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## **PROHIBITION OF MARKET ABUSE – EUROPEAN LAW AND THE LAW OF THE REPUBLIC OF SERBIA**

**ABSTRACT:** Market abuse encompasses trading based on insider information and market manipulation. Such unfair market activities can endanger the entire market and, in their most intense and most pronounced form, seriously disrupt market dynamics, conferring undue advantages to certain participants, thus undermining principles of fair competition. Therefore, when defining legal regulations in the field of market abuse prohibition in a country, understanding the morphology of the market is crucial. It is important to consider both positive and negative consequences for the country's market economy, if the goal is to form a transparent, integrated and efficient market, which would be attractive to investors based on such characteristics and thereby contribute to the economic growth and development of the country. The Republic of Serbia still lacks sufficiently developed mechanisms and appropriate legal solutions necessary for the functioning of a market economy, but its advantage lies in the model, experience, and judicial practice of developed markets within the member states of the European Union.

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**Keywords:** *Market abuse, insider information, market manipulation, market structures, legal regulations, European Union.*

## 1. Introduction

For the efficient functioning of any market economy, it is first necessary to carry out an expert analysis of the dominant market structures, establish how the market is organized and divided within the economy of a country, and then to evaluate its advantages and disadvantages. For the effective operation of market mechanisms within the framework of a free and unified market, it is necessary to have healthy and fair competition and clear legal regulations in case of violation of market morphology and its abuse. The threat of free competition is present in both developed and underdeveloped markets, and this topic is particularly sensitive in countries that are on the path of transition. The main forms of market abuse that prevent the realization of market transparency, as a prerequisite for successful trading, are trade in insider (privileged) information and market manipulation (Raičević & Kovačević, 2013).

Viewed from the economic side, information is considered a scarce resource whose use should be taken care of (Muškić, 2005). Also, the economists are of the opinion that the characteristic of all information is its asymmetry and imperfection, as well as that for certain users (investors), certain information can be of importance, while for others they do not represent any improvement of knowledge and benefit (usefulness). It is also important to point out that every piece of information has its own shelf life. Based on everything presented, it is very difficult to define which situations are when some information is considered privileged or insider information and which are not. The given information, which has not been disclosed to the public, and can (could) have an impact on the price of a security, is called by different names: privileged, insider privileged or inside information, but regardless of the term used, its essence is reflected in an unfair advantage their owners, the use of which is strictly prohibited (Jocović, 2013).

Although speculation (manipulation) on the financial markets implies acting with illegal means in order to obtain benefits (profits) as easily and quickly as possible, it does not mean that all given actions are illegal, but such actions need to be defined on the basis of laws and/or standards. Then again, any legal action that is directed against other (groups of) persons, and even the state, is harmful if it damages other people's interests. As stated by Raičević & Kovačević (2013), there are situations when speculative businesses cause

indirect damages, in the sense that the social benefits from them are far greater than the damages (eg introduction of new technologies or trading at dumping prices).

Market mechanisms alone are not sufficient to establish the efficiency and fairness of a particular market. Therefore, the role of the state consists in formulating clear and unambiguous legal regulations in order to build a transparent market environment and protect all market participants, thereby creating a favorable market environment that is attractive to potential investors.

Laws represent determinant frameworks for shaping business and investment cooperation, as well as for encouraging and developing a congruent market structure, a functional market and, in general, the development of a country's competitiveness. In the legislative practice of the Republic of Serbia, from the aspect of promoting competition and protection (abuse) of the market, the Law on Protection of Competition (2009), the Law on Consumer Protection (2014), Law on the Protection of Users of Financial Services (2011), Law on the Capital Market (2011) and other Laws that define business conditions and the prohibition of abuse of market positions, and for the sake of a successful process of harmonizing legislation with European Union regulations in the process of joining the Republic of Serbia to this community.

The subject of the research in the paper is the presentation and analysis of the legal regulations in the area of the European Union, as well as its compliance with the legal regulations in the territory of the Republic of Serbia regarding the prohibition of the market abuse, specifically insider trading and market manipulation, all for the sake of assessing the competitiveness of the market environment in order to take the necessary steps and procedures for creating an efficient, integrated and transparent market.

The goal of the research is to, after a detailed analysis of the legal regulations regarding market abuse in the area of the European Union and the Republic of Serbia, gain insight and draw conclusions about the way to regulate and suppress market abuse, as well as to prevent the variety of its manifestations and for the sake of increasing the protection of market participants and thereby building a functional and competitive market structure, and thus the economy of a certain country or the entire geopolitical area.

## 2. Market structures, their disturbances and legal regulation of market anomalies

Market morphology (market position or condition) implies the circumstances and conditions under which the sale or purchase of a certain product or service on the market by market subjects takes place. Such processes are influenced by various factors, both on the supply side and on the demand side, and often on both market processes. Perfect competition and monopoly represent extreme cases of market competition, while other forms of competition that lie between these two extreme forms are called incomplete (imperfect) competition. Table 1 shows the morphology of the market, that is, the names of different market structures against the number of buyers and sellers as participants in a certain market.

**Table 1:** Presentation of the market morphology

Number of sellers and buyers		Number of buyers		
		Many	Little	One
Number of sellers	Many	Total competition	Oligopsony	Monopsony
	Little	Oligopoly	Bilaterally oligopoly	Quasi monopsony
	One	Monopoly	Quasi – monopoly	Bilaterally monopoly

Source: Đorđević, D. (2006)., p. 177.

Perfect competition, although it seems to be only a theoretical category, ensures maximum social welfare through dynamic competition of market participants. The attractiveness of a market depends on the possibility of doing business there, that is, easy and quick entry (and exit) from the given market. Globalization represents a challenge both for individual market actors and for entire national economies. Productivity, efficiency, rationality, innovation must be companions of all economic activities, so that local businessmen, as well as entire countries, can cope with the coming competition and (p) remain attractive for the investors. The threat to a company or country can be analyzed based on Porter's five market forces: "Intensity of rivalry, entry barriers, threat of substitutes, bargaining power of buyers and bargaining power of suppliers, which can be of high, medium or low intensity, while the threat to the observed company or the economy grows as the level of intensity of a certain force increases" (Porter, 2007, p. 24).

Disruption of the market structure leads to a mismatch between supply and demand, that is, an uneven relationship between buyers and sellers. Such

discrepancies can have significant implications for the functioning of the entire market mechanism. If this disruption occurs on the supply side, there is a reduction in the number of bidders (manufacturers or distributors), resulting in oligopoly, duopoly or, ultimately, monopoly structures that lead to a decrease in the level of supply and an increase in prices. In this way, there is a general decrease in the level of efficiency and the consumer is threatened, considering that he is forced to pay a higher price. In the event that there is a disturbance on the demand side, oligopson, duopson or monopson structures arise due to a smaller number of buyers. By reducing the level of demand, i.e. by reducing the volume of turnover, there is a drop in prices and the creation of fewer opportunities for the placement of certain products and services on the given market. Ultimately, production “suffers”, that is, producers, who feel losses.

The main goal of all market participants, regardless of the type of market structure we are talking about, is to make (the largest possible amount of) profit. In the aforementioned race for the best possible financial position, many market actors resort to non-competitive behavior in order to create a better position on the market and fight for a higher ranking. From a theoretical point of view, market competition can be threatened in three ways Erić (2008): (1) monopoly agreements (cartels), (2) abuse of a dominant (ruling) position on the market, (3) market structures and competition protection. such tendencies of market participants, which implies non-compliance with the rules of competitive behavior, the competitive discipline of market subjects must be established as an obligation through compliance with legal regulations and by laws.

The branch of law that deals with issues of market structures and relations within them is called competition law. Its scope of interest is suppression of the creation of monopolies and abuse of a dominant (ruling) position on the market.

In countries with a developed market economy, the protection of competition is clearly regulated by special rules created by the practice of official bodies for the protection of competition, usually called Agencies or Commissions.<sup>1</sup>

The competences of these institutions are reflected in the procedures for applying the general rules of competition law. The courts control the decisions of the aforementioned authorities in cases against market players who threaten competition. The aforementioned rules refer in particular to the way of determining the relevant market in order to measure the market power of certain participants, as well as to the methodology of measuring that power.

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<sup>1</sup> In the Republic of Serbia, there is also a Commission for the Protection of Competition, established by the Law on Protection of Competition (2005).

Competition protection policy was regulated in the Republic of Serbia for the first time by a special regulation in the form of the Law on Competition Protection (2005), passed in 2005. Although the law itself was characterized by a lot of shortcomings in its implementation, its most significant contribution can be seen through the establishment of the Commission for the Protection of Competition in April 2006. In fact, the establishment of such an independent body was also a form of international obligation that Serbia undertook within the process of joining the European Union through the Stabilization and Association Agreement (SAA) (2008, Article 73, paragraph 3 and 4). Namely, on the basis of the signed international agreement, what is not in accordance with the Continuation of harmonization of the competition protection policy in the Republic of Serbia with practice and EU law is carried out with the adoption of the new Law on the Protection of Competition in 2009 (2009), which is still in force, with amendments from 2013 (2013). As a special chapter in the negotiations on Serbia's accession to the European Union, the competition protection policy is foreseen, and the SAA prescribes the obligation of our country to apply the standards and criteria resulting from the application and interpretation of the rules of the EU and its institutions when determining the violation of competition. Apart from the mentioned law, the area of competition protection is regulated by the regulations issued by the Government of the Republic of Serbia, as stated on the website of the Commission for the Protection of Competition.

The Commission for the Protection of Competition, as an independent organization established on the basis of the Law on the Protection of Competition, has the status of a legal entity and is responsible for its work to the National Assembly by submitting an annual report on its work. It is a financially independent institution, and it finances its work with its own income, while the surplus is paid into the budget of the Republic of Serbia. Independence is also based on the election period for the leadership of the Commission (which is five years, unlike the election cycle), as well as the fact that the President of the Commission and a certain number of Council members cannot be party figures.

### **3. Prohibition of the market abuse – Legal regulation of the european union**

The countries of the European Community for the first time legally regulated the abuse of insider information, so-called. Insider dealing as early as 1989 with the adoption of Directive 89/592/EEC better known as the Insider

Dealing Directive (IDD). It became the basis for the fight against abuse on the European securities market, but given the accelerated processes of financial market development, it could no longer respond to new requirements, and in 2003 a new directive was adopted that regulated the area of insider trading, information and market manipulation.

In the territory of the European Union, the mechanisms for preventing and sanctioning market abuses are currently based on the provisions of Directive 2014/57/EU of the European Parliament and of the Council of the European Union, starting from April 16, 2014, 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). All issues related to market abuse, including insider information and market manipulation, are regulated by this directive. Thus, Article 1, paragraph 1 of this Directive reads: “This Directive establishes minimum rules for criminal sanctions for trading on the basis of insider information, for illegal publication of insider information and for market manipulation in order to ensure the integrity of the financial markets in the Union and increase the protection of investors and confidence in those markets.” The European Parliament and the Council of the European Union adopt this directive, taking into account the Treaty on the Functioning of the European Union, and in particular its Article 83. Paragraph 2, as well as the proposal of the European Commission, after forwarding the draft legislative act to the national parliaments, but also with the consultation and adopted opinions of the European Central Bank, as well as the European Economic and Social Committee, and respecting the regular legal procedure.

Previous EU directive – Directive on insider trading and market manipulation (market abuse) – Directive 2003/6/EC, which regulated the area of market abuse, specifically insider trading and market manipulation dealing and market manipulation), with the aim of increasing the integrity of the capital market and ensuring equal treatment of participants (Radomirović & Prokopović, 2012), ceased to be valid, and was replaced by the innovative Directive 2014/57/EU.

From all of the above, we conclude that many countries, both member and candidate countries, tried to achieve complete harmonization with EU law related to this area, but it seems that not all of them succeeded in this completely, and it was necessary to make certain corrections and in the directive itself insist on full harmonization in order to build an integrated and efficient financial market on the territory of the EU.

#### **4. Prohibition of market abuse in the economy of the Republic of Serbia – legal regulation**

Regarding market abuses, the most important thing is to establish a legal and institutional framework, i.e. mechanisms for sanctioning them within each separate legal system. It is precisely for this reason that most legal systems include regulations prohibiting the trading of privileged information and the implementation of market manipulations. For this purpose, criminal law and administrative sanctions are mostly used in order to prevent various forms of trade of privileged information and market information in which they can appear in everyday market practice among market actors.

The development of the financial market is of particular importance for attracting new competitors and achieving a developed market economy, especially for a country in the process of transition, such as the Republic of Serbia. The regulation of the prohibition of market abuse in the Republic of Serbia was established for the first time in 2003 by the Law on the Market of Securities and Other Financial Instruments (2003), in the section on privileged information, when the first attempt was made to harmonize with the European Law. Improvement of harmonization of this area with the legal practice of Europe was done by passing the Law on the market of securities and other financial instruments in the middle of 2006.

With the entry into force of the Law on the Capital Market (May 17, 2011, although its implementation was delayed for six months, until November 11, 2011 to be precise), the previous Law on the Securities Market and Other Financial Instruments was replaced, which protects investors in a better way, ensures the efficiency and transparency of the capital market, which simultaneously reduces the risk of participants in the given market, and defines the area of prohibition of market abuse based on European standards.

The Capital Market Law (2011), based on Article 1, paragraph 5, regulates: “prohibition of fraudulent, manipulative and other illegal actions and acts in connection with the purchase or sale of financial instruments, as well as the exercise of voting rights in connection with securities issued by public companies”. On the basis of Chapter VI of the same law (Art. 73 – 94), abuses on the market, presented in Table 2, are regulated.



**Table 2.** Articles of Chapter VI of the Capital Market Law relating to Market Abuse

<b>Articles of the Capital Market Law relating to Market Abuse</b>	
Article 73	Use
Article 74	Subject to bans
Article 75	Inside information
Article 76	Prohibition of misuse of insider information
Article 77	Exchange of insider information
Article 78 and Article 78a	Other persons to whom the provisions prohibiting the misuse of insider information apply
Article 79, 80, 81 and 82	Disclosure of insider information directly related to the issuer
Article 83 and Article 84	List of persons possessing insider information
Article 84a	Trading ban period for a person performing the duties of a manager
Article 84b	Market research
Article 85	Manipulations on the market
Article 86	Prohibition of market manipulation
Article 87	Recommendation
Article 88	Identity of the person making the recommendation
Article 89	General rules for the content of the recommendation
Article 90	General rules for disclosure of interests and conflicts of interest
Article 91	Exceptions
Article 92	Distribution of a referral made by a third party
Article 93 and Article 94	Supervisory measures

Source: Authors, adapted based on the Capital Market Law (2011).

Within the framework of this Capital Market Law, two criminal offenses (Articles 281 and 282) are defined by penal provisions, which refer to the “Prohibition of manipulation on the market”, i.e. “Using, revealing and recommending insider information”. Since the entire issue related to the capital market and specifically the part related to abuses on the market is defined in one act, this way of defining the legal regulation is considered better and more practical from a legal and technical point of view (Milošević & Stanimirović, 2013).

The Law on the Capital Market also provides that the Commission for Securities prescribes in more detail the procedures that constitute market abuse (which are not clearly specified by law), as well as the obligations of the Commission and market participants in order to prevent and detect them.

## 5. Conclusion

Legal certainty is a decisive factor for the development of the competitiveness of a certain country as well as the attraction of new investors. If there are institutional barriers to entering the market, as well as legal obstacles within the legal system, in the sense that the regulatory framework has not defined the functioning of the market economy in the most efficient way, this can represent a problem for potential market participants, and generally harms the development of the entire economy of a country .

Abuse of the market in its worst form (intense, continuous and unpunished) as a rule leads to the acquisition of a privileged position of certain actors on the market, who thereby achieve a competitive advantage. Any abuse of the market leads to the disruption of market structures in terms of its deviation from the optimal model in the form of perfect competition. Ultimately, a monopoly position has extremely negative consequences for the economy and competitiveness of a country. Therefore, when defining the legal regulations governing the area of market abuse prevention, it is of key importance to know all potential forms of market structure and their overall positive and negative effects on the state of the economy in a country, and in order for the given legal solutions to contribute to enabling optimal conditions for realization economic growth and development.

Within the framework of the European Union, the prevention and sanctioning of market abuses in the form of regulation of trade based on insider information as well as market manipulations is carried out on the basis of Directive 2014/57/EU – Directive on criminal sanctions for market abuse (Market Abuse Directive) starting from the April 2014. The aforementioned directive established minimum rules for criminal sanctions for basic forms of market abuse in order to increase the functionality of financial markets and reduce risks for investors, and the task of the member states, as well as the accession countries of the EU, is to implement the aforementioned rules in a harmonious and unified manner, and to regulate and sanction this type of non-market behavior even more harshly through court practice.

For effective enforcement of the law on the capital market and criminal proceedings, it is not enough just to regulate and define the term (inside information and market manipulation) and punitive measures in case of market abuse. It is important to create a jurisprudence that will make this area more comprehensive, more precise and wider than it is able to be covered by legal norms, with its decisive and efficient implementation of given laws as well as specific interpretations. In this way, the situation will be avoided where

legal regulations are actually the best protection for potential perpetrators of market abuse crimes (manipulators and insiders). This especially applies to transitional countries, such as the Republic of Serbia, where the mechanisms for the functioning of the market economy are still insufficiently developed. On the other hand, the main advantage of smaller and underdeveloped markets (capital) lies precisely in the fact that they can base mechanisms and systems for the protection and establishment of a functional market on the experiences of large and developed ones, which are certainly the member states of the European Union.

In this context, the main task of market organizers and their controllers is to ensure, respect and implement clear legal regulations regarding the prohibition of market abuse, in order to ensure the integrity, functionality and liquidity of the market and, on that basis, to protect investors and other market participants.

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## **ZABRANA ZLOUPOTREBE TRŽIŠTA – EVROPSKO PRAVO I PRAVO REPUBLIKE SRBIJE**

**APSTRAKT:** Zloupotreba tržišta podrazumeva trgovinu na osnovu insajderskih informacija kao i manipulacije na tržištu. Ovakve nefer aktivnosti u okviru tržišnih aktera mogu da ugroze i u svom najintezivnijem, izraženijem obliku dovedu do poremećaja optimalnih tržišnih struktura i sticanje povlašćenog položaja određenih učesnika na

tržištu, kroz dostizanje konkurentske prednost nedozvoljenim sredstvima. Zbog toga je prilikom definisanja zakonskih propisa u oblasti zabrane zloupotrebe tržišta u jednoj zemlji od ključnog značaja poznavanje morfologije tržišta, kao i svih njenih pozitivnih i negativnih posledica po tržišnu privredu jedne zemlje, zarad formiranja transparentnog, integrisanog i efikasnog tržišta, koje bi na osnovu takvih karakteristika bilo privlačno za investitore a time doprinosilo privrednom rastu i razvoju date zemlje. Republika Srbija još uvek nema dovoljno razvijene mehanizme i odgovarajuća zakonska rešenja neophodna za funkcionisanje tržišne privrede, ali se njena prednost ogleda u uzoru, iskustvu i sudskoj praksi razvijenih tržišta u okviru zemalja članica Evropske unije.

**Ključne reči:** *zloupotreba tržišta, insajderske informacije, tržišna manipulacija, tržišne strukture, pravna regulativa, Evropska unija.*

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