School of Economics and Business Administration

LLM in Transnational and European Commercial Law & Alternative Dispute Resolution

Dissertation

Title: "The Notion of Insider Trading and Market Manipulation in E.U. Legislation"

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Thessaloniki, December 2013

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INTRODUCTION

A security is a fungible, negotiable financial instrument that represents some type of financial value. Security markets provide a way for investors to channel their savings as creditors to debtors. The persons involved are a) the creditor b) the debtor and c) financial intermediaries. It would be possibly useful to very briefly give a general picture of how securities markets work.

The lenders include the private sector (individuals, corporations, institutions not affiliated with governments) and the public sector investors (public owned corporations/ institutions and governments through exchequer). They use willingly their savings which are profits coming from other activities, to purchase a claim in future earnings. They are also called creditors and investors.

The borrowers are mainly corporate entities and governments. Through borrowing they get an opportunity to raise capital for projects that require huge financing. The corporate borrowers borrow through equity and bond debt instruments while governments borrow only through bonds. Borrowers are also called debtors and issuers.

The financial intermediaries connect the creditors and the debtors. They mainly include banks, brokers and hedge funds. Their main role is double. First they channel the money needed from the creditor to the debtor. Second they analyze and evaluate risks involved in investing in the debtor's securities and advise creditors on the suitability of securities instruments offered by borrowers.

From the aforementioned it can be easily deducted that the possession of confidential information concerning the issuer is a crucial advantage for an investor. It can contribute to gaining huge profits or avoiding huge losses. Furthermore securities markets play vital role regarding the flow of capitals. Through this flow of capitals, money is found for governments to fulfill their policies and corporations to finance projects, which offer workplaces for millions of people worldwide. Any kind of abuse regarding this market, would harm its effectiveness and reduce investors'

confidence. This could subsequently have major negative results worldwide. For this reason market abuse which consists of insider dealing and market manipulation is worldwide prohibited. The goal of this dissertation is to focus on the main subjects concerning EU legislation on Market Abuse.

I. THE EVOLUTION OF EU LEGISLATION

A. HARMONIZATION BASED ON E.C.J. CASE LAW APPROACH

Until the mid 1980s there was no legislation in E.U. level concerning securities market. The regulation of these markets was left to for national E.U. Member States' legislators. European Court of Justice (ECJ) jurisprudence granted for the harmonization of these legislations. The main disadvantages of this tactic were mainly the following ones:

a. The market integration and approximation of national laws effected through the Court's case law developed at a slow pace[1].
b. The coherence of this kind of integration was lesser than it would have been, if it had been evolved through harmonization of legislation[2].
c. The "general good" criterion[3] evolved by the ECJ set obstacles to the establishment of a single E.U. market, concerning also financial services[4]. The general good included imperative public interests like protection of consumers, reasons of political and ethical nature founded on social order etc, which had been seen as reasonable and justified restrictions to the freedom to provide services[5].

One indicative example of the obstacles set to financial services by ECJ jurisprudence is the decision **ECJ 24.10.1978 (C-15/78)** known also as Koestler case[6]. This concerned the application of a German rule, which voided stock exchange futures as wagering agreements, to a series of stock exchange speculative transactions undertaken by a French bank on behalf of a German national. The questions set to ECJ concerned, whether articles 59 and 60 EEC Treaty excluded the

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[1] See **Avgouleas Emilios**, The Mechanics and Regulation of Market Abuse, A Legal and Economic Analysis, Oxford University Press, 2005, Chapter 6, p. 3
[2] See ibid.
[3] Imperative public interests like protection of consumers, social order had been seen as reasonable and justified restrictions to freedom
[4] See ibid.
[5] See ECJ **10.05.1995,Court** Decision, C-384/93, available at the official EU website http://eur-lex.europa.eu/lex/LexUriServ/LexUriServ.do?uri=CELEX:61993J0384:EN:HTML
[6] http://eur-lex.europa.eu/lex/LexUriServ/LexUriServ.do?uri=CELEX:61978J0015:EN:HTML

objection set by German law. Although French law regarded futures contracts as a legal investment activity, and the agreement had been concluded in France, the ECJ decided that the contract was void, because the German rule applied in a non-discriminatory manner[7]. In its view, non-discriminatory barriers to cross-border provision of services could be justified 'for reasons founded on the social order'[8], which mainly had an ethical or political nature.

The aforementioned difficulties, led to the White Paper of the Delors Commission on the internal market. Its objectives concerning the financial services' sector were the complete liberalization of capital movements, the integration of national markets for financial services and the establishment of a common regulatory structure for financial institutions. Additionally a key means to all these, was the removal of legislative national restrictions of Member States which prevented market integrity. The White Paper was adopted by the Council of Ministers and constituted the basis for the Single European Act 1986 (SEA), an amendment of the Treaty of Rome.

B. THE SINGLE EUROPEAN ACT 1986 (SEA)

SEA introduced a series of Directives in its attempt to achieve its goals e.g. the first Directive concerning insider dealing (89/592/EEC), as well as the Public Offer Prospectus Directives (80/390/EEC and 89/298/EEC) and further regulatory legal texts such as the Major Shareholders Directive etc. The main principles of these Directives were minimum harmonization, mutual recognition, home country control and single passport.

The most important objective of the aforementioned body of legislation, was the integration of the internal market for banking and financial services through the liberalization of capital flows and the creation of a harmonized (on the basis of minimum standards) regulatory framework, which would ensure that the 'single passport' and home country control principles operated without significant difficulty. Several other expressed objectives of the relevant legislation were the elimination of

[7] See Thoughts 4 and 6
[8] See Thought 5

distortions of competition in the internal market between investment firms and credit institutions and the improvement of national investor protection regimes.

Some of these goals were achieved up to a certain degree e.g. Council Directive 89/592/EEC prohibited insider dealing and settled issues concerning disclosure documents and public offer of securities. On the other hand there were also several difficulties concerning mainly the fact that harmonization legislation did not extend up to specific vital areas of European market. This had as a result that market integration continued to move at slow pace and important differences could be observed throughout Europe e.g. regarding the manner financial services contracts were formed or the manner regulators understood and interpreted the harmonized legislation.

These difficulties led to the next stage which was the adoption of Financial Services Action Plan (FSAP).

C. THE ADOPTION OF FSAP

The first steps were two Communications issued by the Commission. The first one issued in 1998, concerned building a framework for action on financial services. The second one issued in May 1999 concerned the implementation of the FSAP. In these Communications, the Commission recognized the deficiencies of the existing EC financial market legislation in two areas: The first one concerned the goal of market integration and the second one the lack of effectiveness concerning the regulatory challenges that an integrated market and modern market developments brought about, e.g. regarding cross-border market abuse and conflict of laws. These deficiencies clearly illustrated the goals of the Commission. On the one hand areas which had not been regulated had to be regulated and on the other hand the already existing regulations had to be further reformed so that harmonization legislation would be achieved in a higher degree.

D. THE FOUR LEVEL APPROACH

In 2000 the Council set up the so-called Committee of the Wise Men. Its chairman was Baron Alexandre Lamfalussy[9], this is the reason why the process suggested by this Committee is often called the “Lamfalussy process”. The purpose of this Committee was to identify and recommend the most efficient and timely (‘fast-track’) procedure to debate and enact financial markets legislation. The recommendations of the Committee of the Wise Men had also to be accepted by the European Parliament. The Committee published its Final Report in February 2001.

This Report suggested a four level approach and the constitution of two committees[10]. The final outcome was that Stockholm European Council of March 2001 endorsed the final report of the Committee of the Wise Men. The European Parliament agreed to this new approach in a Resolution adopted on 5 February 2002, adding, however, a number of conditions that would widen Parliament’s role in the new procedure. The Commission adopted, in the meanwhile, two Decisions establishing the European Securities Committee (ESC)[11], and the Committee of European Securities Regulators (CESR).

In the rest of this unit there will be a brief description of the two committees and the four levels.

Da. The Two Committees

The first Committee is called the European Security Committee (ESC). It has been established with the Commission Decision of the 6th of June 2001. Its role is to advise the Commission on policy issues as well as on draft legislative proposals the Commission might adopt in the field of securities (Article 2). It is composed of high level representatives of Member States and is chaired by a representative of the Commission (Article 3).

[9] See Charter of CESR http://www.esma.europa.eu/system/files/01_003.pdf

10For the four-level approach see also **Van Empel M**., (2008), Financial Services in Europe: An Introductory Overview, Austin, Boston, Chicago, New York, The Netherlands: Wolters Kluwers Law & Businesss p. 115

[11] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:191:0045:0046:EN:PDF

The Summary Records uploaded refer to totally 76 meetings, held from 2003 to 2011 and varied from four to ten per year[12]. Specific issues which had been discussed during these meeting were for example in the 26th Meeting (15.12.2004) that the objective regarding the implementation of legislative measures adopted in the context of the FSAP should mainly focus on two directions; to enforce the legislation that has been put in place and to check whether the system could economically function. In the 72nd Meeting[13] (9.11.2010), what has been discussed concerning the Securities Law Directive, was the relationship between the draft legislation and the Convention of The Hague.

The second Committee is called Committee of European Securities Regulators (CESR). It has been established with the 2001/1501/EC Commission Decision of the 6th of June 2001[14]. Its role is to advise the Commission, either at the Commission's request, within a time limit which the Commission may lay down according to the urgency of the matter, or on the Committee's own initiative, in particular for the preparation of draft implementing measures in the field of securities (Article 2). It is composed of high-level representatives from the national public authorities competent in the field of securities (Article 3). Each Member State designates a high-level representative from its competent authority to participate in the meetings of the Committee.

The Committee’s tasks as laid out in its charter are the following ones:

a. It advises the European Commission on securities policy issues either at the European Commission’s request, within a time-limit which the Commission may lay down according to the urgency of the matter, or on its own initiative (Article 4.1 of its Charter)[15].

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[12] See http://ec.europa.eu/internal_market/securities/esc/index_en.htm
[13] See http://ec.europa.eu/internal_market/securities/docs/esc/meetings/2010-11-09-report_en.pdf
[14] http://www.esma.europa.eu/system/files/EstablishCESR_2001_527.pdf
[15] See http://www.esma.europa.eu/system/files/01_003.pdf

b. It responds within such time limits to the mandates given by the European Commission in respect of the preparation of implementing measures (Article 4.2 of its Charter)[16].
c. It fosters and reviews common and uniform day to day implementation and application of Community legislation. Furthermore it issues guidelines, recommendations and standards that the members introduce in their regulatory practices on a voluntary basis. Finally it also undertakes reviews of regulatory practices within the single market (Article 4.3 of its Charter)[17].
d. It develops effective operational network mechanisms to enhance day-to-day consistent supervision and enforcement of the Single Market for financial services (Article 4.4 of its Charter)[18].
e. It observes and assesses the evolution of financial markets and the global tendencies in securities regulation and their impact on the regulation of the Single Market for financial services (Article 4.5 of its Charter)[19].

It has issued three set of guidelines so far. The first one, issued in 2005, concerned market manipulation and contained examples of practices CESR Members considered as market manipulation[20]. The second one, issued in 2007, concerned insider dealing and specifically what constitutes inside information, reasons to delay the publication of inside information etc[21]. The third one, issued in 2009, concerned the notion of insider, suspicious transactions, stabilization and buy pack reports and the notion of inside information[22].

[16] See ibid.
[17] See ibid
[18] See ibid
[19] See ibid
[20] See Barnes Paul supra note 3, and Market Abuse Directive, Level 3 – first set of CESR guidance and information on the common operation of the Directive, Ref: CESR/04-505b from http://www.esma.europa.eu/system/files/04_505b.pdf

[21] See Market Abuse Directive Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market, http://www.esma.europa.eu/system/files/06_562b.pdf

[22] See Level 3 – third set of CESR guidance and information on the common operation of the Directive, Ref: CESR/09-219, http://www.esma.europa.eu/system/files/09_219.pdf

Db. The Four Levels

The First Level concerned primary legislation e.g. Market Abuse Directive 2003/6/EC. More specifically, EC Commission, the Council and the European Parliament should produce only general principle framework directives, which would constitute First Level legislation. These directives should focus on the core political principles of relevant legislation. The structure of the procedure would be the following one. The Commission would first make a proposal concerning one relevant subject. Afterwards, Council and the European Parliament acting on this proposal would agree on the key political direction and orientation for each of these subjects.

The Second Level concerned technical implementing measures such as the Commission Directives 2003/124/EC on definition and public disclosure of inside information and the definition of market manipulation and 2003/125/EC on the fair presentation of investment recommendations and the disclosure of conflicts of interest. In this procedure the two committees would also be involved. More specifically, these Directives would be adopted by the Commission with the assistance of the ESC, following consultation with the CESR. The Committee of the Wise Men adopted the Article 202 of the Treaty procedure for the production of Level 2 rules. This meant that the European Parliament would be excluded from the drafting but not the consultation process.

The Third Level concerned the adoption of non-binding guidelines and common standards by the Wise Men Committee of European Securities Regulators (CESR).

The Fourth Level concerned the monitoring of the implementation of all this legislative effort in Member States level. The final stage in the new regulatory approach, Level 4, is concerned with consistent application of the adopted rules and enforcement. The Commission checks Member State compliance with EU legislation and it may take legal action against Member States suspected of breach of Union Law[23].

[23] See Applications **Commission v. Luxembourg C-128/06, C-151/06 and C-236/06** concerning approximation of laws www.infocuria.com

E. THE REGULATION AND DIRECTIVE PROPOSAL[24]

On 28.06.2010 the Commission services launched a public consultation on the review of the Market Abuse Directive. Its objective was to consult financial market participants, governments, competent authorities and other stakeholders on the modifications to the Market Abuse Directive that the Commission is considering for its forthcoming legislative proposal. On 20.10.2011 Commission adopted proposals for a Regulation on insider dealing and market manipulation (market abuse), and for a Directive on criminal sanctions for insider dealing and market manipulation[25]. On 25.07.2012 Commission adopted amended proposals for a Regulation and for a Directive to prohibit and criminalise manipulation of benchmarks. On 10.09.2013 the European Parliament endorsed the political agreement on new European rules for market abuse.

The main goal of this Regulation is to update and strengthen the existing legal framework and to ensure market integrity and investor protection provided by the Market Abuse Directive. The new framework aims to make sure that regulation follows market developments and to help make the fight against market abuse across commodity and related derivative markets more effective. The choice of Regulation shows that maximum harmonization is the main intention of the Commission.

Ea. The Reasons

The MAD is based on the concept of prohibiting insider dealing or market manipulation in financial instruments which are admitted to trading on a regulated market. However, since the adoption of MiFID, financial instruments have been increasingly traded on multilateral trading facilities (MTFs), on other types of organised trading facilities (OTFs), such as swap execution facilities or broker crossing systems, or only traded OTC. These new trading venues and facilities have provided more competition to existing regulated markets, gaining an increased share

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[24] http://europa.eu/rapid/press-release_MEMO-13-774_en.htm

[25] See European Commission Press Release IP 11/12/17 available at http://europa.eu/rapid/press-release_IP-11-1217_en.htm

of liquidity and attracting a broader range of investors. Besides these, they also established a new market reality which created new regulatory needs since it made clear there were several gaps regarding the already existing legal framework. These gaps and problems were mainly the following ones:

- There were gaps in regulation of new markets, platforms and over-the-counter (OTC) trading in financial instruments;[26]
- There were gaps in regulation of commodities and commodity derivatives;
- regulators could not effectively enforce the MAD;[27]
- There was lack of legal certainty, which undermined the effectiveness of the MAD;[28]
- There were administrative burdens, especially for small and medium-sized companies (SMEs)[29]

The main changes which created a new market reality refer mainly-as mentioned above- to financial instruments which are traded on organized platforms and over the counter (OTC) and the adaption of new technology e.g. High Frequency Trading (HFT). Additionally, gaps concerning regulatory framework were made clear through the LIBOR scandal. Consequently it may be of use to briefly describe the mechanics of OTC, HFT and MTFs in order to more clearly illustrate what the Regulation aims to settle. Additionally, for the same reason, the LIBOR scandal is also briefly described.

i. OTC Markets

There are two main types of derivative markets. The first one is the Exchange based Market, the second one is the OTC market. Their main difference is that the first one involves an extra party, which is called "Exchange". This one is run like a business and draws up or designs the standard contracts. In other words the terms

[26] http://europa.eu/rapid/press-release_MEMO-13-774_en.htm
[27] See ibid
[28] See ibid
[29] See ibid

of these contracts are fixed and the only thing that varies is the price. Furthermore Exchange administers the process of trading (system of clearing and margining).

On the other hand, in the second type (OTC market), derivatives are traded directly between counterparties without the infrastructure of the exchange. This lack of infrastructure mainly results in the parties' tendency to develop their own risk control policies. These policies are mainly the provision of collateral, the application of a system of margin and the extensive documentation used[30] (ISDA Master Agreements, ICOM Master Agreement, IFE Master Agreement etc). The most important agreements used internationally in such contracts are the ISDA Master Agreements (2002)[31]. In other words in OTC market parties rely exclusively on each other.

As far as the provision of collateral as a risk control policy is concerned the following figure[32] is indicative of the frequency of its use.

Percent of Trades

All OTC Derivatives	**Fixed Income Derivatives**	**Credit Derivatives**	**FX Derivatives**	**Equity Derivatives**	**Precious and Base Metals Derivatives**	**Energy and other Commodity Derivatives**
78%	84%	97%	63%	68%	63%	62%

ii. MFT

An MFT is under Article 4 (1) (15) MiFID a multilateral system, operated by an investment firm or a market operator, which brings together multiple third party buying and selling interests in financial instruments, in accordance with non discretionary rules, in a way that results in a contract. Specific issues concerning this system are settled in MAR.

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[30] See **Castagnino John-Peter**, Derivatives The Key Principles, 3rd Edition, Oxford University Press, 2009, p. 185

[31] See **Keijser Thomas** Financial Collateral Arrangements, Kluwer 2006, p. 24

[32] See **ISDA**, Market Review of OTC Derivative Bilateral Collateralization Practices , Release 2.0., 1st of March 2010,p.7 available at http://www.isda.org/c_and_a/pdf/Collateral-Market-Review.pdf

It offers different types of markets which are: a) continuous auction order book trading system, which continuously and automatically matches sell orders and buy orders with no human intervention, b) a quote driven trading system, under which transactions are concluded on the basis of firm quotes that are continuously made available by market makers c) a periodic auction trading system, which periodically and automatically matches sell orders and buy orders with no human intervention.

iii. HFT

HFT is one of the key developments stemming from technological advances. Its history goes back to as early as 2000 and is part of a long trend toward increasing trading automation[33]. There are several factors which have contributed to the emergence of HFT. Some of these are the evolution of technology and low latency access to the market. Furthermore extensive reforms to the regulatory framework in major financial markets, which aimed at promoting competition in trading services, have also played an important role. For example in EU the Markets in Financial Instruments Directive (MiFID), which came into force in November 2007, aimed to foster competition. In order to achieve that, it abolished the concentration rule and allowed the emergence of alternatives to traditional stock exchanges.

In the last few years HFTs has become a quantitatively significant feature of modern financial markets. It is indicative that between 2004 and 2010, high-frequency trading increased from about 13% of all foreign-exchange flows to 30%[34]. By 2011, high-frequency trading had been used for about 60 % of the 7 billion shares that had changed hands daily on United States stock markets, and for about 35% to 40% percent of European equities trading volume[35].

HFT and algorithmic trading constitute “the black box trading”. High-frequency trading is trading that uses computerized platforms to execute a large

[33]See **OICV-IOSCO Technical Committee of the International Organization of Securities Commissions**, Regulatory Issues Raised by the Impact of Technological Changes on Market Integrity and Efficiency Consultation Report, July 2011, p.19 available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD354.pdf

[34] See ibid

[35] See ibid

number of trades at super speeds (measured in seconds and milliseconds)[36]. It is believed that under normal circumstances, high-frequency trading can have a positive impact in markets since it increases liquidity and decreases volatility in the short term by enhancing trade volume and execution speeds.

On the other hand, during periods of high uncertainty, like today, high-frequency trading can exacerbate volatility and harm liquidity by removing significant trading positions from the markets at warp speeds[37]. One indicative example is the famous so called Flash Crash of May 6, 2010. On this day, prices of US-based equities products went up and down in a very short time influencing over 20,000 trades across more than 300 securities which were executed at prices more than 60% away from their values just moments before[38]. HFTs have not caused this crash but it is strongly believed that their responses to pressure of selling have exacerbated market volatility[39].

iv. The LIBOR Scandal

The LIBOR scandal concerned manipulation of benchmarks and proved that there were several gaps concerning EU legislation on securities markets. It may be of use to first briefly describe the function of benchmarks in order to understand the possible negative impact it may have on the function of markets.

A benchmark is a commercial index or published figure which is calculated by a specific formula to the value of one or more underlying assets (e.g. estimated prices, interest rates etc). These underlying assets or prices used in benchmarks can also include equities (e.g. FTSE 100 index), bonds, interest rates (LIBOR or EURIBOR),

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[36] **Lin Tom C.W.**, The New Investor. 60 UCLA Law Review 678 (2013), p. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227498, **OICV-IOSCO Technical Committee of the International Organization of Securities Commissions**, Regulatory Issues Raised by the Impact of Technological Changes on Market Integrity and Efficiency Consultation Report

[37] See ibid supra note 33

[38] See **Technical Committee of the International Organization of Securities Commissions**, Regulatory Issues Raised by the Impact of Technological Changes on Market Integrity and Efficiency Consultation Report, p.11

[39] See **Kirilenko Adrei/Kyle S. Albert/ Mehrdad Samadi/ Tugkan Tuzun** The Flash Crash: The Impact of High Frequency Trading on an Electronic Market, May 26 2011, available to download at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1686004

commodities (e.g. agricultural products), metal and oil. The price of financial instruments (e.g. interest rate swaps, mortgages, loans and credit cards) is related to such benchmarks.

Libor is a benchmark interest rate based on the rates at which banks lend unsecured funds to each other on the London interbank market, and is published daily by the British Bankers' Association (BBA)[40]. This means that global banks submit daily their borrowing costs to the Thomson Reuters data collection service. The calculation agent throws out the highest and lowest 25 percent of submissions and then averages the remaining rates to determine Libor. Calculated for fifteen different maturities and ten different currencies, Libor is considered the most critical global benchmark for short-term interest rates. Eighteen banks submit rates for the U.S. dollar Libor. Consequently any manipulation of benchmarks may influence the price of financial instruments and have a serious (negative) impact on market confidence since it could lead to significant losses to investors and distort the real economy. This is so because large sums of money of financial instruments could be (and here in particular have been) priced at wrong rates[41].

Investigations concerning this scandal began in March 2011. They referred to possible such manipulations concerning EURIBOR and LIBOR benchmarks for interbanking lending rates, by a number of banks. It turned out there were several false submissions of banks' estimated interbank lending rates.

The Commission took this into account and presented on 25th July 2012 its Amendments to Proposals for Market Abuse Regulation and the Directive concerning Criminal Sanctions of Market Abuse in order to make clear that they deal with issues arising from the LIBOR scandal and ensures the prohibition of such tactics. Furthermore in order to strengthen the prohibition of such manipulations, market

[40] See **Alessi Christopher and Mohammed Aly Sergie**, Understanding the LIBOR Scandal at UK Council on Foreign Relations website, http://www.cfr.org/united-kingdom/understanding-libor-scandal/p28729

[41] See ibid and European Commission Amendments to proposed Market Abuse legislation to fight rate fixing – frequently asked questions http://europa.eu/rapid/press-release_MEMO-12-595_en.htm?locale=fr

abuse occurring across both commodity and related derivative markets will be prohibited, and cooperation between financial and commodity regulators will be reinforced.

Moreover supervisors will have access to the information they need to detect and sanction market abuse. Since the sanctions currently available to supervisors often lack a deterrent effect, sanctions will be tougher and more harmonised. Possible criminal sanctions are the subject of a separate but complementary proposal on which it is hoped that negotiations between the European Parliament and the Council on a political agreement could conclude by the end of this year[42].

Eb. Objectives of the new Regulation

The objectives of the Regulation are clearly illustrated by the reasons which led to it. It is clear that they are the mirror of the needs the Regulation has to cover and the problem it has to deal with. For the adequacy of this paper they are briefly presented below.

iv. Keeping pace with market developments

The first objective is to keep pace with market developments. The regulatory framework provided by the original Market Abuse Directive has been outpaced by the growth of new trading platforms, OTC trading and new technology such as high frequency trading (HFT). The new Regulation extends the scope of existing EU legislation to financial instruments only traded on multilateral trading facilities (MTFs), other organised trading facilities (OTFs) and when traded OTC so that trading on all platforms and of all financial instruments which can impact them will now be covered by market abuse legislation.

It also provides an indicative list of HFT strategies which shall be considered as market manipulation, such as placing orders which has the effect of disrupting or delaying the functioning of a trading system ("quote stuffing"). Commodity markets have become increasingly global and interconnected with derivative markets,

[42] See IP/11/1218

leading to new possibilities for cross-border and cross-market abuse. The scope of the legislation is therefore extended to market abuse occurring across both commodity and related derivative markets.

v. Reinforcing regulators' investigative and sanctioning powers

The second objective is to reinforce regulators' investigative and sanctioning powers. Regarding this objective, the new Regulation aims to extend the current reporting of suspicious transactions also to the direction of suspicious unexecuted orders and suspicious OTC transactions. In order to achieve this, the following measures will be taken.

First, everyone professionally involved in executing transactions will have to have systems in place to detect suspicious transactions. Second the Regulation grants supervisory powers to regulators to investigate possible cases of market abuse, subject to adequate and effective safeguards. Third, it also requires Member States to provide for mechanisms for the reporting of actual or potential breaches of the provisions of this Regulation to competent authorities (whistleblowing). Fourth, it also includes attempted market abuse within the prohibition scope, making it possible for regulators to impose a sanction in cases where someone tries to insider deal or manipulate the market.

Common principles are proposed, notably the maximum fine should not be less than three times any such profit. In parallel, a proposal for a Directive on criminal sanctions for market abuse requires Member States to introduce criminal sanctions for the offences of insider dealing and market manipulation where these are committed intentionally[43]. Trilogue negotiations on the Directive are expected to commence in the second half of this year.

vi. Reducing administrative burdens on SME issuers

[43] See European Commission Press Release IP 11/1218 http://europa.eu/rapid/press-release_IP-11-1218_en.htm?locale=en

The third objective is to reduce administrative burdens on SME issuers. The disclosure requirements for issuers on SME markets will be adapted to their needs, and issuers on such markets will be subject to tailored rules for the requirement to draw up lists of insiders.

II. THE NECESSITY OF INSIDER TRADING/DEALING PROHIBITION AND THE UNDERLYING PRINCIPLES

A. THE NECESSITY OF INSIDER TRADING/DEALING PROHIBITION

The first fundamental question which must be answered is whether insider trading must be prohibited. It is true that nowadays insider dealing is considered as illegal in most of the states worldwide. On the other hand, a lot of economic research has attempted to prove that there is nothing unfair about it. It would be therefore interesting to revisit this debate by presenting the main arguments of each side.

Aa. The opinion against the prohibition[44]

The first argument is that insider dealing is one of the most effective ways to award the agents e.g. corporate executives for their contribution to the growth of the company and consequently the increase of the shareholders' (principals') profits.

The second argument runs as follows; one of the fundaments of EU and US securities law legislation is the perception that the quicker price-sensitive information is disclosed the better informed the investors are. The better informed the investors are, the more sensible their investments are, which consequently leads to accurate prices of the shares[45], efficient allocations of capitals and high market liquidity. On the other hand there are few cases, in which disclosure can be legitimately delayed according to Article 6 (2) MAD, in favor of the preservation of current business structures. These exceptional cases are laid out in Article 3 Commission Directive 2003/124/EC (second level of "Lamfalussy process"[46]) e.g. legitimate transactions of market-makers or takeover law. This argument suggests

[44] See **Harris M. Daniel/ Herzel Leo**, Do we need insider trading laws?, Company Lawyer, 1989 , West Law UK, **Lagenbucher Katja**, The "use or possession" debate revisited -Spector Photo Group and Insider trading in Europe, Capital Markets Law Journal, Vol. 5, No. 4 p.462-465, **Manne Henry,** Insider Trading and the Stock Market, Free Press, New York, 1966

[45] See **Lagenbucher Katja**, The "use or possession" debate revisited, p.463, **Sifuna Anazett Pacy**, Disclose or abstain: The prohibition of insider trading on trial. Journal of International Banking Law and Regulation, 2012,p.3 both just presenting the arguments and not supporting them

[46] See above **Unit Db**.

that in such cases, the inside information which is legitimately kept secret by the issuer is infused to the market through insider trading/dealing. In this manner the aforementioned fundamental targets of liquidity, efficient allocations of capitals etc are still achieved without delay.

There is also one example concerning the effect of insider trading/dealing prohibition on market efficiency which is thought to support the opinion against the prohibition. It has to do with what happened in Japan. Marc Ramseyer[47] in a study of insider trading/dealing analyses the impact 1988 amendments to Japanese Securities Law concerning civil and criminal liability on insider trading/dealing, had on the Japanese capital market. It would be of use to first briefly give the background of this legislative change.

Japanese economy had flourished in the 1960s. After a recession in the 1970s, it started growing rapidly again. To fund their growth, firms listed their shares on the stock market. In 1970, 1580 firms listed their stock on the Japanese stock exchanges, for a total market capitalization of 16.8 trillion yen. By 1980, 1729 firms listed their shares at a market capitalization of 80.0 trillion, and by 1987, 1912 listed shares worth 345,6 trillion.

This rise of stock market had as a result that many scholars started to support the idea that without criminal and civil prosecution against insiders who committed insider trading/dealing, investors would not trust the stock market. To solve this, the Diet (Japanese Parliament) passed a statute. Under the new regime, if an officer or director bought or sold his firm's stock while holding material non-public information, he faced criminal penalties. If he bought or sold shares in a tender offer target, he faced criminal penalties. And if a tippee with that non-public information bought or sold stock, he faced the penalties too. It remains to check the impact it had to the Japanese stock market.

The market capitalization of Japanese firms grew from 71 trillion yen at the start of 1980 to 611 trillion by the close of 1989. Then, it collapsed. It has yet to

[47] See **Ramseyer J. Marc**, Insider Trading Regulation in Japan, Harvard John M. Olin Center for Law, Economics and Business, electronic copy available http://ssrn.com/abstract=1915284

recover. Real estate prices plummeted at the same time. According to the author of this study, the fact that the collapse of the stock market began in 1989, the same year in which the insider trading ban was brought into effect is no coincidence. Consequently he supports that the Japanese economy case is a proof of the negative impact insider trading/dealing prohibition has on the capital market function.

Ab. The opinion for the prohibition

The first argument for the prohibition is given in a purely legal perspective and concerns the problem of duties to disclose information. More specifically, this means that as long as the insider is obliged to disclose specific information to his/her counterparty and he does not do so, the counterparty is protected because of the breach of this duty[48]. One example is given by U.S. Supreme Court ruling on **Chiarella v. U.S.** case[49] which is briefly described below.

The petitioner had been employed by a financial printer that had been engaged by certain corporations to print corporate takeover bids. Taking advantage of his position, he deduced the names of the target companies from information contained in documents delivered to the printer by the acquiring companies. Subsequently, without disclosing his knowledge, purchased stock in the target companies and sold the shares immediately after the takeover attempts were made public. According to the decision by having acted in this manner he had breached his duty to disclose this information to his counterparties.

But the analysis of this argument can go a little deeper taking into account the American theory. This has mainly to do with the so called fiduciary relationship requirement, according to which there is no insider trading/dealing violation as long as there is no such relationship prohibiting it[50]. In other words the insider will have to be bound by a specific fiduciary duty. For example in Dirks v. Securities and

[48] See **Lagenbucher Katja**, The “use or possession” debate revisited -Spector Photo Group and Insider trading in Europe, p 464,

[49] See **U.S. Supreme Court No 78-1202, 18.03.1980**,445 U.S. 222 West Law Database

[50] See **Sifuna Anazett Pacy**, Disclose or abstain: The prohibition of insider trading on trial. Journal of International Banking Law and Regulation, 2012, p. 3-4

Exchange Commission[51], the Supreme Court held that an insider was only liable if he made secret profits from trading in securities based on material confidential information upon failure to disclose it.

The second argument concerns causality issues and in particular hypothetical causality. According to it an insider's defence based on the assumption that the counterparty would have been implicated anyway in this transaction and would have anyway suffered the same losses would be enough. A simple example is the following one[52]: if one drives his car over a bike and damages it could be admissible with the defence that the bike was old and rusty and would fall apart one day later anyway. The answer to this is that what makes the insider liable is not just his counterparty's loss but the causal link between his action and his counterparty's damage on the one hand and his intention to cause this damage to his counterparty on the other hand.

An extra argument would be that the key point, is the time, at which, the damage takes place. At the time that the damage is caused, liability is born for the one who caused it and anything that could have happened afterwards, has no significant impact on liability issues[53].

As far as the Japanese economy example is concerned there are two arguments against the Ramseyer's claims. The first one is based on a historical approach[54] of the Japanese economy development according to which the stock exchange market transactions concerned only 10% of the population and there were no laws restricting their exploitation of price sensitive confidential information. After the introduction of laws they were consequently scared.

[51] 681 F.2d 824, 220 U.S. App. D.C. 309 (D.C. Cir. 1982)

[52] See **Lagenbucher** p. 464

[53] See **Stathopoulos Michalis**, Obligation Law (General Part)I, 1982, p. 295, **Kounougeri-Manoledaki Efi**, The problem of Hypothetical Causality in Compensation Law, Scientific Yearbook Armenopoulos, 1981 p. 18, **Georgiades Asterios**, Obligation Law (General Part) I, 2003, p. 138-139

[54] See **Sifuna Anazett Pacy**, Disclose or abstain: The prohibition of insider trading on trial, p.8-9

The second one is based on the fact that some scholars suggest that the crash of Japanese stock market should be attributed to a "bubble" in property assets and financial sectors of Japanese economy. It is also supported that the economy growth dropped from 4.4 % to 2.9 % in 1986 because of the yens appreciation[55]

B. THE UNDERLYING PRINCIPLES

The main underlying principles of the law of insider trading and market manipulation in capital markets, illustrated by EU legislation are the following ones:

Ba. Investor/consumer protection

The Investor/consumer protection is the principle which justifies between others the obligation for disclosure of material information, within the MAD. In its preamble recital 18, one comes across the notion of the normal and reasonable person, someone who is not in a privileged position to have access to privileged information[56]. This person has to be protected and the only manner to surely accomplish this, is to make sure that both parties have equal access to material information concerning their transaction. One manner to achieve that is through the disclosure duty.

It is clear that this principle is also closely connected to the fairness argument. This, because it embodies this fundamental principle that each contracting party should be equal to the other and the one who is in an advantageous position vis-à-vis the other ones should be prevented from profiting from an information the others are not aware of[57].

Bb. Protection of competition/ fair market practices

This principle is found in Recital 25 of the Preamble of the MAD also aiming into creating the necessary confidence to the market which enhances its proper function

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[55] See **Powell Benjamin**, An Overview of Japan's Economy 1985–2000 available at http://mises.org/daily/1099, **Sifuna Anazett Pacy**, Disclose or abstain: The prohibition of insider trading on trial. Journal of International Banking Law and Regulation, 2012, p.9

[56]**Van Empel Martjin**, Financial Services in Europe: An Introductory Overview, Austin, Boston, Chicago, New York, The Netherlands: Wolters Kluwers Law & Business,200 p. 125

[57] See ECJ C-45/08 Thought 48

and prosperity[58]

Bc. Transparency

This principle is fundamental. It can be found, in the preamble of the MAD in Recitals 26, 27 and must lead to avoiding preferential treatment and the distortion of competition. Reflecting the focus on transparency and market stability in Article 3, under Article 8, Member States are to ensure that a bid is made public in such a way as to ensure market transparency and integrity for the securities of the offeree and offeror companies, and of any other company affected by the bid, in order, in particular, to prevent the publication or dissemination of false or misleading information. This requirement should be read with the market manipulation and insider dealing prohibitions contained in the 2003 Market AbuseDirective1[59].

Transparency is needed to ensure that prospective investors will all have equal access to material information concerning the issuer so that they can structure their investment strategy according to their financial needs and commit the essential capital in order to materialize their decisions[60]

Bd. Market efficiency[61]

All the measures and provisions concerning insider dealing and market manipulation are based on the principle of market efficiency. This means that legislators have to always take into account that capital markets have to work as efficiently as possible. In other words legislative provisions must not prevent them from doing so.

It is obvious that this is one of the key principles because if a market does not function efficiently for its participants then it actually has no reason to exist, since they abandon it. It could be suggested that this market efficiency principle acts as the “opposite side” or the “limit” of principles like transparency and investor protection, in the sense that legislators should always be cautious not to smother

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[58]**Van Empel M**. ibid

[59] See **Papadopoulos Thomas/ Moloney Niamh,** Law of the European Union, Oxford University Press, Issue 36, 2012, Section 20, EU Company Law, p.349

[60] See **Staikouras Panagiotis**, The Conundrum of the Market Abuse Directive Preventative Measures for EU Financial Services’ Intergration: In Search of Equilibrium between Market Integrity Enhancement and Undue Regulatory Encumbrance, p. 354

[61] See **Barnes Paul**, Stock market efficiency, insider dealing and market abuse
, Publ. Gower, 2009 p. 123

market efficiency by trying to put into practice these doubtlessly vital principles.

Its importance is clearly illustrated by the fact that the whole debate about whether insider dealing/trading prohibition is necessary or not, goes around this principle. Many scholars are trying to base their arguments on the positive or negative –depending on the argument- impact their opinion has on the market efficiency.

Be. Integrity[62]

Bf. Due skill care and diligence[63]

Bg. Responsible and effective control of affairs with adequate risk-management systems[64]

[62] See **Van Empel M**. ibid.
[63] See ibid
[64] See ibid

III. INSIDER DEALING ELEMENTS

E. **THE STRUCTURE OF THE OFFENCE**

The forms of insider trading/dealing are according to MAD the following ones:

(a) dealing in ('acquiring or disposing or attempting to acquire or dispose of') financial instruments, on the basis of inside information, by the persons listed in Article 2(1) (the so-called 'primary insiders'), or any other person who possesses inside information, if that person knows, or ought to have known, that it is inside information;

(b) the disclosure of inside information by 'primary insiders' to third persons, unless such disclosure is made in the normal course of an individual's employment or profession, and by the disclosure of inside information by 'secondary insiders'; and (c) a recommendation or inducement made by 'primary insiders' or by 'secondary insiders' to another person, on the basis of inside information, to deal in ('acquire or dispose of') financial instruments to which the information relates

B.THE MEANING OF INSIDER

The Directive distinguishes between primary and secondary insiders. Primary insiders are according to Article 2(2) (a) (c) MAD board members, directors and lawyers of a company. Furthermore, there is an extension of the old Insider Dealing Directive, according to which [Article 2 (2) (d) MAD] anyone who, by virtue of his criminal activities, possesses inside information is regarded as a primary insider. This is an explicit response to the terrorist attacks of 11 September 2001 as regards the fight against financing terrorist activities.

According to Article 6 (3) MAD the issuers of financial instruments should provide a list of those persons working for them under a contract of employment or otherwise, who have access to inside information. This list should be upgraded regularly. Furthermore people exercising managerial responsibilities within an issuer or people closely associated to them must notify the competent authorities (e.g. FSA in UK, Capital Markets Commission in Greece etc) for their trading activity.

In **ECJ 10.05.2007**[65] the Court stated, that the need to ensure transparency in transactions conducted by persons discharging managerial responsibilities within issuers of securities and, where applicable, persons closely associated with them, did not appear, as such, in Directive 89/592, and that it was clear from recitals (15), (26) and (27) in the preamble to Directive 2003/6 that, as a measure aimed at preventing market abuse, the concept of transparency had been incorporated in the Community framework for the protection of markets in financial instruments in 2003 with the adoption of Directive 2003/6 which, on entering into force, repealed Directive 89/592.

Consequently, the answer to the question referred was that Articles 1 and 2 of Directive 89/592 had to be interpreted as meaning that, when the main shareholders and members of the board of directors of a company agreed to effect between themselves stock-market transactions in the transferable securities of that company in order to support artificially the price of those securities, they were in possession of inside information of which they did not take advantage with full knowledge of the facts when they carry out those transactions.

Secondary insiders are people who have been given inside information by an insider. A secondary insider can be any other person if this person knew or ought to have known that he or she possessed inside information[66].

C. THE INSIDE INFORMATION

The first and main question which arises is what constitutes an inside information. It is obvious that this is a key question, since inside information plays a crucial role in the whole directive. According to Article 1(1) MAD, there are four

[65] See **C-391/04** Ipougrio Ikonomikon, Proistamenos DOI Amfissas, v. Georgakis http://curia.europa.eu/juris/document/document.jsf?text=&docid=61838&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1268650, **Vervesos Nikolaos**, Commentary on ECJ 10.05.2007, Business and Company Law 12/2007

[66] See **Siems Mathias**, The EU Market Abuse Directive: A Case-Based Analysis, p.7 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1066603

requirements which must be met, in order to characterize some information as “inside information”[67]. Specifically this information:

• must be of a precise nature

• must not have been made public

• must relate, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments

• and, if it were made public, would be likely to have a significant effect on the

prices of those financial instruments or on the price of related derivative financial

This is thought to be the ‘general definition’ of inside information[68] . What now follows is a one by one approach of these characteristics.

Ca. Precise nature

Defining what kind of information constitutes information of a precise nature is a difficult task. The Directive on the Public Disclosure of Inside Information (Art 1 (2) 2003/124/EC), provides the following definition of “precise information”: “[Information that] indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so [provided that] it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments.”

The precise nature of information is to be assessed on a case-by-case basis and depends on what the information is and the surrounding context. “Precise” is here

[67] See also CESR, Second Set of Guidance, p.7, available at http://www.esma.europa.eu/system/files/06_562b.pdf, **Kern Alexander** INSIDER DEALING AND MARKET ABUSE: THE FINANCIAL SERVICES AND MARKETS ACT 2000, p 12, http://www.cbr.cam.ac.uk/pdf/WP222.pdf. See also **Siems Mathias**, The EU Market Abuse Directive: A Case-Based Analysis, p.6 on “tipping” http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1066603

[68] See **Avgouleas** ibid p.15-17 about the two complementary definitions

used different in comparison with precise information concerning disclosure duties[69] since here it is interpreted more widely since it also involves information on “future facts”. However, according to CESR[70] in determining whether a set of circumstances exists or an event has occurred, it must always be seriously taken into account, whether there is solid and objective evidence for this as opposed to rumours or speculation e.g. if it can be proved to have happened or to exist.

On the other hand, when the case is to consider on what may come into existence, the key point is whether it is reasonable to reach the conclusion that the specific event will take place/come into existence, based on the ex ante information available at the time.

Relevant to this is up to a certain degree the **ECJ 28.06.2012** decision[71], according to which Article 1 of Directive 2003/6/EC and Article 1(1) of Commission Directive 2003/124/EC (Level 2 of Lamfalussy process) as regards the definition and public disclosure of inside information and the definition of market manipulation must be interpreted as meaning that, in the case of a protracted process intended to bring about a particular circumstance or to generate a particular event, not only may that future circumstance or future event be regarded as precise information within the meaning of those provisions, but also the intermediate steps of that process which are connected with bringing about that future circumstance or event[72].

There has also been some critique focused on the fact that ECJ did not take into consideration Article 2 of Commission Directive 2003/124/EC. The Court stated that

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[69] See **Staikouras,** The Conundrum of the Market Abuse Directive Preventative Measures for EU Financial Services’ Intergration: In Search of Equilibrium between Market Integrity Enhancement and Undue Regulatory Encumbrance

[70] CESR, Market Abuse Directive Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market http://www.esma.europa.eu/system/files/06_562b.pdf

[71] See **ECJ 28.06.2012,** C-19/11, Markus Geltl v Daimler AG available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=124466&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=947079

[72] See **Papadopoulos Thomas**, Commentary on ECJ 28.06.2012, C-19/11, Hellenic Review of European Law,

a realistic prospect is something more than implausible[73] and something less than a high probability[74]. This can cause implications, since it can lead to the legalization of insiders using price sensitive information, to which they have privileged access, as long as this information has a small probability to happen[75].

Furthermore according to the CESR's guidance, information is 'precise' when it is based on true and objective (at the time it was obtained) information, even if it is subsequently proved to be inaccurate, as would be the case, for instance, when negotiations for a merger between two companies fail. Therefore, information based on rumours or speculation may not be 'precise', even if it, subsequently proves to be a successful forecast or estimate. The relevant piece of information may still be regarded as 'precise', even if it refers to more than one event and is only partially specific.

As a result, a takeover bid could constitute inside information even though the bidder has not yet decided the offer price. In addition, a piece of information could be considered 'precise' even if it refers to events that could be alternatives, such as information that a takeover bid may be launched on one of two companies. Dealing in the securities of either company or encouraging or inducing such dealing, or disclosing relevant information would constitute insider dealing, even if the bid is finally launched only for one of them.

Cb. Made Public

The Market Abuse Directive does not contain exact guidance as to the meaning of non-public information. On the other hand, Article 6(1) of the Directive provides that issuers of financial instruments must make inside information that concerns them publicly available as soon as possible. In this way, the Market Abuse Directive imposes on issuers of financial instruments a duty of continuous disclosure of inside information. This duty is complied with, if information is disclosed in the manner prescribed in Article 2 of the Directive on the Definition of Public Disclosure of Inside

[73] See Thought 48
[74] See Thoughts 46-47
[75] See **Hansen**, The Hammer and the Saw, p. 11

Information. At this point a reasonable question arises. Does this disclosure obligation include any information or is there information which can be kept confidential for competition reasons?

Although the Directive is silent on this issue, it is generally presumed that there is certain information which can be excluded from this obligation scope. If there were no such limitation, the disclosure could harm the issuer since he/she would possibly have to disclose business knowledge, know-how and research results. One possible example is that such disclosure could prevent the granting of patents because an invention cannot be patented if previously made public[76][77]. Furthermore it should be taken into consideration that some of the issuer's competitors could possibly be non-listed companies, which therefore have no disclosure obligation and could in this manner just take advantage of the issuer's disclosure obligation in order to learn his/her confidential vital business information.

Based on the aforementioned arguments one more market-based approach is suggested[78] concerning the relationship between Articles 2 and 6 MAD. According to it, a distinction between them must be made. The purpose of insider dealing/trading prohibition is the prevention of market abuse as long as the information remains "inside". On the other hand, as the argument runs, the purpose of continuous disclosure obligation is to provide investors information about the financial situation of the issuer. As such information is considered mainly the disclosure of the issuer's annual accounts. One extra historic argument for this opinion is that the US security regulation, first introduced in early 1930s, seems to have been strongly influenced

[76] See Art. 3 (1) Directive 2003/124/EC in conjunction with CESR 2007 Guidance 2.8-2.9, **Hansen** The Hammer and the Saw, p.7-8, **Staikouras Panagiotis**, The Conundrum of the Market Abuse Directive Preventative Measures for EU Financial Services' Intergration: In Search of Equilibrium between Market Integrity Enhancement and Undue Regulatory Encumbrance p.358

[77] See also interesting critique on delay of disclosure, concerning possibility of abuse in two tier Board structure issuers , **Staikouras Panagiotis** ibid p. 359

[78] See **Hansen** The Hammer and the Saw, p.7-8

by UK company law on accounting[79]. Article 2 concerns the short term investors, while Article 6 the long term ones.

By implication, inside information disclosed in this manner is regarded as having entered the public domain and no longer qualifies as 'non-public'. However, information that is of a precise nature, directly or indirectly refers to relevant financial instruments or their issuers, and is price sensitive may have various sources other than the issuer—for instance, information relating to the advanced preparations of another company to launch a takeover bid for the issuer. Thus, Article 6(1) of the Market Abuse Directive and attendant Implementing Measures provide an incomplete definition of information that is 'non-public'. Very plausibly, research and estimates developed from publicly available data should not be regarded as inside information. As a result, transactions carried out on the basis of information contained in such research or estimates, do not constitute insider dealing within the meaning of the Directive[80].

As far as the question at which time point some information is made public, is concerned, the answer is to be found initially by checking whether listed companies have used the disclosure mechanisms specified by their Competent Authority, in order to disclose the inside information. So, for example, if they are required to make information publicly available through a particular electronic news service, it will not necessarily be sufficient for them only to give the information to a newspaper. However, for the purposes of determining whether a transaction was made using inside information, it should be noted that it is enough that the information has been made public. Public in this sense, means that a considerable number of people interested can have access to it. Possible examples of such disclosure are e.g. disclosure of the inside information through social medias, TV Channels etc. This distinction can also support the argument about the distinction between the function of Article 2 MAD and Article 6 MAD, analyzed above.

[79] See **Hansen** ibid p. 7
[80] See **Avgouleas** ibid p. 17

Cc. Directly or indirectly related to one or more issuers of financial instruments or to one or more financial instruments

It is clear that there are two categories of information provided here. The first one has to do with information which directly concerns the issuer, the second one with information which indirectly concerns the issuer.

Information which directly concerns the issuer are e.g.[81] Operating business performance; Changes in control and control agreements; Changes in management and supervisory boards; Changes in auditors or any other information related to the auditors' activity; Operations involving the capital or the issue of debt securities or warrants to buy or subscribe securities; Decisions to increase or decrease the share capital;

Information which indirectly concerns the issuer are e.g Data and statistics published by public institutions disseminating statistics; The coming publication of rating agencies' reports; The coming publication of research, recommendations or suggestions concerning the value of listed financial instruments; Central bank decisions concerning interest rates; Government's decisions concerning taxation, industry regulation, debt management, etc.; Decisions concerning changes in the governance rules of market indices, and especially as regards their composition; Regulated and unregulated markets' decisions concerning rules governing the markets;

An example[82]: A civil case of **insider dealing** was brought against two traders at **Dresdner Kleinwort**. They managed a portfolio that held $65m of a Barclays floating rate note (FRN) issue. In March 2007, they were given inside information about a possible new issue of Barclays FRNs on more favorable terms and immediately offloaded their existing holding to other investors who were unaware of the Barclays proposal. That afternoon, the new issue was announced, and the purchasers made losses of $66,000. The traders argued that, in the debt markets

[81] All of them p. 7 http://www.esma.europa.eu/system/files/06_562b.pdf

[82] See http://www.out-law.com/page-8305 (citation)

they dealt in, what they had done was acceptable practice. They escaped with a censure and no fine – in recognition, perhaps, that there was some basis for their claim.

Cd. Significant effect on the prices of those financial instruments or on the price of related derivative financial

Article 1 of Commission Directive 2003/124/EC amplifies what is meant by the concept of "information likely to have a significant price effect". According to it, "…information which, if it were to be made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments shall mean information a reasonable investor would be likely to use as part of the basis of his investment decisions." So the criterion set is whether it is possible that this information could lead a reasonable investor, to certain investment decisions.

A question which arises is whether the disclosure of inside information must have indeed influenced the price of the financial instrument or it is sufficient that it could have influenced it. ECJ recently noted that the key element to decide on whether some information is inside or not is the capacity of this information to have a significant effect on the price of instruments to which it relates and not whether its disclosure actually had a significant effect on the price of the financial instruments to which it relates[83] .

The fact that an event does not appear on the list does not mean it cannot be inside information. Nor does the fact that an event is included on the list mean that it automatically will be inside information: the materiality of the event needs to be considered. Something would only constitute inside information if it was sufficiently material. Moreover, as noted above, it is the specific circumstances of each case which need to be considered.

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[83] See Court of Justice of the European Union PRESS RELEASE No 113/09 p.2http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-12/cp090113en.pdf and **ECJ 23.12.2009**, **C 45/08**, Spector Photo Group NV Chris Van Raemdonck v. Commissie Voot her Bank-, Finanzie-en Assurantiewezen (68-69), available at the official EU website, http://curia.europa.eu/juris/document/document.jsf?text=&docid=77184&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=664283

D. SUBJECTIVE ELEMENT

Da. The distinction between primary and secondary insiders

The final point which must be examined is whether the judge must also check whether specific subjective requirements are met (knowledge, intention etc). In order to answer this question, a distinction between primary insider and secondary insider[84], set in Directive 2003/6/EC, art 2(2)(a),(c) must be taken into account. As far as primary insiders (directors, shareholders, COEs, company lawyers etc) are concerned, it is sufficient that they were aware of the information[85].

On the other hand, as far as secondary insiders are concerned, one extra subject requirement must be met. They must also know that this information is inside information. This is different from US law where it is always required that a fiduciary relationship must be breached[86]. This may be quite difficult to establish.

Furthermore, for most remedies some kind of fault is necessary for primary insiders. In many cases, therefore, it does not matter whether someone is a primary or a secondary insider. This is different from US law where there always has to be a breach of a fiduciary relationship, which may be difficult to establish.

Db. The" Spector case"

In ECJ "Spector" decision, it has been made clear that Directive 2003/6 defines insider dealing **objectively**[87]. More specifically the preliminary question set before the Court, concerned the interpretation of Article 2 (1) "use of inside information". The Court's answer was that the Article 2(1) of Directive 2003/6 does not stipulate that prohibited transactions must be carried out 'with full knowledge of the facts'

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[84] See **Kern Alexander** INSIDER DEALING AND MARKET ABUSE: THE FINANCIAL SERVICES AND MARKETS ACT 2000 p.13, http://www.cbr.cam.ac.uk/pdf/WP222.pdf

[85] See **Siems Mathias**, The EU Market Abuse Directive: A Case-Based Analysis, p.7 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1066603

[86] See **Siems Mathias** supra note p. 7

[87] Court of Justice of the European Union PRESS RELEASE No 113/09 http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-12/cp090113en.pdf, **ECJ 23.12.2009, C 45/08**, Spector Photo Group NV, Chris Van Raemdonck v. Commissie Voot her Bank-, Finanzie-en Assurantiewezen (31-38) available at official EU website, http://curia.europa.eu/juris/document/document.jsf?text=&docid=77184&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=664283

but merely prohibits primary insiders from using inside information when entering into market transactions. That article, according to the decision, defines the constituent elements of such prohibited transactions by referring expressly to two such elements, namely, the persons likely to fall within its scope and the material actions which constitute that transaction[88]. In other words what is to be proved is first that the trader is a primary insider and second that he possessed some specific inside information.

Its reasoning is in particular based on the following two arguments. The first one[89] is the so called “profession based argument”[90], according to which a professional intermediary is typically familiar with trading prohibitions and can therefore be expected to be especially sensitive monitoring relevant sales. The second one is the efficiency of prosecution argument[91] according to which the effectiveness of prosecution will be harmed if the proof of subjective element will be required.

It is quite clear that there is no explicit reference to intention in this definition. The purpose of this was to establish an effective and uniform system for sanctioning insider dealing with the legitimate aim of protecting the integrity of financial markets.

Dc. Critique

There is some interesting critique going on, concerning this point[92]. More specifically the central point of this critique, regards whether “use” can establish a state of mind. The requirements set in Article 2 MAD are a)the trader qualifying as a primary insider in possession of inside information and b) the execution of a transaction and c) the use of this information for this transaction. It is supported that all these three aforementioned requirements constitute objective elements of the offence. On the other hand as the argument runs, there is no reference to the subjective element meaning state of mind. This should regard whether the primary

[88] See Thought 31
[89] See Thought 36
[90] See **Lagenbucher Katja** p. 457
[91] See **Langenbucher Katja** ibid**.**
[92] See thoroughly **Langenbucher Katja**, p. 459

insider knew or should have known that the information he possessed had been "inside" information and furthermore it could also regard whether he intentionally or just negligently used it in a relevant transaction.

As it has already been mentioned the Court ruled that the possession of the inside information and the transaction are enough. In this manner it is clear that a presumption of guilt is established. The first question, which arises, is whether this violates Article 6 (2) ECHR which guarantees everyone charged with a criminal offence a presumption of innocence. The ECJ refers to the ECHR'S premise that factual or legal presumptions are not prohibited in principle[93]. As long as the presumption is rebuttable and the rights of the defence are not infringed, Directive is in conformity with ECHR.

The second question which arises is in which manner this presumption can be rebutted. It is a reasonable question since it is not easy to think of an example, in which a primary insider, who possessed inside information and executed a relative transaction could prove he had not known either that the information was "inside" information or that it had been related to the specific transaction he executed. Perhaps an –unlikely- example would be the following one. If the date, on which he acquired the information, were certain and there were also certain evidence (e.g. documents) proving that he had taken the decision to execute this transaction before acquiring the information, then he would possibly avoid conviction.

[93] See Salabiaku v. France **ECHR, 07.10.1988**, concerning presumption available at website http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/projects/car_serbia/ECtHR%20Judgements/English/SALABIAKU%20v%20FRANCE%20-%20ECHR%20Judgment%20_English_.pdf

IV. MARKET MANIPULATION

A. DEFINITION

Market manipulation is generally admitted as a very difficult concept to define. Legal prohibitions of this practice (offence), such as those in the US Page Securities Exchange Act 1934 (SEA 1934), and the Commodity Exchange Act (CEA) have failed to provide a comprehensive definition of market manipulation, although the most celebrated Treatise on US Securities Regulation suggests that the main purpose of the Federal Statutes was ‘to give a greater degree of definiteness to the concept of manipulation’ along with supplying an enforcement and preventive mechanism. For this reason instead of a definition one mainly finds descriptions of certain practices[94].

Aa. The Market Abuse Directive Definition

The Market Abuse Directive defines market manipulation as meaning:

a. Transactions or orders to trade:- - which give, or are likely to give, false and misleading signals as to the supply of, demand for or price of financial instruments [for ease of reference this might be termed "false or misleading transactions"]; or - which secure by a person or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level ["price positioning"] unless the transaction/order to trade had a legitimate reason and conforms to accepted market practices on the regulated market concerned.

b. Transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance ["fictitious devices"].

c. Dissemination of information through the media... which gives or is likely to give false and misleading signals as to financial instruments ... where the person who made the dissemination knew, or ought to have known, that the information was false or misleading... ["false or misleading information"]

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[94] For a thorough analysis of the definitions which have been suggested until today see **Avgouleas Emilios,** The Mechanics and Regulation of Market Abuse, Oxford University Press, 2005, Chapter 4 p.2-12

Ab. The Market Abuse Regulation Definition

Article 8[95] of the Market Abuse Regulation provides the definition of market manipulation. In particular, it is provided that for the purposes of the Regulation market manipulation shall also comprise the following activity:

"d) transmitting false or misleading information or providing false or misleading inputs 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." This is a clear reference to the LIBOR scandal.

Ac. One more general definition

One definition suggested is the following one[96]: "Behaviour effected through any one, or a combination of any of the following: misrepresentations and other false statements or concealments, artificial transactions, and trading schemes, which are made or structured in such a way as to induce market participants to engage in the trading of financial investments or the exercise of rights in financial investments. Relevant trading must be in such a direction or the exercise of rights must be effected in such a way, as to either lead the price of these investments to an artificial level, and/or enable the perpetrators of the behaviour to materialize, from interests held in the specific or related investments, financial gains that would not be possible, in the absence of such behavior".

Analyzing this definition it is clear that it includes five objective and two subjective elements.

The objective ones are:

(a) the nature of the actions (conduct) that the behaviour in question consists of, for instance, misrepresentations or artificial transactions;

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[95] See http://ec.europa.eu/internal_market/securities/docs/abuse/131023_esma-mandate_en.pdf

[96] See **Avgouleas Emilios,** The Mechanics and Regulation of Market Abuse, Oxford University Press, 2005, Chapter 4 p.12-13

(b) the direction of market participants' trades, or the way in which they exercise their rights in financial investments, following the occurrence of the behaviour in question once this becomes visible to market participants;

(c) the gains that alleged manipulators obtained from their positions in the specific or related financial investments;

(d) whether these gains would be possible, in the absence of the relevant behaviour; and

(e) the structure of the manipulative scheme in question.

The subjective elements of the definition are: first, inducement, and secondly, the alleged manipulator's intent.

Ad. The ECJ 22.03.2012 decision

The preliminary question set to ECJ from the Curtea de Apel Cluj (Romania) concerned whether the provisions of Article 47 of [Directive 2004/39] had to be interpreted as meaning that a market which has not been notified by a competent national authority and is not included in the list of regulated markets is not subject to the legal rules applicable to the regulated markets, in particular as regards the rules designed to prevent market abuse under Directive 2003/6/EC.

The answer was that in accordance with Article 9 (1) MAD applies to any financial instrument admitted to trading on a regulated market in at least one Member State or for which a request for admission to trading on such a market has been made, irrespective of whether or not the transaction itself actually takes place on that market. The referring court, as the decision runs, merely stated that the transactions of which the defendants in the main proceedings had been accused were made on the Rasdaq market. It did not indicate whether the shares concerned were also admitted for trading on another market in financial instruments which was classified as a regulated market or whether the request for such admission had been submitted at the material time. If that had been the case, which would have been for the national court to establish, that manipulation would in any event fall within the scope of Directive 2003/6 by virtue of Article 9 thereof and it would not be necessary to know, for the purpose of the dispute in the main proceedings, whether or not the Rasdaq market is a regulated market within the meaning of Directive 2004/39.

B. PRACTICES CONSIDERED TO BE MARKET MANIPULATION

CESR provided in its first set of guidance a group of practices which its members consider to be market manipulation. These practices are described below:

Ba. False/Misleading Transactions Examples

i. Wash trades[97]

This is the practice of entering into arrangements for the sale or purchase of a financial instrument where there is no change in beneficial interests or market risk or where the transfer of beneficial interest or market risk is only between parties who are acting in concert or collusion. (Repo transactions and stock lending/borrowing or other transactions involving transfer of securities as collateral do not constitute wash trades.

ii. Painting the tape[98]

This practice involves engaging in a transaction or series of transactions which are shown on a public display facility to give the impression of activity or price movement in a financial instrument.

iii. Improper matched orders[99];

These are transactions where both buy and sell orders are entered at or nearly at the same time, with the same price and quantity by different but colluding parties, unless the transactions are legitimate trades carried out in conformity with the rules of the releva nt trading platform (e.g. crossing trades).

iv. Placing orders with no intention of executing them[100]

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[97] See CESR, Level 3 – first set of CESR guidance and information on the common operation of the Directive http://www.esma.europa.eu/system/files/04_505b.pdf

[98] See CESR, Level 3 – first set of CESR guidance and information on the common operation of the Directive http://www.esma.europa.eu/system/files/04_505b.pdf

[99] See CESR, Level 3 – first set of CESR guidance and information on the common operation of the Directive http://www.esma.europa.eu/system/files/04_505b.pdf

[100] See CESR, Level 3 – first set of CESR guidance and information on the common operation of the Directive http://www.esma.europa.eu/system/files/04_505b.pdf

This involves the entering of orders, especially into electronic trading systems, which are higher/lower than the previous bid/offer. The intention is not to execute the order but to give a misleading impression that there is demand for or supply of the financial instrument at that price. The orders are then withdrawn from the market before they are executed. (A variant on this type of market manipulation is to place a small order to move the bid/offer price of the financial instrument and being prepared for that order to be executed if it cannot be withdrawn in time.

Bb. Price Positioning

i. Marking the close[101].

This practice involves deliberately buying or selling securities or derivatives contracts at the close of the market in an effort to alter the closing price of the security or derivatives contract. This practice may take place on any individual trading day but is particularly associated with dates such as future/option expiry dates or quarterly/annual portfolio or index reference/valuation points. Other ones are Abusive squeeze, Excessive bid-ask spreads, etc.

ii. Colluding in the after market of an Initial Public Offer.

This practice is particularly associated with Initial Public Offers of securities immediately after trading in the security begins. Parties which have been allocated stock in the primary offering collude to purchase further tranches of stock when trading begins in order to force the price of the security to an artificial level and generate interest from other investors – at which point they sell their holdings.

iii. Abusive squeeze

This involves a party or parties with a significant influence over the supply of, or demand for, or delivery mechanisms for a financial instrument and/or the underlying product of a derivative contract exploiting a dominant position in order materially to distort the price at which others have to deliver, take delivery or defer delivery of the instrument/product in order to satisfy their obligations.

iv. Creation of a floor in the price pattern

[101] See CESR, Level 3 – first set of CESR guidance and information on the common operation of the Directive http://www.esma.europa.eu/system/files/04_505b.pdf

This practice is usually carried out by issuers or other entities which control them, and involves transactions or orders to trade employed in such a way that obstacles are created to the share prices falling below a certain level, mainly in order to avoid negative consequences for their share or credit ratings. This needs to be distinguished from legitimate trading in shares as part of "buy-back" programmes or the stabilisation of financial instruments.

v. Excessive bid-ask spreads

This conduct is carried out by intermediaries which have market power – such as specialists or market makers acting in cooperation – in such a way intentionally to move the bid-ask spread to and/or to maintain it at artificial levels and far from fair values, by abusing of their market power, i.e. the absence of other competitors.

vi. Trading on one market to improperly position the price of a financial instrument on a related market

This practice involves undertaking trading in one market with a view to improperly influencing the price of the same or a related financial instrument in another market. Examples might be conducting trades in an equity to position the price of its derivative traded on another market at a distorted level or trading in the underlying product of a commodity derivative to distort the price of the derivative contract. On the other hand, transactions to take legitimate advantage of differences in the prices of financial instruments or underlying products as traded in different locations would not constitute manipulation.

Bc. Transactions involving fictitious devices/deception

Trash and cash his is the opposite of pump and dump. A party will take a short position in a security; undertake further selling activity and/or spread misleading negative information about the security with the purpose of driving down its price. The manipulator then closes their position after the price has fallen[102].

i. Concealing ownership

This is a transaction or series of transactions which is designed to conceal the ownership of a financial instrument via the breach of disclosure requirements

[102] CESR, Level 3 – first set of CESR guidance and information on the common operation of the Directive http://www.esma.europa.eu/system/files/04_505b.pdf

through the holding of the instrument in the name of a colluding party (or parties). The disclosures are misleading in respect of the true underlying holding of the instrument. (This practice does not cover cases where there are legitimate reasons for financial instruments to be held in the name of a party other than the beneficial owner – e.g. nominee holdings. Nor do all failures to make a required disclosure necessarily constitute market manipulation.)

ii. Dissemination of false or misleading market information through media, including the internet, or by any other means (in some jurisdictions this is known as 'scalping'[103])

This is done with the intention of moving the price of a security, a derivative contract or the underlying asset in a direction that is favourable to the position held or a transaction planned by the person disseminating the information

iii. Pump and dump

This practice involves taking a long position in a security and then undertaking further buying activity and/or disseminating misleading positive information about the security with a view to increasing the price of the security. Other market participants are misled by the resulting effect on price and are attracted into purchasing the security. The manipulator then sells out at the inflated price.

iv. 'Trash and cash'

This is the opposite of pump and dump. A party will take a short position in a security; undertake further selling activity and/or spread misleading negative information about the security with the purpose of driving down its price. The manipulator then closes their position after the price has fallen.

v. Opening a position and closing it immediately after its public disclosure

This practice is typically carried out by portfolio managers and other large investors whose investment decisions are usually valued by market participants as

[103] See also **LG Frankfurt 9.11.1999**, AG 2000 p.187, Tountopoulos Vasilios, Scalping as insider trading according to Presidential Decree 53/1992, Commentary on Prior decision of LG Frankfurt, Business and Company Law 12/2000, p. 1206

relevant signals of future price dynamics. The canonical unfair conduct consists in closing the position previously acquired immediately after having publicly disclosed it putting emphasis on the long holding period of the investment. However, making a report or disclosure will not, in itself, give rise to a false or misleading impression if it was made in the way specified by any applicable legal or regulatory requirement and was expressly required or permitted by such a requirement.

Bd. Dissemination of false and misleading information[104]

v. Spreading false/misleading information through the media[105]

This involves behavior such as posting information on an internet bulletin board or issuing a press release which contains false or misleading statements about a company whose shares are admitted to trading on a regulated market. The person spreading the information knows that it is false or misleading and is disseminating the information in order to create a false or misleading impression.

vi. Other behaviour designed to spread false/misleading information

This type of market manipulation would cover a course of conduct designed to give false and misleading impression through means other than the media. An example might be the movement of physical commodity stocks to create a misleading impression as to the supply or demand for a commodity or the deliverable into a commodity futures contract.

vii. An Example

Example: In early 2004, Shell announced that it was writing down 25 per cent of its hydrocarbon reserves, causing a £2.9bn drop in its market capitalization. The FSA found that the company had not only **disseminated information likely to give a false or misleading impression** in relation to its reserves since 1998 but also failed to act when evidence of irregularities first came to light. Executives had been aware of the problems at least four years previously. Nonetheless, the FSA's fine appeared

[104] See Supreme Court of the USA 18.06.2009, F.Scott Yeager v. USA, LexisNexis Academic
[105] See CESR, Level 3 – first set of CESR guidance and information on the common operation of the Directive http://www.esma.europa.eu/system/files/04_505b.pdf

puny compared with the $120m (£66m) settlement agreed with the SEC, its US equivalent. Having ruled against Shell, the FSA continued its enquiries into the conduct of a number of individuals in the senior management at the company, most notably the former chairman, Sir Philip Watts. But in November 2005 it announced that no further action would be taken. The company may have been at fault, but no one individual was found to have committed market abuse.

viii. ECJ Jurisprudence on Dissemination of false and misleading information

According to **ECJ 07.07.2011**, Article 1(2)(a), second indent, of Directive 2003/6/EC on insider dealing and market manipulation (market abuse) must be interpreted as not requiring, in order for the price of one or more financial instruments to be considered to have been fixed at an abnormal or artificial level, that that price must maintain an abnormal or artificial level for more than a certain duration[106]**. This means that there is no minimum time limit necessary concerning the maintenance of the price, for the establishment of market manipulation.**

[106] See **ECJ 07.07.2011**,C-445/09, IMC Securities BV v. Stichtig Autoriteit Financiële Markten Ruling+(28)**,**http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0445:EN:HTML

V. ENFORCEMENT AND SAFE HARBORS

A.ENFORCEMENT

This last part concerns enforcement measures against market abuse (both insider dealing and market manipulation). Market abuse may be enforced in four different ways.

First, administrative enforcement is the main type of enforcement addressed in the Market Abuse Directive. For instance, the Directive states that the competent authorities of the Member States must have the powers to access documents, to demand information, to carry out on-site inspections, to request telephone records, to suspend trading and to freeze assets. When provisions of the Directive have not been complied with, Member States shall ensure that there are effective, proportionate and dissuasive administrative sanctions. Further, the Directive specifies that there should be a single administrative authority in each Member State and that the members of the authority shall enjoy professional secrecy..125 An appeal against the decisions of the competent authority shall be possible, and authorities of different Member States shall cooperate.

Second, insider dealing and market manipulation often lead to criminal sanctions. However, the Directive restricts itself to the words “without prejudice to the right of Member States to impose criminal sanctions…”. Thus, with respect to criminal sanctions, several aspects remain within the discretion of the Member States, such as: whether they provide sanctions at all; whether they link such sanctions to the definitions of market abuse of EU law (very likely – despite differences in burden of proof); which kind of subjective requirements are imposed (always intent?); and which kinds of criminal punishment can follow.

Third, the recitals of the EU Directive recommend internal control mechanisms, namely “grey lists”, “window trading”, “codes of conduct” and “Chinese walls”. A company draws up a “grey list” of its business partners in order to communicate to its employees with whose securities they should not trade.“Chinese walls” are information barriers in order to ensure that the department of a company

(typically a financial institution) which trades in financial instruments does not get access to information available in other departments.

Fourth, private-law claims are not addressed in MAD. In cases of market manipulation, in particular securities fraud, private enforcement can be important. Here many questions have to answered such as whether the basis of a private claim is securities law or tort law, whether it is directed against the company or the managers, whether causality has to be proven, whether negligence or intent are necessary, whether it leads to disgorgement of profits, rescission, or damages and how damages are calculated. These topics, still depend on national law in Europe[107].

B.SAFE HARBORS REGARDING INSIDER DEALING

In this unit certain occasions which provide a defence or a “safe harbor” to people, who may have access to inside information due to other reasons.

Ba. Trading in own shares

Under Article 8 and Recital 33 of the Market Abuse Directive, trading in own shares in the context of buy-back programmes and the stabilization of financial instruments is exempted from the prohibitions of the Directive if it complies with the requirements of the Regulation on share-buy backs and stabilizations.

Bb. Obligations Arisen before the possession of the information

Furthermore, Article 2(3) of the Directive creates a safe harbor from the prohibition for transactions conducted in the discharge of an obligation to acquire or dispose of financial instruments, provided that the relevant obligation has arisen in the context of an agreement that was concluded before the person concerned possessed inside information and the parties’ obligations have become due. The goal if this safe harbor is clear since it protects the certainty of contracts and allows for the proper performance of pre-existing contractual obligations, which, in the absence of the safe harbor could also be exposed to the threat of voidability[108].

Bc. Market Makers

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[107] See **Avgouleas**, ibid with reference to different legal orders France, Greece etc, **Siems Mathias** p. 27

[108] See **Avgouleas** The Mechanics and Regulation Chapter 6 p. 22

According to Recital 18, market makers, bodies authorized to act as counterparties (e.g. exchanges in exchange Markets), or settlement and payment systems, custodians, and persons authorized to execute orders on behalf of third parties who possess inside information, will not be found in violation of the prohibition provided that: (a) market makers and central counterparties or settlement and payment systems restrict themselves to buying or selling financial instruments, and (b) brokers who act for third parties simply carryout 'an order dutifully'; as these persons are afforded a safe harbor their trading activities will not be deemed in themselves to constitute use of such 'inside information'.

Bd. Access due to a Takeover bid

Recital 29 provides that the mere fact of having access to inside information relating to another company and using it in the context of a public takeover bid, for the purpose of gaining control of that company or proposing a merger with that company, should not in itself be deemed to constitute insider dealing. This safe harbor in conjunction with the safe harbor of Recital 30 clearly covers trading by a bidder in a prospective target company's securities in its full knowledge that it is preparing to launch a takeover bid for that company. However, any bidder acting in the way described above in the preparation of a takeover bid must also comply with Article 6 of the Takeover Bids Directive. This Article requires that a bidder discloses without delay its decision to make a bid, and even pre-notifies the supervisory authority of its decision, 117 also being obliged to draw up, in a timely fashion, an offer document addressed to the shareholders of the offeree company.

Be. Disclosure in the normal course of the exercise of his employment, profession or duties

Furthermore, Article 3(a) of the Market Abuse Directive creates a clear safe harbor from the secondary offence of disclosure of inside information, where such disclosure is made by a person 'in the normal course of the exercise of his employment, profession or duties'. Within the safe harbor should fall directors who discuss the unpublished results of an issuer with their auditors and bankers, the regulatory and tax authorities, and the company's lawyers or accountants who share 'inside information' with their co-workers for the purposes of work carried out for the issuer.

C. SAFE HARBORS FOR MARKET MANIPULATION

Article 8 and Recital 33 of the Market Abuse Directive provide that trading in own shares in the context of buy-back programmes and the stabilization of financial instruments are exempted from the prohibitions of the Directive as long as they are carried out in accordance with the requirements of the EC Regulation on share buy-backs and stabilizations. The choice of enacting a Regulation indicates that the Commission aimed at the maximum harmonization of Member State's regulations on share buy-backs and stabilizations. Furthermore, through the use of a Regulation greater legal certainty concerning the implementation and application of the relevant rules is achieved.

This does not, however, mean that share buy-back schemes and stabilizations[109] that do not comply with the provisions of the Regulation should be deemed to constitute market abuse[110]. They should be examined by the Member States' competent authorities on an ad hoc basis for the purposes of enforcing the prohibition of market manipulation in the Directive and requisite sanctions should apply[111].

[109] For extensive analysis see **Avgouleas** Chapter 6 p. 43-51
[110] See **Avgouleas** Chapter 6 p.43
[111] See ibid with reference to different legal orders France, Greece etc.

CONCLUDING REMARKS

The notion of insider dealing and market manipulation has been analyzed above. This analysis included the description of their elements, their practices, their impact on the market and the possible safe harbors. Their importance as key factors of the function of capital markets has been –hopefully- made clear.

It has also been made clear that in capital markets huge numbers of transactions, which involve large sums of money, take place worldwide on a daily basis. Large sums of money mean powerful interests. Powerful interests mean capability to finance research. For this reason, the evolution of securities markets is very rapid and continuously involves new technologies and new financial instruments. Consequently the legislators have difficulty in following this evolution. A possible danger is that regulatory authorities cannot understand the mechanics of what they have to regulate and sanctioning authorities the practices they have to sanction.

Hopefully the new Regulation on Market Abuse and the new Directive on sanctioning manipulation of benchmarks will effectively deal with these emerging dangers.

A. BIBLIOGRAPHY

- **Alessi Christopher and Mohammed Aly Sergie**, Understanding the LIBOR Scandal at UK Council on Foreign Relations website, http://www.cfr.org/united-kingdom/understanding-libor-scandal/p28729
- **Avgouleas Emilios,** The Mechanics and Regulation of Market Abuse, Oxford University Press, 2005
- **Barnes Paul**, **Stock market efficiency, insider dealing and market abuse**, Publ. Gower, 2009
- **Castagnino John-Peter**, Derivatives, The Key Principles, Oxford University Press, 2009
- **Hansen Jesper Lau**, The Hammer and the Saw – A Short Critique of the Recent Compromise Proposal for a Market Abuse Regulation
- **Harris M. Daniel/ Herzel Leo**, Do we need insider trading laws?, Company Lawyer, 1989 , West Law UK
- **ISDA**, Market Review of OTC Derivative Bilateral Collateralization Practices, Release 2.0., 1st of March 2010, p.7 http://www.isda.org/c_and_a/pdf/Collateral-Market-Review.pdf
- **Keijser Thomas**, Financial Collateral Arrangements, Kluwer, 2006
- **Kern Alexander** INSIDER DEALING AND MARKET ABUSE: THE FINANCIAL SERVICES AND MARKETS ACT 2000 p.13, http://www.cbr.cam.ac.uk/pdf/WP222.pdf
- **Kern Alexander**, The Law of Insider Dealing: A Tale of Two Jurisdictions, ZVglRWiss 112(2013) p. 262-292
- **Kirilenko Adrei/Kyle S. Albert/ Mehrdad Samadi/ Tugkan Tuzun** The Flash Crash: The Impact of High Frequency Trading on an Electronic Market, May 26 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1686004

- **Langenbucher Katja**, The “use or possession” debate revisited – Spector Photo Group and insider trading in Europe, Capital Markets Law Journal, Vol. 5, No 4
- **Lin Tom C.W.,** The New Investor. 60 UCLA Law Review 678 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227498
- **Manne Henry,** Insider Trading and the Stock Market, Free Press, New York, 1966
- **OICV-IOSCO Technical Committee of the International Organization of Securities Commissions**, Regulatory Issues Raised by the Impact of Technological Changes on Market Integrity and Efficiency Consultation Report, July 2011, p.19 available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD354.pdf
- **Papadopoulos Thomas/ Moloney Niamh,** Law of the European Union, Oxford University Press, Issue 36, 2012, Section 20, EU Company Law
- **Papadopoulos Thomas**, Commentary on ECJ 28.06.2012, C-19/11, Hellenic Review of European Law
- **Ramseyer J. Marc**, Insider Trading Regulation in Japan, Harvard John M. Olin Center for Law, Economics and Business, electronic copy available http://ssrn.com/abstract=1915284
- **Siems Mathias**, The EU Market Abuse Directive: A Case-Based Analysis, p.7 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1066603
- **Sifuna Anazett Pacy**, Disclose or abstain: The prohibition of insider trading on trial. Journal of International Banking Law and Regulation, 2012
- **Staikouras Panagiotis**, The Conundrum of the Market Abuse Directive Preventative Measures for EU Financial Services’ Intergration: In Search of Equilibrium between Market Integrity Enhancement and Undue Regulatory Encumbrance
- **Tountopoulos Vasilios**, Scalping as insider trading according to Presidential Decree 53/1992, Commentary on Prior decision of LG Frankfurt, Business and Company Law 12/2000, p. 1206

- **Van Empel Martijn**, Financial Services in Europe: An Introductory Overview, Austin, Boston, Chicago, New York, The Netherlands: Wolters Kluwers Law & Business, 2008
- **Vervesos Nikolaos**, Commentary on ECJ 10.05.2007, Business and Company Law 12/2007

B. JURISPRUDENCE

a.ECJ

- ECJ 03.05.2001, C-28/99, Verdonck etc
- ECJ 22.11.2005, C-384/02, Grøngaard and Bang, available at official EU website, http://curia.europa.eu/juris/document/document.jsf?text=&docid=56135&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=904506
- ECJ 23.12.2009, C-45/08 Spector Photo Group NV,Chris Van Raemdonck v. Commissie Voot her Bank-, Finanzie-en Assurantiewezen (CBFA), available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=77184&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=664283
- ECJ 07.07.2011, C-445/09, IMC Securities BV v. Stichtig Autoriteit Financiële Markten,http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0445:EN:HTML
- ECJ 10.05.2007, C-391/04, Ipourgos Ikonomikon, Proistamenos DOI Amfissas v. Charilaos Georgakis, available at EU official EU website, http://curia.europa.eu/juris/document/document.jsf?text=&docid=61838&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=903747
- ECJ 22.03.2012, C-248/11, Nilaş, Dascăl etc

b.USA

- **Supreme Court of the USA 18.06.2009**, F.Scott Yeager v. USA, LexisNexis Academic
- **U.S. Court of Appeals**, Dirks v. Securities and Exchange Commission681 F.2d 824, 220 U.S. App. D.C. 309 (D.C. Cir. 1982)
- **U.S. Supreme Court No 78-1202, 18.03.1980**, 445, U.S. 222 **Chiarella v. U.S.** West Law Database
- **US Supreme Court *1986*** *United States v. Carpenter* West Law Database
- **U.S. Supreme Court 1997** *United States v. O'Hagan* West Law Database
- **U.S. Supreme Court** 1909 *Strong v. Repide* West Law Database

c.Germany

LG Frankfurt 9.11.1999, AG 2000 p.187