

**Banking in the crosshairs: Investigations by financial regulators and
competition authorities in the banking industry – Libor, Forex, what next?**

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Certain episodes of benchmark manipulation (Libor, Forex, etc.) have generated global doubt and concern with regards to the integrity of many benchmarks, undermining the integrity of the system and legal and commercial certainty, and resulting in major losses for investors.

- 1. Have the authorities from your jurisdiction proposed or adopted any measures to ensure the necessary integrity of the market and of its benchmarks, guaranteeing that they are not distorted by any conflict of interest, that they reflect economic reality and that they are used correctly? (i.e.: measures to better protect investors, reinforce confidence, address unregulated areas, and/or ensure that supervisors are granted adequate powers to fulfil their tasks)**

In our jurisdiction, the Spanish regulator is working to implement the new European regulations regarding market abuse before the end of the second quarter of 2016: (i) Regulation (EU) N° 596/2014 of the European Parliament and of the council on Market Abuse (MAR)¹ and, (ii) Directive 2014/57/EU of the European Parliament and of the Council on criminal sanctions for market abuse (MAD)². These two new regulations will establish a more uniform interpretation of the European Union market abuse framework and will provide new measures that ensure the integrity of the market and its benchmarks.

- 2. Which authority monitors financial bodies in your jurisdiction?**

The authorities that monitor the financial bodies in our jurisdiction are the Bank of Spain and the Spanish Securities & Exchange Commission (CNMV).

The Bank of Spain³ is the central bank of Spain. It is also the national supervisor of the Spanish banking system and its activity is regulated by Law 13 of 1 June 1994, namely the Law of Autonomy of the Bank of Spain, its main functions being to define and implement the monetary policy of the Eurogroup, as well as to oversee solvency and compliance with certain rules of credit institutions, other entities and financial markets, among others.

CNMV is the agency in charge of supervising and inspecting Spanish stock markets and the activities of all participants in those markets. It was created by Law 24 of 28 July 1988 regarding the securities market (Spanish Securities Market Law), which instituted in-depth reforms of this segment of the Spanish financial system. Furthermore, Law 37 of 1998 updated the aforementioned Law and established a

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0596&from=EN>

² <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0057&from=EN>

³ <http://www.bde.es/bde/en/>

regulatory framework that is fully in line with the requirements of the European Union and which enforces the development of European stock markets.

The purpose of the CNMV⁴ is to ensure the transparency of the Spanish market and that prices are correctly set therein, as well as the protection of investors. The CNMV promotes the disclosure of any information required to achieve these ends by any means at its disposal.

The main functions of the CNMV relate to stock market companies, and investment companies and securities established in the secondary market. The CNMV also oversees the investment companies and securities previously mentioned in order to provide certificates of completion of transactions and the solvency of the market (i.e. Collective Investment Schemes, Broker-Dealers and Dealers and Portfolio Management Companies).

- 3. [For EU and EFTA member states] has your country completed the transposition of Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments (also known as «MiFID II»)? If not, when will transposition be completed?**

No, MiFID II has not already been transposed into the Spanish legal framework, and it is not expected to be implemented until the end of the second quarter of 2016. Since the directive was published, the European Securities and Markets Authority (ESMA) has produced two reports concerning technical standards, with regard to which CNMV has stated that it will proceed to implement MiFID II following its recommendations.

- 4. Have the authorities in your jurisdiction conducted any inquiry on leading banks or institutions in relation anti-trust practices with regards to essential financial information and/or the clearing system?**

To date, the Spanish regulator has not conducted any inquiry into top-tier banks or financial institutions concerning such practices with regard to essential information or the clearing system. In addition, the fact that there has been no scandal regarding benchmarks our financial markets means that the CNMV has not been compelled to commence such proceedings.

⁴ <http://www.cnmv.es/portal/home.aspx>

5. Which new requirements have been established in order to reinforce governance and oversight and introducing measures sanctioning those responsible for LIBOR and other index manipulation?

MAR establishes new requirements for the first time in the EU in relation to the LIBOR scandals of summer 2012 in the UK, and confirms that attempting to engage in market manipulation is prohibited. For these reasons, it is forbidden either to manipulate or attempt to manipulate benchmarks including, amongst other, the interbank offered rates.

In this context, rumours and false or misleading information are included in the definition of false and misleading information. Furthermore, anyone who freely expresses any information contrary to their own opinion can also be considered as spreading false or misleading information or misleading others; additionally, any information published on social media will be similarly treated.

Notwithstanding what it is set out in MAD regarding criminal sanctions, MAR sets forth certain administrative sanctions including, among others, the possibility of imposing a ban on exercising any management function in investment firms. Also, the opportunity exists in MAR for Member States to impose both types of sanctions (criminal and administrative). In this regard, the maximum amount of administrative sanctions would be in the region of € 5.000.000 for individuals that contravene the prohibition of market manipulation, and € 15.000.000 or up to 15% of the proceeds thereof for legal entities.

6. Has any similar scandal-malpractice affected your jurisdiction? Have penalties been imposed? and/or administrative or criminal sanctions? If not, which sanctions are foreseen in your jurisdiction for this type of misconducts?

The benchmarks scandal has been on the minds of all Member States due to the relevance for all related financial products. In Spain it has been part of other unexpected scandals, for example, the Gowex case (a company operating in the telecommunications market since 1999 which has been at the forefront of creating Wireless Smart Cities, and providing Free & Premium WiFi connectivity in public places and on transportation⁵, and considered an example of Spanish innovation, which went bankrupt in summer 2014). The case dealt with the accounting fraud that brought down the WiFi provider, and had a knock-on effect on the Spanish Alternative Stock Market (MAB) so much so that, mere days after the Gowex scandal, a further three companies listed on the market declared themselves bankrupt.

⁵ <http://www.gowex.com/en/investors-shareholders/alternext/lets-gowex/>

The President of Gowex was seen as a guru, notwithstanding the fact that he was falsifying accounts over four a period of four years; the main dilemma is that nobody detected the fraud i.e. neither auditors nor tax managers. Consequently, CNMV shall improve their channels to prevent cases such as this where it appears that we are living in wonderland.

In that landmark case, the President of Gowex is on trial for corporate offences, namely the distortion of company accounts, (as set out in article 290 of the Spanish Criminal Code, an offence punishable by a sentence of one to three years' imprisonment and a ban from six to twelve months⁶) and offences relating to the consumer market, specifically the distortion of economic and financial information, as well as the use of relevant information for falsifying annual accounts, and fraud.

The sanctions for benchmarking manipulation, until MAD is implemented in Spain, are laid down in article 284 of the Spanish Criminal Code, which was introduced by the previous directive 2003/6/CE, which provides for a punishment of a sentence of imprisonment from six months to two years or else a ban of twelve to twenty-four months for:

- any case in which violence, intimidation or deceit were used to attempt to alter the prices that would otherwise arise from a free competitive market in products, merchandise, securities or financial instruments, services or any other moveable assets or real estate subject to contract.
- disseminate news or rumours, themselves or through the media, to persons or companies, that alter or preserve the listed price of a financial security or instrument, obtaining a profit for them or others of over 300.000 euros, or alternatively causing a similar amount's worth of damage.
- using privileged information for insider dealing, carrying out transactions or giving operating orders liable to produce false indications concerning the offer, demand or price of financial securities or instruments, or using that same information, themselves or in collusion with others, to secure for themselves a dominant market position regarding such securities or instruments in order to set their prices at abnormal or artificial levels.

In the landmark cases, a ban is to be imposed prohibiting, for a period of one to two years, a person from trading on the financial market as a principal, agent, broker or analyst.

⁶ Spanish Criminal Code <http://www.legislationline.org/documents/section/criminal-codes>

7. How are the potential conflicts of interest affecting banks or other financial institutions addressed in your jurisdiction? Which requirements are adopted to ensure that benchmarks reflect economic reality and that they are used correctly?

The regulation of the conflicts of interest affecting financial institutions is contained in the Securities Market Law dealing with the rules of conduct in the securities markets and registration requirements. In this regard there are two main types of conflicts of interests: the first between the financial institution and its client, and the second resulting from the existence of a number of different clients of the same financial institution. Such matters will be regulated by the CNMV.

Furthermore, until MAR and MAD are totally incorporated within our legal framework, the potential conflicts of interest will be governed by the Securities Market Law, which was last modified in relation to this subject by Royal Decree 1333 of 2005 that implemented the requirements of EU Directive 2003/6 on insider dealing and market manipulation, which establishes specific disclosure requirements that apply to investment services, entities and credit institutions providing services regarding investment recommendations. The Securities Market Law sets specific requirements necessitating the disclosure of the organisation's internal conduct regulations formed to prevent and avoid conflicts of interest in relation to investment recommendations, as well as the obligation to disclose on a quarterly basis the proportions in which the organisation has made recommendations to buy, sell or maintain their position with the corresponding proportions in which those issuers have been affected by the recommendations.

Accordingly, the CNMV in their annual report (2013)⁷ said that with regard to suspicious transactions 65.3% of the reports received were linked to the potential use of insider information. Furthermore, just as in 2012, there was an increase in the number of reports regarding the manipulation of benchmarks.

⁷http://www.cnmv.es/DocPortal/Publicaciones/Informes/IA_2013en.pdf

8. Are any measures foreseen in your jurisdiction for the protection of “whistleblowers”?

With regard to this matter CNMV reported in 2007 that they were working towards establishing a procedure by which anyone could inform the regulator of any situation that could affect the market or be considered as a market abuse practice. However, this never materialised and the project was shelved.

With this in mind, the new regulations (MAR and MiFID II) force the competent authorities of Member States to proceed with the creation of whistleblowing channels and to receive information on possible breaches of the regulations provided by others who are not legally part of the transaction and who do not have any notification obligations.

In the near future, CNMV will implement a new procedure by which whistleblowers may bring new information which assists CNMV in the targeting and imposition of sanctions in cases of insider dealing and market manipulation. Until this time, whistleblowers were in a difficult position where they may be put off either for fear of retaliation or else for lack of incentives.

Furthermore, it is expected that whistleblowers will receive financial incentives in cases where they offer relevant information about potential infringements but also where this information would prove useful in proceeding with the appropriate sanction for non-compliance with the established rules. Also, as there is a lack of protection of southern European member states, it has to include mechanisms that provide appropriate protection of the accused, particularly with regard to the right of the protection of his personal data.

We believe that Members States should peruse the process implemented by the United States Securities and Exchange Commission, where each year whistleblowers are rewarded with between 10% and 30% of the money raised in cases where the sanctions exceed one million dollars.

9. Is there any measure in place in your jurisdiction to guarantee suitable and appropriate evaluation of benchmarks?

There is no measure or study relating to the appropriate evaluation of the benchmarks. However, as previously mentioned, the Spanish regulator will implement the main points of MAR and MAD before the end of 2016 regarding the need for Member States to establish the joint and equal treatment of these scenarios, together with the corresponding sanctions laid down by MAD.

- 10. Which requirements and/or transparency rules –if any- are undertaken in your jurisdiction in order to prevent distortions of competition resulting from divergences between other national laws and/or to provide more legal certainty for market participants? (i.e. to prevent or limit regulatory complexity and potential regulatory arbitrage)**

The Spanish regulator, since MAR was published, is willing to provide a uniform and stronger framework which will preserve market integrity, avoid potential regulatory arbitrage, as well as improve accountability in the event of attempted manipulation. However, until MAR is totally implemented in our framework (July 2016), there is no expectation of any requirements or transparency rules being implemented regarding these situations, except in the event that ESMA requires any measures to be implemented at short notice.