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A new system for the punishment of market abuse in France

The law of 21 June 2016 reforming the system for the punishment of market abuse introduces a new system for the punishment of market abuse into French law, overseen by both the criminal courts and the Autorité des Marchés Financiers.

Why has the system for the punishment of market abuse been changed?

The French Constitutional Council, in its decision of 18 March 2015, when a priority issue of constitutionality arose in the criminal aspect of the EADS case, found that the system then in force, which allowed the same people to be punished for the same facts by both the criminal courts and the AMF's Enforcement Committee, was contrary to the principle of the necessity of crimes and punishments introduced by Article 8 of the Constitution. The Constitutional Council deferred the repealing of the legal provisions criticised (Articles L. 621-15 and L. 465-1 of the French Monetary and Financial Code) to 1 September 2016, to leave the French legislature the time to legislate and so that prosecutions could still be brought or continued.

During this transitional period, the French financial prosecution service, which is the prosecution service that has special authority to handle stock market cases, and the Autorité des Marchés Financiers, agreed to ensure that ongoing cases are not subject to double punishment, in both criminal and administrative form.

After a process of deliberation in which all the parties involved in the punishment of market abuse took part, including the AMF and the French financial prosecution service, as well as representatives of the Chancellery and the Treasury, a draft bill intended to rectify this unconstitutionality was tabled by member of parliament D. Baert in March 2016.

What does the new system introduced consist of?

The system applicable since the entry into force of the law of 21 June 2016, supplemented by an implementing decree dated 11 August 2016, consists of the implementation of a system of case referral on the prosecution of alleged facts, in order to decide whether the criminal channel or the administrative channel is the most appropriate choice for the punishment of the alleged facts, while prohibiting each of the authorities in question (the AMF's Board and the French financial prosecution service) from prosecuting market abuse facts relating to a person without obtaining the other's approval to do so.

More specifically, if the AMF or the French financial prosecution service intends to issue a statement of complaint or bring public proceedings against a person for facts qualifying as market abuse (i.e. a breach of the regulations on insider dealing or insider dealing, price manipulation, or a breach of the regulations on the dissemination of false information or the dissemination of false information), it must inform the other authority of its intentions, to secure their approval within a period of two months.

If a disagreement arises on the appropriate punishment channel (in other words if both of the parties wish to prosecute), the decision is made by a third party, namely the Public Prosecutor at the Paris Court of Appeal, who must issue their decision within a one-month period. This decision cannot be appealed.

The decree of 11 August 2016 clarified the conditions of implementation of the referral system provided for by Law.

What changes have been made with regard to the possibility, for the AMF, of punishing market abuse?

In theory, the authority of the AMF's Board to prosecute, and of the Enforcement Committee to punish market abuse is intact. In practice, however, two prerequisites must now be met to issue a statement of complaint and punish market abuse, where appropriate: (i) the person against whom a market abuse complaint is envisaged has not already had public proceedings brought against them by the French financial prosecution service for the same facts and, (ii) the French financial prosecution service has stated that it does not wish

to also bring criminal proceedings against them and secured approval to do so through the referral procedure.

As cases are referred when statements of complaint are issued, the AMF's investigating powers remain the same, for all forms of market abuse, and will continue to be exercised under similar conditions, in agreement and cooperation with the French financial prosecution service.

Note that the law of 21 June 2016 also opened the possibility for the AMF to conclude administrative settlements for market abuse cases, an option that was previously reserved for breaches of professional rules alleged against regulated professionals.

Read more

- Law n° 2016-819 of 21 June 2016 reforming the system for the punishment of market abuse (in french)

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