

The EU Market Abuse Directive: A Case-Based Analysis

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Abstract:

Since the law on market abuse in EU countries has in recent years become predominantly European-based, it makes sense to address this area of law from a European point of view. However, there is, so far, no European case law on the new market abuse regime. This article therefore uses some hypothetical and real-world examples in order to explain the main content and practical problems of the new law. First, it analyses the three main elements of the European market abuse regime, namely; insider dealing, ad-hoc-publicity and market manipulation. Subsequently, the limits to these provisions – including cross-border aspects – are addressed. The final part deals with enforcement issues, in particular the extent to which the law of the Member States remains important.

JEL Classification: G10, K14, K22, K42, N2

Keywords: Market Abuse Directive, market abuse, market manipulation, insider dealing, insider trading, securities fraud, ad hoc publicity, buy-back programmes, European securities law.

**Final version published in
(2008) 2 Law and Financial Markets Review 39-49**

^{*} I am grateful for comments made by Matthijs Nelemans and Jill Robbie. The usual disclaimer applies.

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A. INTRODUCTION

In recent years the law on market abuse in EU countries has become predominantly European-based, with EU directives being the predominant source of the law. It is true that many provisions of the Insider Dealing Directive 89/592/EEC¹ can still be found in the current European law, in particular in the Market Abuse Directive 2003/6/EC.² However, there are also important differences. First, the scope of the current European law is wider because it not only covers insider dealing (or insider trading)³ but also ad hoc publicity⁴ and market manipulation. This is in line with international developments because IOSCO's recommendations also address all these topics.⁵ Secondly, the European law has become "deeper". According to article 6 of Directive 89/592/EEC Member States could adopt more stringent or additional provisions. Now, however, the Market Abuse Directive follows the concept of maximum harmonisation, which means that Member States can provide neither more lenient nor stricter rules.⁶ Thirdly, the EU law on market abuse is a result of the Lamfalussy-model of law-making.⁷ Thus, it consists of a multi-levelled and comprehensive set of provisions. At the first level, the Market Abuse Directive 2003/6/EC⁸ provides the basic legal framework. At the second level, the Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, and the Regulation (EC) No. 2273/2003 specify some technical de-

¹ Directive 89/592/EEC of the Council coordinating regulations on insider dealing. On its history see MG Warren, *European securities regulation* (The Hague, Kluwer, 2003) 143-150.

² Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).

³ "Insider dealing" is the term more common in Europe; "insider trading" is more common in the US.

⁴ Previously – but more limited – in Directive 2001/34/EC of the European Parliament and the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities, art 81.

⁵ See International Organization of Securities Commissions, *Objectives and Principles of Securities Regulation*, 2003, No 4.2.1; Technical Committee of the International Organization of Securities Commissions, *Investigating and Prosecuting Market Manipulation*, 2000.

⁶ Likewise other parts of EU securities law. See L Enriques and M Gatti, "Is There a Uniform EU Securities Law After the Financial Services Action Plan?" (Working Paper 2007) 15-16, available at <http://ssrn.com/abstract=982282> accessed on 23 October 2007.

⁷ See Directive 2003/6/EC, rec 4, 5 and art 17.

⁸ See *supra* note 2.

tails.⁹ At the third level, the Committee of European Securities Regulators (CESR) publishes guidance on the common operation of the Directive.¹⁰ Finally, at level four, the Commission ensures compliance with the European law.¹¹

These developments point to the need to address this area of law from a European perspective. This article will outline the rational and basic structure of the European rules. Because there is no European case law on the new market abuse regime some hypothetical and real-world examples will be used in order explain the main content and practical problems of the new law. First the article will analyse the three main elements of the European market abuse regime, namely; insider dealing, ad-hoc-publicity and market manipulation (B-D below). Subsequently, the limits to these provisions – including cross-border aspects – will be addressed (E below). The final part of the article will deal with enforcement issues, in particular the extent to which the law of the Member States remains important (F below).

B. INSIDER DEALING

1. Rationale

The reason insider dealing is prohibited is only briefly mentioned in the Market Abuse Directive. Recital 12 states that the prohibition ensures the integrity of Community financial markets and enhances investor confidence in those markets. Recital 15 adds

⁹ Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation; Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest; Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices; Commission Regulation (EC) No 2273/2003 on Market Abuse.

¹⁰ First set of CESR guidance and information on the common operation of the Directive, May 2006, CESR/04-505b; Consultation paper – Market Abuse Directive, Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market, November 2006, CESR/06-562

¹¹ http://ec.europa.eu/internal_market/company/infringements/index_en.htm accessed on 23 October 2007.

that insider dealing “prevents full and proper market transparency, which is a prerequisite for trading for all economic actors in integrated financial markets”.

Yet, the harmfulness of insider dealing should – despite its long history¹² – not be assumed. The counter-view¹³ argues that allowing insiders to use their knowledge is favourable for capital markets because the very fact that they sell the shares in question discloses secret information. Furthermore, the possibility of insider dealing provides incentives to find out important information. For instance, it can motivate journalists to uncover corporate scandals. Finally, the alleged harm that insider dealing causes may not call for a statutory prohibition. Rather by requiring disclosure of information, it is possible to reduce the danger of insider dealing. Private contractual prohibition is also possible. For instance, for directors of a company it is usually provided in their service contracts that they should not take advantage of the information they know because of their privileged position.

The trend is, however, to prohibit insider dealing by law. The alleged advantages of insider dealing are discounted. It is argued that insider dealing does not lead to substantial disclosure because insiders will only trade so much that it will not be discovered. It is also doubted whether the admissibility of insider dealing would provide the right incentives. For instance, a manager may buy shares of a competitor and then manage his own company in a way that would benefit the competitor.¹⁴ Further, one can – as the recitals of the EU Market Abuse Directive show – focus on the negative impact that insider dealing has on the investor confidence in capital markets. This harms companies because it makes corporate finance more expensive.¹⁵ An alternative

¹² See already *R v De Berenger* (1814) 105 ER 36 (sale of Government securities after raising false rumours that Napoleon was dead which lifted the price of the securities); see also G Artom, *Napoleon is dead in Russia* (1970).

¹³ DW Carlton and DR Fischel, “The Regulation of Insider Trading” 35 *Stanford Law Review* 857 (1983). See also FH Easterbrook and DR Fischel, *The Economic Structure of Corporate Law* (Cambridge, Mass., Harvard University Press, 1991) Ch 10; SM Bainbridge, “Insider trading”, in B Bouckaert and G De Geest, Gerrit (eds) *Encyclopaedia of Law and Economics* (Cheltenham, Edward Elgar, 2000) 777-84.

¹⁴ See Easterbrook and Fischel, *supra* n 13, 260.

¹⁵ See, eg, DF Vagts, “Securities Regulation – An Introduction”, in A Conard (ed), *International Encyclopaedia of Comparative Law* (Tübingen, Mohr, 2000), Ch 10, para 20; IG MacNeil, *The Law on Financial Investment* (Oxford, Hart, 2005) 298-9; G Ferrarini, “The European Market Abuse Directive” (2004) 41 *Common Market Law Review* 711, 713-5; N Moloney, *EC Securities Regulation* (Oxford, OUP, 2002) 739-43. See also LN Beny, “Insider Trading Laws and Stock Markets” 31 *Journal of*

reasoning argues that there is breach of a fiduciary relationship. This is the approach followed in the US.¹⁶ This difference in reasoning also has a practical impact because under EU law no breach of fiduciary relationship has to be shown.

2. Basic structure of the law

In all cases of insider dealing there has to be inside information.¹⁷ There are four requirements for this. First, the information has to be precise. Secondly, it has to be non-public. Thirdly, it has to be market information, that is any information relating directly or indirectly to issuers or financial instruments.¹⁸ Fourthly, the information has to be price sensitive, which means that if it were made public the effect on the price of the financial instrument would be significant.

Further, there has to be either trade or tipping. Trade means buying or selling, or attempting to buy or sell, financial instruments. It does not matter whether the insider buys or sells them for his or her own account or for the account of a third party.¹⁹ “Tipping” is also defined widely. On the one hand, it can be any disclosure of the inside information unless it is made in the normal exercise of employment, profession or duties. This exception may, for instance, apply to the situation in which managers of a company ask external lawyers for advice. On the other, there can be tipping if – without disclosing the information – the insider recommends financial instruments to another person.²⁰

Finally, the Directive distinguishes between primary and secondary insiders. Primary insiders are, for instance, board members, directors and lawyers of a company.²¹ Furthermore, in extension of the old Insider Dealing Directive, 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 re-

Corporation Law 237 (2007) (empirical study which found that there is a significant relationship between insider trading laws and stock market performance).

¹⁶ See, eg, *Dirks v SEC* 463 US 646 (1983); Easterbrook and Fischel, *supra* n 13, 269-270.

¹⁷ Directive 2003/6/EC, arts 2-4 with art 1(1). See also Directive 2003/124/EC, art 1 and CESR/06-562, Part 1.

¹⁸ Examples in CESR/06-562, paras 1.15, 1.16.

¹⁹ Directive 2003/6/EC, art 2(1).

²⁰ Directive 2003/6/EC, art 3.

²¹ Directive 2003/6/EC, art 2(2)(a),(c).

gards the fight against financing terrorist activities.²² A secondary insider can be any other person if this person knew or ought to have known that he or she possessed inside information. Thus, there is an additional subjective element which appears not to be required for primary insiders. However, the Directive also states that primary insiders must not “use” that information by disposing of or acquiring securities.²³ Thus, it is necessary that the primary insider knew the information (but not that he or she knew that it was “inside” information). Furthermore, for most remedies some kind of fault is necessary for primary insiders.²⁴ 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 relationship²⁵ which may be difficult to establish.

3. Examples and details

*(1) Mr Grongaard is an employee representative of the board of directors of the financial institution RealDanmark. He is also secretary of the trade union of employees in the financial sector and a member of a liaison committee between RealDanmark and the trade union. When a board meeting of RealDanmark decided to enter into merger negotiations with another financial institutions, Mr Grongaard informed the General Secretary of the trade union, Mr Bang with the aim of helping the staff to deal with the consequences of the merger. Mr Bang informed Mr Christensen, one of his colleagues in the trade unions secretariat. Mr Christensen bought shares in RealDanmark. After the merger was made public, the market price of RealDanmark’s shares rose by 65%. Mr Christensen sold his shares, realising a total profit of about € 180 000.*²⁶

Who has committed insider dealing?

The most obvious candidate is Mr Christensen. First, with respect to inside information the problem could be that the mere merger negotiations could be considered not precise enough. However, in order to be precise it is sufficient that an event may

²² Directive 2003/6/EC, rec 14 and art 2(2)(d).

²³ Directive 2003/6/EC, art 2(1).

²⁴ On enforcement see also F below.

²⁵ See 1. above.

²⁶ This summarises the facts of the decision of the European Court of Justice in *Grøngaard and Bang* (Case C-384/02) of 22 November 2005. This case was decided on the basis of Directive 89/592/EEC. However, it would not have been decided differently today.

reasonably be expected to come into existence provided there is a possibility that there will be an effect on the prices of financial instruments.²⁷ If the information concerns a process which occurs in stages, information about each stage of the process as well as the overall process can be information of a precise nature.²⁸ Thus, the information about the merger negotiations is sufficient. Secondly, Mr Christensen traded in securities. Thirdly, it could be questioned whether he is a primary or a secondary insider. Although he is not a manager of the issuer (ie RealDanmark), he would be a primary insider if he had access to the information through the exercise of his employment.²⁹ It is questionable, however, whether the employment by a third entity (the trade union secretariat) is also covered.³⁰ Yet, this question does not matter in the present case. Mr Christensen would also be a secondary insider. He knew that the information about the merger negotiations was inside information (that is why he bought the shares).

With respect to Mr Grongaard and Mr Bang the question of whether there was inside information is identical to the considerations above. Thus, there was inside information. Yet as Mr Grongaard and Mr Bang did not trade in shares of RealDanmark, they would have only committed insider dealing if there were a “tipping” according to the Directive. This was the main problem discussed by the ECJ in Grongaard³¹ because there would be no tipping if the disclosure of inside information were made “in the normal exercise of his employment, profession, or duties”.³² On the one hand, the ECJ emphasised that – within the limits of the Directive – this decisively depends on the law of the Member States.³³ Thus, the ECJ itself did not examine whether Mr Grongaard and Mr Bang can profit from this exception. On the other hand, the ECJ gave some guidance. The exception requires that there is a close link between the disclosure and the exercise of his employment, profession or duties, and that disclosure is strictly necessary for the exercise of that employment, profession or

²⁷ Directive 2003/124/EC, art 1(1).

²⁸ CESR/06-562, para 1.6.

²⁹ Directive 2003/6/EC, art 2(2)(c).

³⁰ Similar Moloney, *supra* n 15, 760-1.

³¹ ECJ, *supra* n 26, paras 43-54.

³² Directive 2003/6/EC, art 3(a).

³³ ECJ, *supra* n 26, paras 44, 52.

duties.³⁴ This is probably more likely for Mr Grongaard than for Mr Bang because as an employee representative of RealDanmark it may be within his duties to seek to prevent a reduction of staff in the case of the expected merger. Finally, it has to be decided whether Mr Grongaard and Mr Bang would be primary or secondary insider. As a board member Mr Grongaard was a primary insider. With respect to Mr Bang – like Mr Christensen – it depends on the question whether the employment or professional relationship has to be with the issuer (ie RealDanmark). In any case, this distinction would not matter here because Mr Bang knew that the information about the merger negotiations was inside information.

(2) *The CEO of a British bio-tech company publishes until now non-public research results made by his company in a Brazilian medical journal and immediately upon publication trades on the information in the UK.*³⁵ *If he had disclosed this information in the UK, the share price would have risen by 10 % Later, it is, however, found out that the research results are useless. Did he commit insider dealing? Modifications: (a) The CEO publishes the research in a UK medical journal. (b) Immediately upon publication a financial analyst reads the Brazilian journal and trades on it in the UK. (c) The CEO tells his CFO and his son about it. Both buy shares, but claim that they thought this information had already been published in the UK.*

The main problem is whether there was inside information. This would not be the case if the information were not non-public or price sensitive. It is not specified in the Directive how the term “non-public” is to be understood. However, this does not lead to intolerable uncertainty for the issuer. If information is published in accordance with the requirements of ad-hoc-publicity³⁶ this information is “public” with respect to the definition of inside information. More difficult are other forms of publication. Here one has to apply a test of availability. It has to be examined whether a hypothetical counterparty of the transaction is likely to have been acquainted with the information in question.³⁷ This is not the case here because it is not reasonable to assume that other traders would have read the Brazilian medical journal.³⁸

³⁴ ECJ, *supra* n 26, para 34 *contra* P Stanley, “European briefing” (2005) *Solicitors Journal* 1446 (who argues that the “exception” need not to be constructed strictly because “the ‘rule’ and the ‘exception’ are really one – they form a single sentence”).

³⁵ Example given in JL Hansen, “MAD in a Hurry: The Swift and Promising Adoption of the EU Market Abuse Directive” (2004) *European Business Law Review* 183, 196.

³⁶ Directive 2003/124/EC, art 2. On ad-hoc-publicity see C below.

³⁷ Hansen, *supra* n 35, 195.

³⁸ Hansen, *supra* n 35, 196.

“Price sensitivity” is defined as “information a reasonable investor would be likely to use as part of the basis of his investment decisions.”³⁹ The recitals add that it depends on the ex ante available information.⁴⁰ Consequently, it does not matter that the research results were found to be useless. Further, it is enough that the share price would have risen by 10 % Although a CESR document states that fixed thresholds alone are not a suitable means of determining price significance,⁴¹ a 5 % rise or fall of the share price is usually enough.⁴²

As a result, there is inside information. As the CEO traded shares and as he is a primary insider, he has committed insider dealing.

Modifications: (a) It is questionable whether publishing the information in a UK medical journal makes a difference. Although it may be possible that a hypothetical counterparty knew about it, this is not likely. Thus, here too the information only would become public if, for instance, a journalist reads this article and publishes this piece of information in the main-stream financial press.

(b) According to an article by Jesper Lau Hanson, where he used this example,⁴³ there is no insider dealing “because the analyst could reasonably assume that information legally available to her would also be available to other equally diligent players. To prevent the analyst from trading on the information simply because she had reason to believe that many other participants were probably unaware of the information would stifle the incentive to gather and process information so vital to market efficiency”.⁴⁴ Although this result makes sense, Hanson’s line of reasoning is not plausible. The definition of inside information is identical to the original case. Thus, here too there is inside information. The only difference is that in this variant the financial analyst is a secondary insider. From this follows that only if he did not know or ought not to have known that he possessed inside information, would he not have committed insider dealing.

(c) This modification is also about the distinction between primary and secondary insiders. The CEO and the CFO are primary insiders. Therefore, it does not matter

³⁹ Directive 2003/124/EC, art 1(2)

⁴⁰ Directive 2003/124/EC, rec 1.

⁴¹ CESR/06-562, para 1.12.

⁴² See U Diehl et al., *Effiziente Kapitalmarktkommunikation* (Stuttgart, Schäffer-Pöschel, 1998) 175-209.

⁴³ Hanson, *supra* n 35, 196.

⁴⁴ Hanson, *supra* n 35, 196.

that the CFO claims that he did not know that the information had not yet been published. This is different for the son who, as a secondary insider, can raise this objection.

(3) Ms X is a broker-dealer, which means that she not only buys and sells securities for clients but also deals with securities on her own account. She is accused of insider dealing because she bought shares on her own account but was also charged with the execution of an order for the shares of the same company. She objects that the client order was not “precise” because the size and prize of the purchase was only defined by limits.⁴⁵ Furthermore, she argues that due to the liquid capital market the client order was not “price-sensitive”.

Is she right?

Client orders are explicitly mentioned in the Market Abuse Directive. It is said that “for persons charged with the execution of orders concerning financial instruments, ‘inside information’ shall also mean information conveyed by a client and related to the client’s pending orders”.⁴⁶ In addition, CESR provides guidance. With respect to the requirement for precise information it is emphasised that not all characteristics of an order need to be defined.⁴⁷ Generally, it is also said that information can be precise if it refers to events which are alternatives. For example, an intended take-over bid for one or other of two companies can be precise even if the bidder had not finally decided which would be its target.⁴⁸ More difficult is the issue of price sensitivity. Here CESR lists a set of criteria, for instance, the size of the order, the liquidity of the market, the execution timeframe and the identity of the client. Thus, it depends on the specific facts whether Ms X has committed insider dealing.⁴⁹

⁴⁵ This is different from “front-running” (see Directive 2003/6/EC, rec 19), where the broker-dealer is accused of actually executing a client order after she has bought or sold the same securities.

⁴⁶ Directive 2003/6/EC, art 1(1)(s3).

⁴⁷ CESR/06-562, para 3.15.

⁴⁸ CESR/06-562, para 1.7.

⁴⁹ Additionally, she may have violated conduct of business rules for investment firms; see E Avgouleas, *The Mechanics and Regulation of Market Abuse* (Oxford, OUP, 2005) 263.

C. AD HOC PUBLICITY

1. Main rule and rationale

There is a requirement for issuers to provide ad hoc publicity to certain information: an issuer of financial instruments has to inform the public as soon as possible of inside information which directly concerns the issuer.⁵⁰ This serves two purposes. On the one hand, as the linkage to inside information indicates, it aims at the prevention of insider dealing. When inside information is made public, it ceases to be inside information and thus insider dealing cannot take place. On the other hand, similar to other forms of public disclosure, it serves the allocative efficiency of the capital market. The more information issuers publish, the more accurate the prices of financial instruments become and the better capital markets channel investments to the best issuers.

2. Details and examples

Despite the linkage to inside information, there are differences in scope between insider dealing and ad hoc publicity. First, ad hoc publicity is only necessary for information which directly concerns the issuer, whereas insider dealing can also concern information which indirectly relates to issuers or financial instruments.⁵¹ This makes sense because, for instance, it is not the responsibility of the issuer to inform the public about expected decisions of the Central bank, rating agencies, competition or tax authorities.⁵²

Secondly, publication may be delayed for “legitimate interests”.⁵³ However, the issuer has to ensure the confidentiality of the information⁵⁴ and the prohibition of insider dealing remains. According to a second level directive, examples of legitimate interests are negotiations in course or the need of approval of decisions by another corporate body.⁵⁵ For negotiations in course the directive itself mentions negotiations

⁵⁰ Directive 2003/6/EC, art 6(1)(s1).

⁵¹ See B above.

⁵² Examples in CESR/06-562, para 1.16.

⁵³ Directive 2003/6/EC, art 6(1).

⁵⁴ Directive 2003/6/EC, art 6(1). Further details in Directive 2003/124/EC, art 3(2).

⁵⁵ Directive 2003/124/EC, art 3(1).

designed to ensure the financial recovery of the issuer.⁵⁶ CESR provides further guidance. For instance, it mentions the case where the disclosure that negotiations were taking place would jeopardise the conclusion of a contract.⁵⁷

Thirdly, it is prescribed how inside information has to be made public. In general, the mode of publication follows the requirements of the Transparency Directive.⁵⁸ Furthermore, the ad hoc publicity must not be misleadingly combined with other pieces of information and changes of previously disclosed information must be published through the same channel.⁵⁹ There is also the important requirement of complete disclosure. This means that the issuer must not disclose the information only to a selected group of persons (such as some financial analysts). However, complete disclosure is not required if the other person owes a duty of confidentiality. Thus, for instance, a company can outsource business functions and use the services of external advisers if law or contract provide a duty of confidentiality. Additionally, the issuer has to draw up an insider list about the persons who have access to inside information.⁶⁰

3. Extension of personal scope

Whereas ad hoc publicity imposes obligations on the issuers of financial instruments, the same article of the Market Abuse Directive also addresses other groups of persons. First, managers have to disclose to the competent authority if they trade in shares of their company.⁶¹ Of course, managers' transactions may sometimes even be prohibited because of insider dealing. However, in other cases too disclosure of these transactions is regarded as valuable for both market participants and the competent authorities.⁶²

⁵⁶ Directive 2003/124/EC, art 3(1)(a)(s2).

⁵⁷ CESR/06-562, para 2.8.

⁵⁸ This follows from Directive 2003/124/EC, art 2(1); Directive 2004/39/EC, arts 2(1)(k), 20-22, 32(6).

⁵⁹ Directive 2003/6/EC, art 2(1)(s.3),(3).

⁶⁰ For details see Directive 2003/6/EC, art 6(3)(s3); Directive 2004/72/EC, art 5; CESR/06-562, paras 4.1-4.7.

⁶¹ For details see Directive 2003/6/EC, art 6(4); Directive 2004/72/EC, arts 1(1),(2), 6.

⁶² Directive 2004/72/EC, rec 7.

Secondly, there are detailed rules regarding anyone who provides financial recommendations.⁶³ This includes financial analysts and journalists but not individual investment advisers or credit rating agencies.⁶⁴ Financial analysts provide recommendations to buy, hold or sell financial instruments. They may do this for financial institutions, which sell or publish the recommendations, or for funds, which use them for their own investment.⁶⁵ As a dishonest analysis can undercut investor confidence and undermine the efficient allocation of the capital market, EU law tries to ensure that research about financial instruments is fairly presented and conflicts of interests are disclosed.⁶⁶ For journalists, in general, the same rules apply unless self-regulation achieves a similar effect.⁶⁷ Finally, the Directive provides that persons whose main business is to produce recommendations have to follow stricter disclosure standards.⁶⁸

Thirdly, the article about ad-hoc-publicity addresses market operators, public institutions disseminating statistics and professionals arranging transactions in financial instruments. However, the duties are not specific to ad hoc publicity. Market operators must ensure that they prevent and detect manipulation practices, statistics must be disseminated in a fair and transparent way, and professionals must notify suspicious transactions.⁶⁹ Only for the latter duty are more details specified, such as, for instance, the way in which notifications have to be made, and that investment firms and credit institutions are to be regarded as professionals.⁷⁰

⁶³ Directive 2003/6/EC, art 6(4); Directive 2003/125/EC.

⁶⁴ See Directive 2003/125/EC, rec 3, 10.

⁶⁵ See also the definition in Directive 2003/125/EC, art 1(3),(4). Generally see also A Davidson, *How the City Really Works* (London, Kogan Page, 2006) 152-7.

⁶⁶ Directive 2003/6/EC, art 6(4). For details see Directive 2003/125/EC, arts 3, 5.

⁶⁷ Directive 2003/125/EC, arts 3(4), 5(5).

⁶⁸ Directive 2003/125/EC, arts 4, 6. This supplements the requirements of the MiFiD Directive 2004/39/EC.

⁶⁹ Directive 2003/6/EC, art 6(6),(8),(9).

⁷⁰ Directive 2004/72/EC, art 1(3), arts 7-10. See also CESR/04-505b, Part V.

D. MARKET MANIPULATION

1. Main rule and rationale

The Market Abuse Directive states that “Member States shall prohibit any person from engaging in market manipulation”.⁷¹ Of course, this alone is not really helpful because it all depends how market manipulation is defined. This is done in a very complicated way: first, in the Market Abuse Directive itself;⁷² secondly, in two of the second level directives;⁷³ and thirdly in guidance by CESR.⁷⁴

In order to understand the purpose of the prohibition of market manipulation it is best to start with the most basic example, that is, the prohibition of securities fraud. Its rationale is related to the general rationale of public disclosure. Information should lead to more accurate pricing of investments and thus result in the capital market channelling investments to the best issuers. However, there is also the danger of false statements. As individual investors are often not able to verify the truth (or at least it would be very costly for them to do so), a rule against fraud is necessary in order to induce them invest in the capital market and ensure market efficiency.⁷⁵

Other rules about market manipulation have a similar purpose. They aim at behaviour which has a destructive effect on the capital market. However, details are difficult to define. For instance, manipulation cannot be defined as every action that puts pressure on the prices of financial influence because that would also cover ordinary trading.⁷⁶ Thus, the predominant view tries to address the problem of market manipulation by distinguishing between different situations and by using various examples.

⁷¹ Directive 2003/6/EC, art 5

⁷² Directive 2003/6/EC, art 1(2).

⁷³ Directive 2003/124/EC, arts 4 and 5; Directive 2004/72/EC, art 2.

⁷⁴ CESR 04-505b.

⁷⁵ See also Easterbrook and Fischel, *supra* n 13, 279-285; Gilson and Kraakman, “The Mechanisms of Market Efficiency” 70 *Virginia Law Review* 549 (1984); Gilson and Kraakman, “The Mechanisms of Market Efficiency Twenty Years Later” 28 *Journal of Corporation Law* 718 (2003); Avgouleas, *supra* n 49, 210-3.

⁷⁶ See also M Nelemans, “Trade-Based Market Manipulation” (Working Paper 2007) 18-26, available at http://www.law.columbia.edu/focusareas/intlaw_portal/WWJrCS? accessed on 23 October 2007; Avgouleas, *supra* n 49, 108.

2. Details and examples

The European legal framework on the different types of market manipulation can best be illustrated in a table:

	<i>First Variant:</i> False or misleading transactions (unless AMP = accepted market practice)	<i>Second Variant:</i> Price positioning (unless AMP = accepted market practice)	<i>Third Variant:</i> Transactions involving deception	<i>Fourth Variant:</i> False or misleading information
Definitions in Market Abuse Directive 2003/6/EC	Art 1(2)(s1)(a) (ind 1)	Art 1(2)(s1)(a) (ind 2)	Art. 1(2)(s1)(b)	Art. 1(2)(s1)(c)
Examples in Market Abuse Directive 2003/6/EC	Art. 1(2)(s2) (ind 2)	Art. 1(2)(s2) (ind 1)	Art. 1(2)(s2) (ind 3)	
Indicators in Directive 2003/124/EC	Art 4	Art 4	Art 5	
AMPs in Directive 2004/72/EC	Art 2	Art 2		
AMPs in CESR/04-505b Guidance	Parts II and III	Parts II and III		
Examples in CESR/04-505b Guidance ⁷⁷	Para 4.11	Para 4.12	Para 4.13	Para 4.14
Signals in CESR/04-505b Guidance	Para 5.10	Para 5.10	Para 5.10	

Market manipulation by “false or misleading information” (*fourth variant*) is least complicated because it covers straight-forward situations such as securities fraud (see example 1, below). More complications can arise for market manipulations by “false or misleading transaction” (*first variant*) and by “transactions involving deception” (*third variant*). They are defined as “transactions or orders to trade which give, or a likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments” and “transactions or orders to trade which employ fictitious de-

⁷⁷ A similar list of examples could already be found in Proposal for a Directive on insider dealing and market manipulation (market abuse), COM(2001) 281 final, Annex B.

vices or any other form of deception or contrivance”.⁷⁸ In particular, it can be difficult how to distinguish between these two variants – and possibly also further duties of the Market Abuse Directive (see examples 2 and 3, below). Finally, there can be market manipulation by “price positioning” (*second variant*). This case is most complex because a dominant position over the price of securities⁷⁹ typically requires the use of futures, options, or other derivative instruments. It will therefore be only briefly be addressed in this article.⁸⁰

Examples:

(1) *The CEO of a company deliberately publishes incorrect price-relevant information about his company on its webpage. Has he committed market manipulation?*

Modifications: (a) Nobody believes the information is true. (b) A journalist, who read the information on the webpage, publishes it in his newspaper. Has he also committed market manipulation?

The original situation is a straight-forward case of market manipulation under the fourth variant (see Table above). The CEO has published false information which gave a false signal as to financial instruments and he knew that the information was false.⁸¹ It does not matter whether he made any personal profit from this false information.

Modifications: (a) The Market Abuse Directive also regards it as sufficient if information is likely to give a false or misleading signal as to financial instruments.⁸² Thus, market manipulation is still possible if some persons doubt the correctness of the CEO’s information. Of course, this may be different if nobody believes the CEO because in this case the information is unlikely to have an effect on the price of the financial instrument.

(b) In general everyone can commit market manipulation by false or misleading information, if he or she could have known that this information was false. However, for journalists this may lead to unbearable risks. Therefore, the Directive states that with respect to journalists the rules governing their profession have also to be taken into account, unless the journalist derived profits from the dissemination of the infor-

⁷⁸ Directive 2003/6/EC, art 1(2)(s1)(a)(ind 1),(b).

⁷⁹ See Directive 2003/6/EC, art 1(2)(s2)(ind 1).

⁸⁰ See text accompanying notes 104-108 below.

⁸¹ Directive 2003/6/EC, art 1(2)(s1)(c)(s1).

⁸² Directive 2003/6/EC, art 1(2)(s1)(c)(s1).

mation.⁸³ Thus, it also depends on this criterion as well as the national press law whether there is market manipulation.

(2) An email spammer sends emails to persons advising them to buy securities of a particular company. Before he sent these emails, he had bought securities of this company himself. Has he violated the Market Abuse Directive?

There is no market manipulation due to false or misleading information. However, there can be market manipulation under the third variant (see Table above). Taking advantage of access to the media by voicing an opinion about a financial instrument while having previously bought it without disclosing this conflict of interests is regarded as a transaction involving deception.⁸⁴ This is sometimes called “scalping” because the purpose of this voicing of a positive opinion is to “scalp” the rise in the share price when the shares are subsequently sold at profit.

Furthermore, it could be argued that the spammer had to comply with the duties applicable to someone who produces investment recommendations.⁸⁵ Here too it is necessary that this person discloses a conflict of interest.⁸⁶ However, these provisions do not apply to persons who provide personal recommendations to a client.⁸⁷ It is possible that this is the case here because emails – even if sent by a spammer to various persons – are transmitted to specific email accounts.

(3) A owns securities of a particular company, which are, however, disregarded by the financial press and other investors. Therefore A “sells” his securities to one of his companies and “reacquires” them immediately in order to create some artificial market activity. Has A committed market manipulation? Modifications: (a) Instead of using one of his companies A asks his friend B to buy and resell the securities. (b) A’s securities are just “penny stocks”. A agrees to sell, and B agrees to buy, these securities at rising prices. After a few weeks time the price of the securities is twenty times

⁸³ Directive 2003/6/EC, art 1(2)(c)(s2).

⁸⁴ Directive 2003/6/EC, art 1(2)(s1)(b), (s2) (ind 3); Directive, 2003/124/EC, art 5(b); CESR para 4.13. For email spam see also the release of the American SEC at <http://www.sec.gov/news/headlines/spam-case.htm> accessed on 23 October 2007. For internet fraud and market manipulation see also Avgouleas, *supra* n 49, 123-6.

⁸⁵ Directive 2003/6/EC, art 6(5).

⁸⁶ Directive 2003/6/EC, art 5.

⁸⁷ See C 3. above.

the original price. Now, B sells all of his securities. (c) As (b) but B does not buy at rising prices but an increasing amount of securities.

If there is no change in (beneficial) ownership, this “wash sale” can be market manipulation under the first variant (see Table above).⁸⁸ In order to constitute a false or misleading transaction it is necessary that A’s manipulation was successful. This means that his artificial market activity has to increase the demand in the securities. Usually this will be the case unless other market participants have completely counter-balanced A’s mispricing.

Modifications: (a) There can be an “improper matched order”, that is, a transaction 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.⁸⁹ A similar technique is “painting the tape”, which denotes a transaction or series of transactions which are reported on a public display facility to give the impression of activity or price movement in a financial instrument.⁹⁰ In both cases this leads to market manipulation under the first variant (and one can also take the view that the distinction between “improper matched orders” and “painting the tape” is unnecessary).

(b) This form of market manipulation is called “pumping and dumping” -- where the buyer and seller act in collaboration to push the price of a security to an artificially high level and subsequently the buyer sells it for profit. Typically the security in question is an illiquid one – like a penny stock – so its price level is easy to manipulate.

There is some confusion whether this is a false or misleading transaction (first variant)⁹¹ or a transaction involving deception (third variant).⁹² This is not merely of theoretical importance because only in the first and second variant, but not in the third and fourth, is market manipulation excluded if it conforms to accepted market practices.⁹³

The correct answer is that it can be both.⁹⁴ The initial sale of securities at rising prices is a false or misleading transaction. As these transactions could also be “ordi-

⁸⁸ Directive 2003/124/EC, art 4(c); CESR/04-505b, para 4.11.

⁸⁹ CESR/04-505b, para 4.11.

⁹⁰ CESR/04-505b, para 4.11.

⁹¹ Proposal for a Directive on insider dealing and market manipulation (market abuse), COM(2001) 281 final, Annex B.

⁹² CESR/04-505b, para 4.13.

⁹³ See Table *supra* b.

⁹⁴ Similar Avgoulaes, *supra* n 49, 138 (who also contemplates information-based manipulation).

nary transactions” where one person is increasingly sceptical and another person increasingly optimistic about a particular security, it makes sense that an accepted market practice may exclude market manipulation. This is different for the subsequent sale of the securities. Here the initial buyer exploits his position by selling the securities to innocent counterparties. This is a transaction involving deception, likewise example (2).

(c) This situation is called “advancing the bid”.⁹⁵ It is decided in the same way as modification (b): the increasing bid for a security is likely to manipulate its price due to the creation of an illusion that an increase in demand was causing the increase in price.

(4) A buys a significant amount of securities of a particular company because his private research has led him to the conclusion that the price of this security is undervalued. A’s acquisition increases the price of the security significantly and induces other investors to buy them. A few days later, A sells his securities. The competent authority accuses A of market manipulation because his buying and selling had no objective basis. A objects that he just traded in these securities and that he did not intend any manipulation of the capital market. Is he right?

Objectively, it is possible that A engaged in market manipulation. The fact that his trade significantly changed the price of the security and the fact that he sold the securities quickly are indicators of false or misleading transactions.⁹⁶ However, the fact that A’s acquisition was based on his private research could be a counter-argument because it could mean that A’s behaviour did not create a false price but only corrected it. Of course, it may be the case that his research was not accurate. This leads to the general question of whether market manipulation requires fault. Only in the third and fourth variant this is implicitly (“deception”) or explicitly (“knew or ought to have known”) mentioned in the Directive. However, some take the view that *mens rea* is an indispensable element of market manipulation. Indeed, the term “manipulation” would seem to require a subjective element and it would also stifle financial markets if otherwise completely innocent persons could be found guilty of market manipula-

⁹⁵ Proposal for a Directive on insider dealing and market manipulation (market abuse), COM(2001) 281 final, Annex B; see also Avgouleas, *supra* n 49, 141.

⁹⁶ Directive 2003/124/EC, art 4(b),(e).

tion.⁹⁷ The counter-argument is, however, that in any case the subjective requirements depend on the different remedies (criminal, administrative, private).⁹⁸

Further remarks:

As market manipulation is difficult to define, accepted market practices (AMPs)⁹⁹ provide some “negative criteria” which supplement the “positive criteria” of the European directives. These AMPs are not uniform in the EU but depend on the particular market. EU law only provides a list of factors which should be taken into account when considering market practices,¹⁰⁰ and CESR has drafted a format for assessing AMPs¹⁰¹ and publishes the AMPs of Member States on its webpage.¹⁰² This lack of complete uniformity arises for a number of reasons including the fact that AMPs depend on the liquidity and depth of the relevant market.

This section has not yet addressed price positioning.¹⁰³ The definition of price positioning is that someone secures “the price of one or several financial instruments at an abnormal or artificial level”.¹⁰⁴ For instance, this concerns the situation where someone secures “a dominant position over the supply or demand of a financial instruments”.¹⁰⁵ This is most relevant for the trading of futures, options, and other derivative instruments.¹⁰⁶ Further details are quite complex and would require a separate article.

⁹⁷ See Ferrarini, *supra* n 15, 724; Avgouleas, *supra* n 49, 111-3, 117. For a different view see Nelemans, *supra* n 76, 47-50.

⁹⁸ See F below.

⁹⁹ See references in Table *supra* b.

¹⁰⁰ Directive 2004/72/EC, art 2.

¹⁰¹ CESR/04-505b, Part II.

¹⁰² See <http://www.cesr-eu.org/index.php?page=groups&mac=0&id=51> accessed on 23 October 2007.

¹⁰³ See Table *supra* b, second variant.

¹⁰⁴ Directive 2003/6/EC, art 2(s.1)(a)(ind.2).

¹⁰⁵ Directive 2003/6/EC, art 2(s.2) (ind.1).

¹⁰⁶ Similar Avgouleas, *supra* n. 49, 149 (also for exceptions).

E. LIMITS

1. General scope of the directive

In general, the European market abuse regime applies to financial instruments admitted to trading on a regulated market in at least one Member State.¹⁰⁷ This is relatively wide. First, “financial instruments” not only covers shares and bonds but also derivative instruments.¹⁰⁸ Secondly, the term “regulated market” is wide too because it means that all registered and not only listed companies are covered.¹⁰⁹ Thirdly, it is irrelevant whether the transaction itself takes place on a market.¹¹⁰ Thus, not only public but also private transactions or transactions conducted on an alternative trading system are part of the market abuse regime if the company’s financial instruments are admitted on a registered market.

Nevertheless, there are situations where the European law is not applicable. First, it does not apply to the securities of private companies. Secondly, for public companies whose securities are only traded at a non-regulated market, such as the AIM in London, it depends on the national law whether and how in these markets insider dealing, fraud and other forms of market abuse are prohibited. Thirdly, there is an explicit provision which excludes transactions by Member States, central banks and other public bodies.¹¹¹

2. Buy-back programmes and stabilisation

When companies buy back their own shares and investment banks buy shares in order to stabilise the price of a particular security, this could frequently qualify as insider dealing or market manipulation. Thus, European law provides “safe harbours” if certain requirements are fulfilled. As these safe harbour rules are part of a European regulation,¹¹² they are directly applicable in all Member States.

¹⁰⁷ Directive 2003/6/EC, art 9(1).

¹⁰⁸ Directive 2003/6/EC, art 1(3).

¹⁰⁹ The reference in Directive 2003/6/EC, art 1(4) to Directive 93/22/EEC has to be read as referring to Directive 2004/39/EC, art 4(1)(no14); see Directive 2004/39/EC, art 69.

¹¹⁰ Directive 2003/6/EC, art 9(1).

¹¹¹ Directive 2003/6/EC, art 7.

¹¹² Regulation (EC) No 2273/2003 based on Directive 2003/6/EC, art 8.

Companies can have various reasons for buying back their own shares. Like dividends, it can be a means to return surplus money to the shareholders. Its purpose can also be to sell the shares later. For instance, the shares can be used for employee stock option plans or more generally to provide quick liquidity for the company. Finally, to trade in its own shares can have the purpose of influencing the capital market, for example, to affect the market price or the liquidity of the company's shares. There are two potential dangers. On the one hand, the acquisition of own shares reduces the company's capital. Thus, the Second Company Law Directive provides that the board has to be authorised by the general meeting to acquire shares and that the acquisition must not significantly reduce the company's net assets.¹¹³ On the other hand, there is the danger of insider dealing and market manipulation. However, the EU Regulation specifies under which circumstances market abuse is excluded. First, one has to consider the purpose of the buy-back-programme. For instance, reduction of capital and employee share option plans are accepted.¹¹⁴ Secondly, the buy-back-programme has to be properly disclosed.¹¹⁵ Thirdly, the company must not distort the market, for example, by purchasing shares at a high price or by trading more than 25% of the shares per day.¹¹⁶ Fourthly, apart from the buy-back programme the company must not engage in further trading of the shares.¹¹⁷

Stabilisation of a financial instrument is defined as any purchase by financial institutions, "which is undertaken in the context of a significant distribution of such relevant securities exclusively for supporting the market price of these relevant securities for a predetermined period of time, due to a selling pressure in such securities".¹¹⁸ These transactions are often made by underwriting investment banks after a public offering in order to secure the market price and thus prevent short-term speculation and guarantee the success of the public offering.¹¹⁹ However, the danger is that stabilisation leads to a manipulation of the market because it may keep the price of a secu-

¹¹³ Second Council Directive 77/91/EEC, art 19 as amended by Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 as regards the formation of public limited liability companies and the maintenance and alteration of their capital.

¹¹⁴ For details see Regulation (EC) No 2273/2003, art 3.

¹¹⁵ For details see Regulation (EC) No 2273/2003, art 4.

¹¹⁶ For details see Regulation (EC) No 2273/2003, art 5.

¹¹⁷ For details see Regulation (EC) No 2273/2003, art 6.

¹¹⁸ Regulation (EC) 2273/2003, art. 2(no7).

¹¹⁹ See also Regulation (EC) No 2273/2003, rec 11.

rity at an artificially high level. Thus, the EU Regulation only allows it under certain conditions. For instance, the stabilisation must not be carried out for longer than 30 days, it must be disclosed and the securities must not be sold above the offering price.¹²⁰

3. Cross-border aspects

The EU market abuse regime applies to all financial instruments which are admitted to a regulated market in at least one of the Member States (see 1., above). This means that the nationality of the company and the identity of the person who committed market abuse are not decisive. For instance, securities fraud by a Brazilian citizen about financial instruments of an Australian company listed in London leads to the applicability of EU law.

Similarly, within the EU, it is the general starting point of the Market Abuse Directive that the country where the financial instruments are admitted to trading is competent for supervising market abuse.¹²¹ If the financial instruments are admitted to trading in several countries, all of these Member States are competent and thus their implementation of the EU law is applicable. Furthermore, the Member State is competent where the actions are carried out.¹²² This leads to problems if the implementation of the EU market abuse law differs in the countries whose law is applicable.¹²³ Take the example of a French citizen resident in Spain committing securities fraud regarding securities of an Italian company listed in Frankfurt and London. In this case the Spanish, German, and British – but not the French and Italian – implementations of the EU market abuse regime are applicable.

F. ENFORCEMENT

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 (in

¹²⁰ For details see Regulation (EC) No 2273/2003, arts 7-10.

¹²¹ Directive 2003/6/EC, art 10(a).

¹²² Directive 2003/6/EC, art 10(b).

¹²³ See also Enriques and Gatti, *supra* n 6, 28.

the UK this is the FSA) 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.¹²⁴ 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.¹²⁶

Secondly, 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...”¹²⁷ 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.

Thirdly, the recitals of the EU Directive recommend internal control mechanisms, namely “grey lists”, “window trading”, “codes of conduct” and “Chinese walls”.¹²⁸ 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. “Window trading” refers to the opposite, specifying if and under which conditions employees can trade certain securities. “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. Finally, “codes of conduct” specify how sensitive information is to be handled.

The recommendations of the recitals are not binding. However, with respect to “Chinese walls” the Regulation on buy-back programmes provides that the restriction on share trading does not apply if the financial institution has installed “Chinese

¹²⁴ Directive 2003/6/EC, art. 11(2).

¹²⁵ Directive 2003/6/EC, arts 11, 13.

¹²⁶ Directive 2003/6/EC, arts 15, 16.

¹²⁷ Directive 2003/6/EC, art 14(1).

¹²⁸ Directive 2003/6/EC, rec 24. See also Hansen, *supra* n 35, 217.

walls”.¹²⁹ Furthermore, the Markets in Financial Instruments Directive requires “organisational and administrative arrangements to prevent conflict of interests”,¹³⁰ which can lead to a requirement to install “Chinese Walls”.

Fourthly, private-law claims are not addressed in the EU market abuse law. Such claims may not be very important for insider dealing, which is often called a “victimless crime”, this being a crime without clearly identifiable aggrieved persons.¹³¹ However, in cases of market manipulation, in particular securities fraud, private enforcement can be important. Here many questions have to be 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, which have been extensively debated in the US,¹³² still depend on national law in Europe.¹³³

G. CONCLUDING REMARKS

The scope and density of the new EU market abuse regime is already impressive. Moreover, future level 2 and 3 measures will lead to a further Europeanisation and juridification of market abuse law. Critics may question whether this development may go too far. Of course, market abuse has to be prohibited and, since foul play does not care about borders, uniform rules are also plausible. However, there is also no denying the fact that capital markets across Europe are still in quite different stages of development. For instance, the complex criteria for market manipulation may be no problem for authorities in London or Frankfurt but this may be different in Vilnius or Sofia. Thus, alongside further legal measures, empirical data are needed on the extent of market abuse in different jurisdictions and how the new legal regime is applied in practice. This is particularly important since insider dealing and market manipulation

¹²⁹ Regulation (EC) No 2273/2003, art 6(2). See also E 2. above.

¹³⁰ Directive 2004/39/EC, arts 13(3), 18(2).

¹³¹ Warren, *supra* n 1, 152. See also B 1. above on the purpose of prohibiting insider dealing.

¹³² See, eg, LD Soderquist and TA Gabaldon, *Securities Law* (New York, Foundation Press, 2nd edn, 2004) Ch 12; JD Cox and TL Hazen, *Corporations* (New York, Aspen, 2nd edn, 1995ff), Volume III, § 27.

¹³³ For a general overview see Avgouleas, *supra* n 49, 292-5 and 389-446 (for the UK).

are notoriously under-enforced.¹³⁴ The obvious candidates for pursuing this task are the EU Commission and CESR. Conversely, given the sensitivity of data, private persons (such as academics) would hardly be able to get access to the necessary information.

¹³⁴ See, eg, MI Steinberg, “Insider Regulation – A Comparative Analysis” (2003) 37 *International Lawyer* 153; Moloney, *supra* n 15, 769, 779-80; G Hertig and H Kanda, “Related Party Transactions”, in R Kraakman et al (eds), *The Anatomy of Corporate Law* (Oxford, OUP, 2004) 101, 113; MacNeil, *supra* n 15, 301 (for the UK).