

# The 3<sup>rd</sup> meeting of the Steering Group

Sanctions for EWC member guilty of disclosing confidential information to unauthorised persons



# Sanctions

Members of the EWC are obliged to respect confidentiality of some of information obtained from the central management.

It this includes the prohibition of providing information to unauthorized persons and the unauthorized use of information, e.g. stock market speculation.

Recital 36 of the EWC Directive states that, in accordance with the general principles of Community law, administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate to the gravity of the crime, should apply in the event of a breach of the obligations arising from the EWC Direct

The EWC directive does not provide further guidance on sanctions arising from violations of the EWC directive, leaving detailed regulation to Member States.



# Legal basis of sanctions

- ▶ EWC agreement sanction –

## National legislation

- ▶ European legislation
- ▶ There are different definitions of confidential information so it is not possible to list all sanctions in advance.
- ▶ In national and European law the type of sanction will vary depending on the type of information covered by the sanction, e.g. business secret and banking secret, national security secret etc.

# Sanction applied on the grounds of EWC agreement

- ▶ EWC agreement sanction – removal from the EWC
- ▶ Eg. „ *Any employee representative or substitute or expert who breaches the obligation of confidentiality set out in ..... will **at the discretion of Central Management be removed from the EWC** and may be the subject of disciplinary and/or legal proceedings.*„



# Employment relations

- ▶ National labour law or employment contract may foresee the employee's widely understood obligation to care for the good of the workplace.
- ▶ Is this is the case, breaching the obligation of confidentiality is the breaching of the basic obligations of an employee and may provide the basis for disciplinary termination of employment.

## Civil sanction – compensation, indemnity, damages

- ▶ Eg. DIRECTIVE (EU) 2016/943 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure
- ▶ Article 14
- ▶ 1. Member States shall ensure that the competent judicial authorities, upon the request of the injured party, order an infringer who knew or ought to have known that he, she or it was engaging in unlawful acquisition, use or disclosure of a trade secret, **to pay the trade secret holder damages appropriate to the actual prejudice suffered as a result of the unlawful acquisition, use or disclosure of the trade secret.**
- ▶ Member States may limit the liability for damages of employees towards their employers for the unlawful acquisition, use or disclosure of a trade secret of the employer where they act without intent.



## Civil sanctions, compensations, indemnity, damages,

- ▶ Know-how follow up
- ▶ 2. When setting the damages referred to in paragraph 1, the competent judicial authorities shall **take into account** all appropriate factors, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, **in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the trade secret holder by the unlawful acquisition, use or disclosure of the trade secret.**
- ▶ Alternatively, the competent judicial authorities may, in appropriate cases, set the damages as a lump sum on the basis of elements such as, at a minimum, the amount of royalties or fees which would have been due had the infringer requested authorisation to use the trade secret in question.

## Financial market administrative sanctions

- ▶ At present, the direct source of regulation of the definition of confidential information regarding the financial market and the regime for dealing with it is in Polish conditions and in the legal orders of other Member States Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on fraud on the market (Regulation on market abuse) 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.
- ▶ The MAR Regulation introduces for the first time a uniform definition of confidential information in all Member States.



# Financial market administrative sanctions

- ▶ Article 30 of the MAR Regulation provides that Member States, in accordance with national law, may apply administrative sanctions and other **administrative measures** through their authorities.
- ▶ As explained in recital 17, the actual amount of administrative fines imposed in specific cases may reach the maximum level provided for in this Regulation or the higher level provided for under national law for very serious infringements, while fines significantly lower than the maximum level may be applied for less significant breach or in the event of a settlement.
- ▶ This Regulation does not limit the possibility for Member States to introduce stricter sanctions or other administrative measures.

# Financial market administrative sanctions

- ▶ Art.. 30 par. 2 letter i) In respect of a natural person, maximum administrative pecuniary sanctions of at least:
  - ▶ (i) for infringements of Articles 14 (insider dealing and of **unlawful disclosure of inside information**) and 15 (market manipulation) , EUR 5 000 000 or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014;
  - ▶ (ii) for infringements of Articles 16 (Prevention and detection of market abuse) and 17 (Public disclosure of inside information) , EUR 1 000 000 or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014; and
  - ▶ (iii) for infringements of Articles 18(Insider lists), 19 (Managers' transactions) and 20 (Investment recommendations and statistics) , EUR 500 000 or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014; and



## Article 10 Unlawful disclosure of inside information

- ▶ 1. For the purposes of this Regulation, unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, **except** where the disclosure is made **in the normal exercise** of an employment, a profession or **duties**.
- ▶ This paragraph applies to any natural or legal person in the situations or circumstances referred to in Article 8(4).
- ▶ 2. For the purposes of this Regulation the onward disclosure of recommendations or inducements referred to in Article 8(2) amounts to unlawful disclosure of inside information under this Article where the person disclosing the recommendation or inducement knows or ought to know that it was based on inside information.
- ▶ Pursuant to art. 17 central management may provide EWCs with confidential information that has not yet been made public, provided that EWC members are obliged and undertake to maintain confidentiality. Otherwise, under the provision, when this information is provided, a simultaneous obligation arises to disclose such information fully and effectively.

# Criminal sanctions

- ▶ Directive 2014/57 / EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse.
- ▶ The so-called MAD is addressed to EU Member States and requires implementation into their national legal order by July 3, 2016. The directive provides for the obligation to introduce in national law of EU Member States criminal penalties for natural persons and legal provisions for infringements provided for in the MAR Regulation.
- ▶ The directive sets minimum standards / sanctions, and thus individual Member States can, at their own discretion, introduce or maintain stricter criminal provisions on fraud.
- ▶ The directive sets minimum standards for criminal sanctions for the use of confidential information, and unlawful disclosure of confidential information.
- ▶ "Confidential information" means information within the meaning of Art. 7 item 1-4 of Regulation (EU) No 596/2014 (Article 2 point 2 of the Directive)



# Use of confidential information

- ▶ In accordance with art. 3 of the Directive, the use of confidential information occurs when a person is in possession of confidential information and uses that information when purchasing or selling, on his own account or for a third party, directly or indirectly, the financial instruments to which that information relates.
- ▶ **This provision applies to all persons who hold confidential information because of:**
- ▶ a) being a member of the administrative, management or supervisory bodies of the issuer or emission allowance market participant;
- ▶ b) holding shares in the capital of the issuer or emission allowance market participant;
- ▶ c) **having access to information on employment, occupation or duties;** or
- ▶ d) involvement in criminal activities.
- ▶ This Article shall apply to any person who has obtained inside information in circumstances other than those mentioned in the first subparagraph, where that person knows that the information in question constitutes inside information.

# Criminal penalties for natural persons

- ▶ According to art. 4 paragraph 1 of the Directive, unlawful disclosure of inside information constitutes a criminal offence at least in serious cases and when committed intentionally.
- ▶ Art.. 4 par. 2 unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties, including where the disclosure qualifies as a market sounding made in compliance with Article 11(1) to (8) of Regulation (EU) No 596/2014.



# Criminal penalties for natural persons

- ▶ Offences of insider dealing, recommending or inducing another person to engage in insider dealing and offences market manipulation are punishable by a **maximum term of imprisonment of at least four years** (art. 7 par. 2).
- ▶ Offence of unlawful disclosure of inside information is punishable by a maximum term of imprisonment of at least two years (art. 7 par.3).
- ▶ These were examples of sanctions. Other sanctions may be regulated in national or EU law.