibility of applying those legislative instruments to the IPEX by, at the same time, acting in accordance with the Italian law.

Given the foregoing, the author can affirm that article 12 MAR and MAD II can be used to fight market manipulation at the IPEX. It means that within her interpretation of article 12 MAR and MAD II, the ARERA and GME have the tools to enforce the prohibition of market manipulation at the IPEX. Now, it is up to those National Regulatory Authorities to use those instruments to prevent and repress the manipulation of the IPEX.

CONCLUSION

In 2016, the leading economic newspaper *Il Sole 24 ore* announced to the Italian consumers that they would pay 4,3% more for electricity than before. That price spike was due to the manipulation of the electricity's dispatching costs, formed on the IPEX. The IPEX is the Italian regulated financial market where the qualified corporations listed on the official website of the GME trade financial instruments in the form of contracts for the electricity's supply and transportation through the Italian power grid by means of telematic platforms accessible via the Internet.

In 2016, the main related problem consisted in the shortcoming in fighting those manipulative behaviours, because of the missing legislation to enforce the IPEX manipulation prohibition in a proper way. In 2020, the lack of effective repressive measures still affected the IPEX.

According to the author, a possible solution to deal with the IPEX manipulation may be found in the applicability to this financial market of the market manipulation prohibition provided under article 12 MAR and the MAD II. The reason is that the MAR and MAD II are the two main pillars on which the repression of manipulative misconduct within the EU financial markets is currently based on. In 2014, they replaced the MAD I and introduced a comprehensive legislative system including minimum rules on the criminal offence of market manipulation and definitions of the related administrative and criminal sanctions on the basis of article 83(2) TFEU.

In addition to the prohibition of market manipulation under article 12 MAR and the MAD II, article 2(2) REMIT may represent another valuable solution to deal with the IPEX manipulation. The reason is that the REMIT applies to the entire electricity market and establishes rules regarding the wholesale electricity market functioning, and the prohibition of manipulative behaviour within the wholesale electricity market. The demanding fact is that the wholesale electricity market is a financial market and article 12 MAR and the MAD II apply to fight market manipulation in the Union financial markets. Hence, the MAR and REMIT provisions might accumulate, since article 12 MAR and the MAD II also aim to repress manipulative misconducts in financial markets.

To figure out whether article 12 MAR and the MAD II or article 2(2) REMIT can be applied to the IPEX to combat its manipulation, the author has had to clarify several concepts in this thesis.

First of all, it must be analysed the meaning of the IPEX. That because, given the main issue, it is crucial to understand the context in which the author will examine the applicability of article 12 MAR, the way it is implemented in Italy, and whether this provision can be used for the repression of market manipulation at the IPEX. Precisely, it is necessary to explain who trades on the IPEX, which is the object of the IPEX transactions, where they occur, and how the IPEX works.

In chapter III, the author has clarified that the IPEX involves exclusively 284 highly qualified companies listed on the official GME website. They trade financial instruments as contracts for the electricity's supply and transportation through the Italian power grid. Those contracts are spot electricity contracts concerning the trading of spot electricity suppliers and forward contracts related to future electricity suppliers. The price of those spot and forward contracts determines the price of electricity delivered to end-consumers and depends on the price of electricity derivative contracts traded and vice-versa. If the price of electricity derivatives is manipulated, the electricity pricing at the IPEX might result to be manipulated as a consequence. Finally, the IPEX transactions currently occur only on non-physical and telematic platforms accessible by operators via the Internet.

Second, it is essential to understand the scope and content of the prohibition under article 12 MAR, and how this norm needs to be enforced by the Member States. Otherwise, it could not be figured out whether article 12 MAR and the MAD II may apply to the IPEX.

In chapter II, the author has explained that article 12 MAR currently applies to financial instruments that can be traded on a regulated market or relating to which a request for admission to trading has been submitted; to financial instruments whose price or value depends on or impact on price or value of another financial instrument; to spot commodity contracts where transactions, order or behaviour has or might affect the price or value of another financial instrument; and to financial instruments for transferring credit risk where the transaction, order, bid or

behaviour impact or may influence the price or value of a spot commodity contract where those price or value depend on those financial instruments' price or value, such as commodity derivatives.

Moreover, article 12(1)(a)(i) and (ii), and (b) MAR provides that transaction manipulation consists in intentionally entering into transactions which give, or may give, false or misleading signals as to the supply of, demand for, or price of financial instruments or related spot commodity contracts; or which secure, or may secure, the price of financial instruments or related spot commodity contracts at an abnormal or artificial level irrespective of how long the alteration of the price of financial instruments concerned would last; or which affect, or may affect, the price of financial instruments or related spot commodity contracts by employing fictitious device or any other form of deception or contrivance.

Instead, article 12(1)(c) MAR establishes that information manipulation refers to the following activities committed knowing, or having to know, that they are manipulative. Spreading information that gives, or may give, false or misleading signals as to the supply of, demand for, or price of financial instruments or related spot commodity contracts; or that fixes, or may fix, the price of financial instruments or related spot commodity contracts at an abnormal or artificial level.

Furthermore, recital 18 and article 15 MAR, and articles 7 and 8 MAD II require that the prohibition of market manipulation under articles 12 and 15 MAR shall apply to both natural and legal persons. The Member States shall enforce it by complying with rules provided in both the MAR and MAD II respectively for administrative and criminal law enforcement.

With regard to natural persons, according to articles 5(1) and 7 MAD II, in cases in which their misconduct is serious and intentional, they shall be sanctioned through effective, proportionate, and dissuasive penalties whose maximum shall be at least four years imprisonment. Instead, in line with article 30(2) MAR, in other cases, the amount below which the maximum of administrative pecuniary sanctions that the Member States must apply to natural persons shall correspond to at least EUR 5 million.

As for legal persons, article 9 MAD II states that the Member States must adopt the necessary effective, proportionate, and dissuasive sanctions to ensure that

they will be liable under article 8 MAD II in cases in which legal persons commit intentionally serious cases of market manipulation. In other cases, articles 5(1), 8 and 9, and article 30(2) MAD II provide that perpetrators of market manipulation must be punished by administrative fines whose maximum shall be at least EUR 15 million or 15% of the total annual turnover of the legal person according to the last available accounts approved by the management body.

Furthermore, article 30(1) MAR enshirines that, as for both natural and legal persons, if they commit market manipulation in cases other than those encompassed under article 5 MAD II, perpetrators of market manipulation shall be punished by means of the appropriate administrative sanctions related to infringements of the market manipulation prohibition under article 15 MAR. Article 30(2) MAR requires that the Member States shall ensure that competent authorities have the power to impose an order requiring the person responsible for the infringement to cease the conduct and to desist from a repetition of that conduct, the disgorgement of the profits gained or losses avoided due to the infringement insofar as they can be determined, and maximum administrative pecuniary sanctions of at least the amount of the profit gained or losses avoided because of the violation if determinable.

Third, it must be discussed the relationship between the MAR and MAD II with the REMIT in light of the MiFID II novelties with regard to the EU regime of market manipulation. That because the REMIT would have represented the other hypothetical legislative instrument applicable to fight the IPEX manipulation. But, according to the author, not.

In chapter III, the author has clarified that the entry into force of the MiFID has led to a significant recalibration in the REMIT scope concerning the market prohibition in financial, wholesale electricity markets. Indeed, according to her analysis, by comparing the scope of the MAR and REMIT under the post-MiFID II regime, the MAR has a broader scope and an added value than the REMIT.

Primarily, because the MAR currently applies to all manipulative misconduct under article 12 MAR as involving relevant financial instruments for the MAR applicability, save for manipulative misbehaviour related to wholesale electricity derivatives where physical electricity's delivery is mandatory or

regarding spot electricity contracts that cannot affect financial instruments' price or value. It means that three situations might arise. First, both the MAR and REMIT can be applicable; the MAR should prevail because it has a broader scope than the REMIT. Second, the misconduct of market manipulation regards wholesale electricity derivatives where physical electricity's delivery is mandatory or regarding spot electricity contracts that cannot affect financial instruments' price or value; only the REMIT applies. Finally, neither the MAR nor the REMIT can be applied; the manipulative behaviour remains unpunished.

Secondly, because, unlike the REMIT, the MAR establishes an enforcement regime by means of the MAR and MAD II rules, respectively, for administrative and criminal law enforcement. In light of the foregoing, it seems more challenging for a trader who aims to manipulate the wholesale electricity market to circumvent the MAR rather than the REMIT. Then, article 2(2) REMIT does not represent a valuable solution to deal with the IPEX manipulation. For those reasons, the author has investigated on article 12 MAR and the MAD II applicability to combat market manipulation at the IPEX, rather than on article 2(2) REMIT possibility to apply.

Finally, it is essential to understand whether Italy has enforced article 12 MAR by complying with the MAR and MAD II rules to prohibit market manipulation in the Italian financial markets. That because the main issue is confined to the Italian wholesale electricity market, the IPEX, which is a financial market. Moreover, demonstrating that article 12 MAR theoretically apply to the IPEX is not sufficient to definitely apply it. Therefore, it is also significant to investigate whether the Italian legislator has properly implemented the MAR and MAD II provisions within the TUF, that represents the primary, domestic source regulating the Italian financial markets. This assessment is crucial because if that is the case, it can be established that article 12 MAR is also practicably applicable to fight market manipulation at the IPEX.

In chapter IV, the author has explained that the d.lgs.107/2018 has amended the TUF to follow the MAR and MAD II norms to prohibit market manipulation in the Italian financial markets. She has looked at article 180 TUF, concerning the applicability of the market manipulation prohibition under article 185 TUF. She has

established that, as modified by the d.lgs.107/2018, article 180 TUF complies with the applicability of the MAR pursuant to article 2 MAR.

Moreover, the author has analysed the content of article 185(1) TUF. It defines market manipulation as the offence committed by any person who disseminates false information, or sets up sham transactions or employs other devices concretely capable of resulting in a significant alteration of financial instruments' price. Article 185(1) TUF thus distinguishes between transaction and information manipulation. Hence, by making such distinction, article 185(1) TUF follows the structure of article 12(1) MAR.

In addition, according to article 185(1) TUF, information manipulation consists in a dissemination of false information made by any means and in any form to a huge public, concretely likely to cause a notable alteration in the price of financial instruments. Instead, transaction manipulation corresponds to setting up sham transactions or employing other devices concretely capable of causing a significant alteration in the price of financial instruments.

In the author's opinion, the market manipulation prohibition under article 185(1) TUF is less detailed than the one pursuant to article 12(1) MAR. It signifies that article 185(1) TUF has a more general and simplified approach than article 12(1) MAR. In fact, firstly, regarding information manipulation, signals encompassed under article 12(1) MAR have a wider scope than information under article 185(1) TUF. Secondly, about transaction manipulation, the *actus reus* under article 185(1) TUF does not encompassed securing financial instruments' prices, which is, instead, embraced under article 12(1) MAR. However, the author has concluded that, despite those differences, article 185(1) TUF complies with the *actus reus* and *mens rea* enshirined under article 12(1) MAR.

Moreover, by establishing that the active subject of the manipulative misconduct concerned might be one or more natural or legal persons, article 185(1) TUF follows the content of recital 18, articles 7, and 8 MAD II.

Finally, article 185(1) TUF provides for imprisonment from one to six years and a criminal fine ranging from EUR 20,000 to 5 million. Hence, this TUF provision complies with article 7(2) MAD II. Article 187-*ter* (1) TUF requires the competent national authorities to impose an administrative fine between EUR

20,000 and 5 million. Hence, the TUF provision at stake follows the content of article 30(2) MAR. Also, article 187-*quinquies* TUF refers to an administrative fine ranging from EUR 20,000 to 15 million or 15% of turnover when this amount is more than EUR 15 million, and it can be determined. By providing so, article 187-*quinquies* TUF agrees with article 30(2) MAR.

Therefore, in amending Section V (Title I-*bis*) TUF about the prohibition of market manipulation in the Italian financial markets, the Italian legislator has implemented article 12 MAR by concretely complying with the MAR and MAD II rules. By doing so, the Italian legislator has led to the legitimacy of applying article 12 MAR and the MAD II to perpetrators of manipulative misconduct in the Italian financial markets. Those financial markets include the Italian wholesale energy markets, which, in turn, encompass the Italian wholesale electricity market, the IPEX. According to the author's line of reasoning, the fact that the Italian legal system currently complies with the MAR and MAD II requirements results in the possibility of applying those legislative instruments to the IPEX by, at the same time, acting in accordance with the Italian law.

Given the foregoing, the author has concluded that article 12 MAR and MAD II can be used to fight market manipulation at the IPEX. Therefore, given the proven good reasons to believe that the MAR is applicable to manipulative behaviour at the IPEX, the ARERA and GME are currently able to deal with situations of market manipulation at the IPEX by using the prohibitions under article 12 MAR. Moreover, the ARERA can impose administrative sanctions on those IPEX companies that enter into contracts for the electricity supply and transportation throughout Italy, and, by doing so, manipulate the IPEX.

In addition, since the MAR is connected to the MAD II and this Directive requires criminal sanctions, the ARERA is now also capable of combatting cases of market manipulation at the IPEX by notifying the Italian competent judicial authorities a finding that an offence of market manipulation has been committed at the IPEX. Accordingly, those authorities should act by sanctioning the perpetrators of market manipulation concerned with criminal sanctions.

To conclude, if the ARERA, GME, and other Italian judicial authorities will act in this way, the IPEX manipulation will be fought by means of effective

repressive measures and the Italian end-consumers will be avoided to pay unfair electricity prices.

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