

Europe's commitment to countering insider dealing and market manipulation on the basis of Art. 83 para. 2 TFEU

A critical evaluation

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On 12 June 2014, the European Parliament and the Council issued the Commission's Proposal for a Directive on Criminal Sanctions for Market Abuse (i.e., insider dealing and market manipulation) as well as a Regulation on Market Abuse.¹ Given the numerous recent reviews² on that topic – many of them suggesting to repeal criminal sanctions from money market action and even to withdraw criminal law from that field of the economy –³ it is quite astonishing that former Vice-President and EU Justice Commissioner Viviane Reding and Internal Market and Services Commissioner Michel Barnier said: “Today the European Union is sending a clear signal: there must be zero tolerance for manipulators in our financial markets. The EU's new market abuse framework will ensure that those who commit market abuse will face huge fines or jail across Europe.”⁴ In fact, the following assessment paints a much less enthusiastic picture of this advance when it debunks two major shortcomings of that proposal: First, in the present version, this EU legislation, on the whole, has no valid basis in Art. 83 para. 2 TFEU (II.). Second, the wording of its provisions on insider dealing and market manipulation is overtly crude, and as such runs counter to the principle of legality (III.).

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¹ Directive 2014/57/EU of the European Parliament and the Council of 16 April 2014 on Criminal Sanctions for Market Abuse (Market Abuse Directive); Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on Market Abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, available from:

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0596&from=DE> (18.6.2015).

² See – for example – Moloney, EU Securities and Financial Market Regulation, 3rd ed. 2014, p. 699 f.; Vervaele/Luchtman, New Journal of European Criminal Law 5 (2014), 192; Schröder, HRRS 2013, 253; Kert, NZWiSt 2013, 252; Hammen, ZIS 2014, 303; Schönwälder, Grund und Grenzen einer strafrechtlichen Regulierung der Marktmanipulation, 2012, p. 192 f., 246 f.; Trüg, Konzeption und Struktur des Insiderstrafrechts, 2014. See further Luchtman, Utrecht Law Review 2 (2006), 136.

³ From all the references cited in fn. 2 the contribution by Vervaele/Luchtman represents an important exception in favor of this EU legislation.

⁴ http://europa.eu/rapid/press-release_MEMO-14-77_de.htm (18.6.2015).

I. Introduction: Posing the research questions

The first contentious point raised by these initiatives concerns the competence of legislation. Ratione materiae, market abuse obviously cannot be subsumed Art. 83 para. 1 TFEU, and after some consideration, Art. 325 para. 4 TFEU has also been rejected as a proper enabling clause⁵, so that the only basis left could be Art. 83 para. 2 TFEU. This competence, however, requires the approximation of criminal laws of the Member States to be “essential” to ensure the effective implementation of a Union policy. It will be interesting to fathom under what circumstances legislation is essential in this sense (II. 1., 2.), which demands essentiality entails in methodical terms (II. 2., 3.) and if it must be distinguished between the traditional field of market abuse as a long-time area of national legislation on the one hand and the primary core of European financial market law as a new emergence on the other hand (II. 4.).

The second question concerns the wordings of the provisions themselves. Do these rules comply with the principle of legality (nullum crimen sine lege certa in particular)? In this context, numerous publications have suggested a couple of promising ideas for improvement, especially in the wake of some recent decisions by the ECJ and by the ECtHR (i.e., the cases of Grongard-Bang, Spector, and Soros). These concern the definition of inside information (III. 4.), the using of that information (III. 5.), the question of legitimacy (III. 7., 8.), and other matters of the actus reus (III. 2., 6., 9., 10., 12.) and of mens rea (III. 3., 11.) of the crimes involved. It will be instructive to examine if these European initiatives have implemented those exigencies and recommendations at all, and – if this is the case – how successfully.

II. The issue of competence

1. General remarks

The first soft spot of this proposal is rooted in the matter of competence. According to Art. 83 para. 2 TFEU, the approximation of criminal laws and regulations of the Member States have to prove essential to ensure the effective implementation of a Union policy in an area that has been subject to harmonisation measures. Only if this is the case, may directives establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.

It is doubtful, however, that national criminal laws on the imposition of criminal sanctions for market abuse offences differ so substantially between Member States. Of course, the

⁵ See for this debate Miglietti, The New EU Criminal Law Competence in Action, The Proposal for a Directive on Criminal Sanctions for Insider Dealing and Market Manipulation, 2013, p. 20 with further references, available from: <http://www.ies.be/files/Working%20Paper%20Miglietti.pdf> (18.6.2015).

Commission pretends to have unmasked such “divergent approaches” which leave a certain scope for perpetrators to make use of the most lenient sanction systems. The Commission holds that market abuse occurs across borders and that it harms the integrity of financial markets, which are now increasingly integrated into the Union. It is further held that it undermines “both the deterrent effect of each national sanction regime and the effectiveness of enforcement of the Union's legislative framework on market abuse”.⁶ But can these conjectures ever justify EU-wide minimum rules on those forms of deviance without further action of Member States legislation?

Consequently, the key questions are whether national laws of the Member States on insider dealing and market abuse are so inadequate and unqualified that they cannot serve for a proper implementation of these EU policies, what kind of evaluation the term “essential” requires and lastly whether the Commission has met these standards sufficiently by its proposal.

2. The interpretation of essentiality

The criterion of essentiality in Art. 83 para. 2 TFEU is originally an implementation of the principle of subsidiarity⁷ and derives from the ECJ's jurisdiction on the Council framework decision on the protection of the environment from 2005.⁸ Back then, the ECJ held the “protection of the environment” to be “[...] one of the essential objectives of the Community”.⁹ “[W]hen the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences”, Community legislature was thus “not prevented from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.”¹⁰ Moreover, the Council took the view that criminal penalties were essential for combating serious offences against the environment.¹¹

In this manner, essentiality has developed significantly from a characteristic of the application of national laws by national authorities in order to combat crime (“when the application of penalties [...] is an essential measure”) to a

feature of the approximation of criminal laws of the Member States in order to implement EU policies efficiently.¹²

As a feature of EU law, it nowadays clearly serves as a restrictive element against EU legislation. It forces EU law-making bodies to activate directives as means of approximation only if this is the only way to achieve an effective realisation of EU policies – in other words: if this is the last resort (*ultima ratio*).¹³ Conversely, those means of approximation are unnecessary when such a proper implementation can already be based on the national laws of the Member States.¹⁴

Against this background, and in terms of method, EU legislators first need to assess these national laws properly before they can propose approximating legislation. Such a comparison is necessary in order to fathom similarities and differences in the laws of the Member States, to determine their legal situation.¹⁵ Doing so, the national situation appears much less inept than the initial statement in the wake of the launching of the directive suggests (See page 347).

As a result of this comparison, not even Austria, where market abuse is only an administrative offence, at least resulting in a fine up to 150,000 €, and the UK, where market abuse is a civil offence punishable with an unlimited fine, underachieve what the Commission deems best: zero tolerance, huge fines or imprisonment across Europe.¹⁶

3. The significance of impact assessment and of communication on reinforcing sanctioning regimes in the financial services sector

Even so, although differences are minimal,¹⁷ the Commission fiercely disagrees:

¹² Cf. *Vogel* (fn. 7), Art. 83 AEUV para. 82.

¹³ *Vogel* (fn. 7), Art. 83 AEUV para. 82; *Schröder*, HRRS 2013, 253 (255); *Hilgendorf*, in: Park (ed.), *Kapitalmarktstrafrecht*, 3rd ed. 2013, Vor § 12 WpHG para. 10; cf. *Satzger*, *International and European Criminal Law*, 2012, p. 78.

¹⁴ According to *Schröder*, in: *Schröder/Hellmann* (eds.), *Festschrift für Hans Achenbach*, 2011, p. 491 (496), they are even more unnecessary when we take into account that EU harmonisation might have led to the financial crises of 2001/2002 and 2007/2008.

¹⁵ It has been argued in this context that obliging EU legislation to compare the laws of the Member States would ask EU law-making bodies for more than any national legislator (cf. *Hecker* [fn. 8], § 8 para. 48).

¹⁶ Cf. the reports of the European financial authorities: The Committee of European Securities Regulators (CESR) published a comprehensive “Report on Administrative Measures and Sanctions as well as the Criminal Sanctions available in Member States under the Market Abuse Directive (MAD)” in November 2007 (CESR/07-693.). The review panel of its successor, the European Securities and Markets Authority (ESMA), issued several corresponding reports, available from:

<http://www.esma.europa.eu/page/Review-Panel-Documents> (18.6.2015). Further *Tiedemann*, *Wirtschaftsstrafrecht*, *Besonderer Teil*, 3rd ed. 2011, §9 para. 355.

¹⁷ Cf. *Schröder*, HRRS 2013, 253 (254 f.).

⁶ COM (2011) 654 final, p. 5, section 3.2.

⁷ Although some, like *Vogel*, in: *Grabitz/Hilf/Nettesheim* (eds.), *Das Recht der Europäischen Union, EUV/AEUV, Kommentar*, 43. dely., as of: March 2011, Art. 83 AEUV para. 83, hold essentiality compared to subsidiarity an even stricter criterion. Cf. *Zöller*, in: *Baumeister/Roth/Ruthig* (eds.), *Staat, Verwaltung und Rechtsschutz*, *Festschrift für Wolf-Rüdiger Schenke zum 70. Geburtstag*, 2011, p. 579 (592, 595 f.).

⁸ ECJ, Judgment of 13.9.2005 – C-176/03 (Commission v. Council); further *Hecker*, *Europäisches Strafrecht*, 4th ed. 2012, § 8 para. 28, fn. 48, 30 f.; *Böse*, ZIS 2010, 87; *Mitsilegas*, *EU criminal law*, 2009, p. 70 f.

⁹ ECJ, Judgment of 13.9.2005 – C-176/03, para. 41.

¹⁰ ECJ, Judgment of 13.9.2005 – C-176/03, para. 48.

¹¹ ECJ, Judgment of 13.9.2005 – C-176/03, para. 50.

“[...]five Member States do not provide for criminal sanctions for disclosure of inside information by primary insiders and eight Member States do not do so for secondary insiders. In addition, one Member State does not currently impose criminal sanctions for insider dealing by a primary insider and four do not do so for market manipulation. Since market abuse can be carried out across borders, this divergence undermines the internal market and leaves a certain scope for perpetrators of market abuse to carry such abuse in jurisdictions which do not provide for criminal sanctions for a particular offence.”¹⁸

The Commission’s impact assessment takes the same line. Clause 3.5. (“Subsidiarity and proportionality”) reads as follows:

“The preceding analysis has shown that although all the problems outlined above have important implications for each individual Member State, their overall impact can only be fully perceived in a cross-border context. This is because market abuse can be carried out wherever that instrument is listed, or over the counter, so even in markets other than the primary market of the instrument concerned. Therefore there is a real risk of national responses to market abuse being circumvented or ineffective in the absence of EU level action. Further, a consistent approach is essential in order to avoid regulatory arbitrage and since this issue is already covered by the *acquis* of the existing Market Abuse Directive addressing the problems highlighted above can best be achieved in a common effort.”¹⁹

Accordingly, the Commission also took the policy criteria of its communication “Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law” of September 2011²⁰ as a basis for its assessment. Consequently, the Commission needs to identify an “added value of EU criminal law legislation”²¹. It considers the EU rules on financial market behaviour such a case in point where criminal law could be a useful additional tool to ensure effective enforcement. In order to cope with the financial crisis, where financial market rules were not always respected and applied sufficiently, greater convergence between legal regimes in the Member States, including in criminal law, could have helped to prevent the risk of improper functioning of financial markets.²²

Given the fact that the Member States all provide for the punishment of the core crimes in question, the apprehension that national responses may be circumvented or ineffective or that criminals could even amount to regulatory arbitrage must be regarded as far-fetched: Should market abuse be carried out in markets other than the primary market of the instrument concerned, liability exists everywhere under the current legal status. Moreover, the purported need for this legislation in order to cope with the financial crises must be regarded as pretextual: Greater convergence of criminal laws on market abuse can neither remedy the Euro-crisis from 2010 nor the global one from 2007, given that the reasons for these crises have never been a coexistence of non-harmonised criminal laws, primarily relating to the crimes of insider dealing and market abuse, but rather heterogeneous circumstances: sub-prime and predatory lending, growth of the housing bubble, doubtful credit conditions, weak and fraudulent underwriting practices, deregulation, increased debt burden or overleveraging, financial innovation and complexity, incorrect pricing of risk, boom and collapse of the shadow banking system, rising household and government debt levels, trade imbalances, structural problems of the Eurozone system and – as a result – loss of confidence.²³

As a matter of course, this evaluation changes abruptly when taking a look at all the rules dealing with the primary and genuine core of European financial market law, like trading on multilateral trading facilities,²⁴ over-the-counter trading²⁵ or benchmark manipulation in interbank foreign exchange market action. In this case, Art. 83 para. 2 TFEU also requires EU-legislation to be essential, but this does not call for a comparison with national legislation due to the fact that there is no such given *acquis* in the Member States. This is a different story calling for far-reaching banking reforms in light of the current crisis of confidence, recommending the adoption of binding regulations and of rules within the broader context of separation of powers in European Union law²⁶ as well as calling for complementary enforcement regimes like effective transnational cooperation and coordina-

of European Banking Supervisors-CEBS, Committee of European Insurance and Occupational Pensions Supervisors-CEIOPS and Committee of European Securities Regulators-CESR) on the equivalence of the sanctioning regimes in the financial sector in Member States.

²³ See http://en.wikipedia.org/wiki/European_debt_crisis (18.6.2015); and http://en.wikipedia.org/wiki/Financial_crisis_of_2007%E2%80%932008 (18.6.2015).

²⁴ See SEC (2011) 1217 final, p. 10, 12, 32, 67, 70, 78.

²⁵ See SEC (2011) 1217 final, p. 9 f., 12, 17, 32 f., 67.

²⁶ See *Firzli*, *Revue analyse financière* 2010, no. 34, 49, available from:

http://www.canadianeuropean.com/yahoo_site_admin/assets/docs/Bank_Regulation_and_Financial_Orthodoxy_RAF_Jan_2010.784613.pdf (18.6.2015);

Veil, *European Capital Markets Law*, 2013, p. 25 f., 96 f., 209 f., 310 f.

¹⁸ Proposal for a Directive of the European Parliament and of the Council on Criminal Sanctions for Insider Dealing and Market Manipulation, COM (2011) 654 final, p. 3.

¹⁹ SEC (2011) 1217 final, p. 33.

²⁰ COM (2011) 573 final.

²¹ COM (2011) 573 final, p. 5.

²² See again COM (2011) 573 final, p. 5 and the “Communication on reinforcing sanctioning regimes in the financial sector”, COM (2010) 716 final. This is based on comparative research by the three Committees of Supervisors (Committee

tion, integrated supervision, and the protection of fundamental rights²⁷.

4. Results for the competence subject to Art. 83 para. 2 TFEU

Judging from that EU policy point of view, the Member States all feature a model of criminal law that allows for considerable sanctions.²⁸ Understood in a normative way, any further approximation would not be essential, because the present national laws already punish infringements of EU law sufficiently.²⁹ The only way to see things differently would be a conception of essentiality more as an empirical criterion that requires evidence that the underlying harmonisation of money market law lacks enforcement, which can only be resolved by the harmonisation of criminal laws.³⁰ Such a deficit of execution could only be proven by an alarming violation of EU law in a Member State in the absence of appropriate and sufficient criminal law, while other Member States show such provisions and observe EU law.³¹

Clearly, such a purely empirical concept that compels EU legislation to wait and watch for a lack of implementation would go too far: Art. 83 para. 2 TFEU has to be interpreted in a functional way, matching EU law-making with both EU policies and the demands of EU law. Just like any other (national) legislation, EU law-making has to enjoy some freedom of action in terms of an assessment prerogative. Conversely this allows EU legislature to provide for criminal-law measures grounded on the need to ensure compliance with Community legislation and to protect the EU legal system along with EU values.³² Yet this exercise of legislative power is subject to the demonstrated methodical restriction to perform a comparison of the laws of the Member States in a twofold sense: First, in order to identify a sound purpose of legislation, and second, to fathom the question of essentiality. As far as substance is concerned, it is not for nothing that Art. 83 para. 2 TFEU limits EU legislation to minimum rules. This ensures that the harmonisation of criminal law under Art. 83 para. 2 TFEU is not exhaustive but limits itself to what is utterly necessary. Not every infringement of EU-harmonised law can justify criminal sanctions pursuant to Art. 83 para. 2 TFEU, especially since Member States would not have any freedom of action at implementing those demands.³³

²⁷ *Vervaele/Luchtman*, *New Journal of European Criminal Law* 5 (2014), 192 (212 f.).

²⁸ Already in 2002, *Foffani*, in: Tiedemann (ed.), *Wirtschaftsstrafrecht in der Europäischen Union*, 2002, p. 335 (343), regarded insider dealing a European-wide harmonised crime and the result of a deliberate EU criminal policy initiative.

²⁹ *Vogel* (fn. 7), Art. 83 AEUV para. 83.

³⁰ This is the view of the German Federal Constitutional Court, BVerfGE 123, 267 (412).

³¹ *Vogel* (fn. 7), Art. 83 AEUV para. 83.

³² *Hecker* (fn. 8), § 8 para. 48; *Vogel* (fn. 7), Art. 83 AEUV para. 83; *Meyer*, *NStZ* 2009, 657 (662).

³³ *Zimmermann*, *Jura* 2009, 844 (850); *Böse*, *ZIS* 2010, 76 (87).

Additionally it is not very convincing in this regard to argue that the criminal law of insider dealing or market manipulation is traditionally less shaped by, or less rooted in, national law but typically a subject matter of (modern) EU law.³⁴ Indeed, for market manipulation quite the opposite is true: In German law, for example, the crime of market abuse had already been established in sec. 249d of the General German Commercial Code (ADHGB) of 1884 on fraudulent influence on market prices, which later on became sec. 75 of the German Stock Exchange Act (Börsengesetz) of 1886.³⁵ So, without much effort, we can unfold a national history of more than 130 years, which makes money market crimes all the more a delicate and sensitive area that can only be harmonised under the aforesaid circumstances. Unfortunately, the regulation at hand falls short of these requirements.³⁶

III. The matter of certainty

1. General remarks

Deficient certainty in the wording of the provisions on insider dealing and market manipulation marks another weakness of this directive. Following that is nothing less than a breach of the principle of legality (*nullum crimen sine lege*) – either directly or indirectly if this principle already applies to a directive or to the subsequent implementation only (see next paragraph). This principle – entrenched today in multiple domestic legal orders³⁷ and set down in several highly important treaties of international law³⁸ – requires criminal conduct to be fixed by law in written form with a defined wording and the provisions to be applied in a strict and non-retroactive way as the basis for individual criminal accountability (*nullum crimen sine lege scripta, stricta, certa and praevia*). As regards potential offenders, this rule works as a guiding conduct rationale for the predictability of criminal law. It

³⁴ *Böse*, *ZIS* 2010, 76 (87): “[Z]umal die Harmonisierung häufig Bereiche betrifft, die weniger stark mit im nationalen Kontext geprägten gesellschaftlichen Wertvorstellungen geprägt sind (Bilanzrecht, Lebensmittelrecht)”; similarly *Hecker* (fn. 8), § 8 para. 48.

³⁵ “Wer in betrügerischer Absicht auf Täuschung berechnete Mittel anwendet, um auf den Börsen- oder Marktpreis von Waaren oder Werthpapieren einzuwirken, wird mit Gefängniß und zugleich mit Geldstrafe bis zu fünfzehntausend Mark bestraft. Auch kann auf Verlust der bürgerlichen Ehrenrechte erkannt werden.”

³⁶ Likewise *Schröder*, *HRRS* 2013, 253 (261); *Trüg* (fn. 2), p. 59 f., 69.

³⁷ Cf. for instance Art. 111 para. 3 French Code Pénal; § 1.03. a) Texas Penal Code; Art. 103 para. 2 German Grundgesetz, where Art. 7 (2) ECHR has not been ratified. In 2001, the German Government revoked its original reservation against the Nuremberg trials in this regard, cf. *Safferling*, *German Law Journal* 8 (2007), 879 (884).

³⁸ Of course in Art. 7 (1) ECHR and Art. 49 (1) EUCFR, but also in Art. 99 Third Geneva Convention, Art. 67 Forth Geneva Convention, Art. 15 (2) UNCCPR, Art. 9 (1) ACHR, Art. 7 (2) ACHPR or Art. 22 ICCSt.

provides a “fair warning that certain conduct is prohibited”³⁹, and, as a private individual safeguard, it prohibits any conviction on the basis of unwritten, vague, analogous or retroactive law; as regards legislation, the maxim also disciplines law-making bodies.⁴⁰

Two points must be cleared up straight away: The first is that the principle of legality should already apply to this directive, as otherwise, the binding effect of the directive would compel Member States to draft vague laws in order to implement the directive congruently. Indeed, “[...] Member States must be accorded a broad discretion when adopting such implementing measures, which in any event, [...] precludes any reference by the competent national authorities to the relevant provisions of the Directive [...]”⁴¹. Although directives leave a certain scope in the implementation process, Member States are always geared to the wording of the directive and aim to reproduce this prototype, especially in criminal law. Thus, not bridling the wording of the directive would place the burden of certainty solely on the Member States. This cannot be allowed.

The second point is that the principle of legality by virtue of Art. 7(1) ECHR is still valid, although the decision of the ECtHR in *Soros v. France* tends to have diluted its scope considerably, particularly in the case of market abuse. In this case of alleged insider dealing, the accused (Soros) purchased and resold shares of a major bank, gaining a profit of 2.28 million USD, after he had declined the offer by an investor to participate in a corresponding purchase.⁴² The French criminal courts held that Soros had used an information “à l’occasion de l’exercice de leur profession ou de leurs fonctions”, although Soros argued that he had not maintained any professional or contractual relationship to that issuer. In this respect, he argued that his deviance of insider dealing was unforeseeable from his point of view. According to the ECtHR, French law did not infringe the principle of legality. Rather, the addressee of the legal provision (Soros) had to bear that risk of predictability because not every form of conduct could be covered precisely by the wording of the statute.⁴³ Further, the assessability of law would depend largely on the context within that which this deviance occurs.⁴⁴ This jurisdiction has been considered alarming.⁴⁵ In

any case, it cannot relieve legislation of that obligation to create clearly drafted legal provisions to provide the basis (!) of judicial interpretation. In this spirit, the principle of legality by no means outlaws the gradual clarification of these statutory rules through judicial interpretation from case to case,⁴⁶ but it definitely urges legislation to do its homework first of all, and not to free itself of this task by handing this matter over to judges, especially in those jurisdictions where statutory law is common.

But let us now take a closer look at the relevant wording of the directive (emphasis added by the author; subscripts refer to the subsequent paragraphs of this article dealing with the highlighted prerequisites):

Article 3 Insider dealing, recommending or inducing another person to engage in insider dealing

1. Member States shall take the necessary measures to ensure that insider dealing, recommending or inducing another person to engage in insider dealing as referred to in paragraphs 2 to 8, constitute criminal offences at least in serious cases₂ and when committed intentionally₃.

2. For the purposes of this Directive, insider dealing arises where a person possesses inside information₄ and uses that information by acquiring or disposing of₅, for its own account or for the account of a third party, directly or indirectly, financial instruments₆, to which that information relates.

3. This Article applies to any person who possesses inside information as a result of:

- (a) being a member of the administrative, management or supervisory bodies of the issuer or emission allowance market participant;
- (b) having a holding in the capital of the issuer or emission allowance market participant;
- (c) having access to the information through the exercise of an employment, profession or duties; or
- (d) being involved in criminal activities.

This Article also applies to any person who has obtained inside information under circumstances other than those referred to in the first subparagraph where that person knows that it is inside information.

4. The use of inside information by cancelling or amending an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information shall also be considered to be insider dealing.

5. In relation to auctions of emission allowances or other auctioned products based thereon that are held pursuant to Regulation (EU) No 1031/2010, the use of inside information referred to in paragraph 4 of this Article shall also comprise submitting, modifying or withdrawing a bid by

notion de prévisibilité dépend dans une large mesure du contenu du texte dont il s’agit, du domaine qu’il couvre ainsi que du nombre et de la qualité de ses destinataires [...]”

⁴⁵ *Hammen*, ZIS 2014, 303 (306 f.).

⁴⁶ ECHR, Judgment of 22.11.1995 – 20166/92 (*S.W. v. UK*), para. 36.

³⁹ *Ludington*, US SC Reports, 75 L Ed 2d 1051 (1985).

⁴⁰ *v. Feuerbach*, Journal of International Criminal Justice 5 (2007), 1005 (§ 13 f.).

⁴¹ ECHR, Judgment of 12.12.1996 – C-74/95, C-129/95, para. 31.

⁴² ECHR, Judgment of 6.10.2011 – 50425/06 (*Soros v. France*), reviewed by *Hammen*, ZIS 2014, 303 (306 f.).

⁴³ ECHR, Judgment of 6.10.2011 – 50425/06 (*Soros v. France*), para. 52: “L’utilisation de la technique législative des catégories laisse souvent des zones d’ombre aux frontières de la définition. A eux seuls, ces doutes à propos de cas limites ne suffisent pas à rendre une disposition incompatible avec l’article 7, pour autant que celle-ci se révèle suffisamment claire dans la grande majorité des cas.”

⁴⁴ ECHR, Judgment of 6.10.2011 – 50425/06 (*Soros v. France*), para. 53: “La Cour rappelle enfin que la portée de la

a person for its own account or for the account of a third party.

6. For the purposes of this Directive, recommending that another person engage in insider dealing, or inducing another person to engage in insider dealing, arises where the person possesses inside information and:

(a) recommends, on the basis of that information, that another person acquire or dispose of financial instruments to which that information relates, or induces that person to make such an acquisition or disposal; or

(b) recommends, on the basis of that information, that another person cancel or amend an order concerning a financial instrument to which that information relates, or induces that person to make such a cancellation or amendment.

7. The use of the recommendations or inducements referred to in paragraph 6 amounts to insider dealing where the person using the recommendation or inducement knows that it is based upon inside information.

8. For the purposes of this Article, it shall not be deemed from the mere fact that a person is or has been in possession of inside information that that person has used that information and has thus engaged in insider dealing on the basis of an acquisition or disposal, where its behaviour qualifies as legitimate behaviour under Article 9 of Regulation (EU) No 596/2014.⁷

When analysing these provisions in more detail, unfortunately a lot remains unclear. Besides substantial flaws of uncertainty, the Commission's proposal also raises questions of coherence and consistency:⁴⁷

2. At least in serious cases

The idea to compel the Member States to punish at least serious cases of market abuse is laudable in terms of subsidiarity but goes astray in the end for two reasons: First, this term is highly ambiguous and open for interpretation. What is a serious case, especially in distinction to a simple case? Secondly, it should be quite hard to tell serious from less serious cases of market abuse from a criminological point of view: Characteristically, this kind of misconduct is committed in a social context by managers or by the counsel of issuers,⁴⁸ which is why such deviance always perpetrates a "serious" attack on financial markets. In short: This restriction makes no sense.

3. Intentional commitment

Articles 3, 4 and 5 all require an intentional commitment of insider trading or market abuse, unfortunately without defining intent in this context. Compared to earlier proposals of

the European Parliament, where the insider only had to "be aware" of the fact that his information was inside information, and where even reckless commission was considered an offence,⁴⁹ much indicates an understanding of intentionality that clearly goes beyond sheer awareness of the relevant facts with regard to three circumstances: (1) Rather, intention also requires the insider to know that his information is not yet published and so not yet publically known.⁵⁰ (2) Given the aforementioned difficulties with the concept of "serious cases" (see above 2.), it seems moreover at least arguable to ask for a certain insider belief that his information is likely to have a significant effect on the price of a financial instrument.⁵¹ (3) And third, this intentionality must be proven in the criminal process and cannot just simply be presumed from the established objective constituent elements of insider dealing,⁵² although exactly this was the method the ECJ applied in the 2009 Spector-case⁵³ ("possession means knowledge"). In view of these pressing issues, a clarification of the term "intentional" by way of a legal definition would have helped greatly here.⁵⁴

4. Inside information

The term "inside information" is not really defined by the directive but is referred to in Art. 2 (4) as an "information within the meaning of Article 7 (1) to (4) of Regulation (EU) No 596/2014". By addressing oneself to this article, one is downright overwhelmed by the following unexpected long windedness:

Article 7 Inside information

1. For the purposes of this Regulation, inside information shall comprise the following types of information:

(a) information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, 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 instruments; [...]

2. For the purposes of paragraph 1, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur,

⁴⁹ Kert, NZWiSt 2013, 252 (255, 259).

⁵⁰ Cf. Assmann, in: Assmann/Schneider, Wertpapierhandelsgesetz, 6th ed. 2012, § 14 paras. 58, 115, 131.

⁵¹ Cf. Assmann (fn. 50), § 14 para. 60.

⁵² Cf. Assmann (fn. 50), § 14 para. 61a; Altenhain, in: Hirte/Möllers (eds.), Kölner Kommentar zum Wertpapierhandelsgesetz, 2nd ed. 2014, § 38 para. 37.

⁵³ See ECJ, Judgment of 23.12.2009 – C-45/08 (Spector Photo Group, Chris Van Raemdonck v. Commissie voor het Bank-, Financie- en Assurantiewezen), para. 38; analysed by Klöhn, in: Hirte/Möllers (fn. 52), § 14 paras. 143 f.

⁵⁴ Kert, NZWiSt 2013, 252 (255); Brodowski, ZIS 2013, 455 (465).

⁴⁷ The following review concentrates on the most striking issues only.

⁴⁸ Cf., for example, the 1995 Frankfurt case reported by Hilgendorf (fn. 13), Vor § 12 para. 30; see further Hammen, ZIS 2014, 303 (307).

where 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 the financial instruments or the related derivative financial instrument, the related spot commodity contracts, or the auctioned products based on the emission allowances. In this respect in the case of a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, those future circumstances or that future event, and also the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or that future event, may be deemed to be precise information.

The term “information” has to be interpreted in view of its rootedness in several disciplines and in the light of the present purpose to protect the integrity of financial markets and to enhance investor confidence:

In general, an information (lat. *informare* = to form an idea of, to fashion⁵⁵) is a statement about circumstances or incidents of the past, present or future.⁵⁶ “Classical reference points”⁵⁷ of such an information are facts. A fact (lat. *factum* = a thing done or performed) is something that has really occurred in the past or is actually the case at present and which can be proved right or wrong.⁵⁸ Therefore, information may often refer to facts but can also refer to something different, like opinions or judgments.⁵⁹ As a means of communication, information transports knowledge about factual or non-factual circumstances.⁶⁰

In particular, the fact that a company really gains more profit is as well information as the opinion that it should run less into debts would be. In order to protect the integrity of financial markets, the term information also has to be able to comprise elements of the future, if those future circumstances or incidents will occur in all likelihood (like plans, proposals, intentions, prognoses or expectations, e.g. “In the next five years, company x will suffer from declining sales in the export business.”).⁶¹

According to Art. 7 (1), any inside information has to be of a “precise nature” being “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 the financial instruments” by virtue of Art. 7 (2).⁶² It is very problematic to define this precision requirement with reference to a possible effect on the price of a financial instrument for two reasons:

First, this possibility first and foremost regards the fourth characteristic of the term “inside information” in Art. 7 (1), and second, there should be clear-cut distinctions among all four limbs of that definition of an “inside information”.⁶³ Whether information is of “precise nature” cannot be answered with a look at probabilities but by examining its accuracy and clarity. Whether such precise information may affect the price of a financial instrument is another question and depends on the meaningfulness and significance of that information related to future market events.⁶⁴ In this respect, the definition in Art. 7 (2) of the Directive has to be adapted.

Next that precise information has to “be likely to have a significant effect on the prices of those financial instruments”. This demand intends to exclude trifle cases⁶⁵ and calls for an assessment on the basis of probabilities by following a two-step-process.⁶⁶ First, it has to be questioned whether that information changes the entirety of all publically known information. If so, it has to then be asked, in how far this change indicates a different evaluation of the fundamentals. In doing so, the significance of the price effect is not determined by fixed threshold values but by rather subjective criteria.⁶⁷

5. Using that information by acquiring or disposing of

Already in 2009, the ECJ ruled in *Spector et al. v. CBFA* that “the fact that a person [...] in possession of inside information, acquires or disposes of [...] the financial instruments to which that information relates implies that that person has ‘used that information’ within the meaning of that provision, but without prejudice to the rights of the defence and, in particular, to the right to be able to rebut that presumption. The question whether that person has infringed the prohibition on insider dealing must be analysed in the light of the purpose of that directive, which is to protect the integrity of the financial markets and to enhance investor confidence, which is based, in particular, on the assurance that investors will be placed on an equal footing and protected from the misuse of inside information. Only usage which goes against that purpose constitutes prohibited insider dealing.”⁶⁸

Given these difficulties in interpreting the term of using, it would have been wholesome to render that wording more precisely.⁶⁹ The ECJ rightly emphasised that the possession of insider information alone is not enough but may indicate that usage. Even if an insider in possession of inside infor-

⁵⁵ <http://www.latin-dictionary.net/search/latin/informare> (18.6.2015).

⁵⁶ Cf. *Rogall*, NStZ 1983, 1 (5); *Assmann* (note 50), § 13 para. 6.

⁵⁷ *Klöhn* (fn. 53), § 13 para. 48 (“klassischer Gegenstand”).

⁵⁸ *Klöhn* (fn. 53), § 13 paras. 48, 49.

⁵⁹ *Klöhn* (fn. 53), § 13 paras. 71 f.; *Assmann* (fn. 50), paras. 14, 15.

⁶⁰ Dissenting *Hilgendorf* (fn. 13), § 13 WpHG para. 61.

⁶¹ Cf. *Assmann* (fn. 50), § 13 paras. 8, 23 f., 27.

⁶² Cf. *Assmann* (fn. 50), § 13 paras. 8, 13; *Klöhn* (note 53), § 13 paras. 75 f., 78, 82 f.

⁶³ Cf. *Hellgardt*, Common Market Law Review 50 (2013), 861 (871 f.).

⁶⁴ Cf. *Hellgardt*, Common Market Law Review 50 (2013), 861 (871 ff.).

⁶⁵ Cf. *Assmann* (fn. 50), § 13 paras. 51, 66.

⁶⁶ Cf. *Klöhn* (fn. 53), § 13 paras. 164 f. for the following.

⁶⁷ Cf. *Assmann* (fn. 50), § 13 paras. 63 f.

⁶⁸ ECJ, Judgment of 23.12.2009 – C-45/08, paras. 61, 62. Cf. *Blachnio-Parzych*, EuCrim 2013, 136; *Vervaele/Luchtman*, New Journal of European Criminal Law 5 (2014), 192 (210 fn. 51).

⁶⁹ See *Klöhn*, European Company and Financial Law Review 2010, 347.

mation enters into transaction on the market, this should not be deemed in itself to constitute the use of inside information as this could adversely lead “to a situation in which a person is prohibited from carrying out his activity, an activity which is both legitimate and useful for the efficient functioning of the financial markets.”⁷⁰

Therefore, such a usage has to be proven additionally in two steps. First, there has to be a causal nexus between the inside information and the transaction in terms of a *condicio sine qua non*:⁷¹ The usage of information in a transaction is only thinkable if this transaction would not have happened without the inside information. So, if we eliminate the existence of the inside information hypothetically, and if that transaction then would have happened nonetheless, this information has not been “used”.⁷² Second, this transaction does not only have to be caused by but also be imputable to the use of inside information. For this purpose, the specific risks of inside information have to realise themselves in that transaction, or in other words: that inside information has to leave its mark in that transaction.⁷³ When this is not the case, accordingly no such “use” is seen if such an acquisition happens, e.g., in fulfillment of an earlier obligation which came into existence prior to the obtaining of the information.⁷⁴

A more appropriate and precise wording could consequently read: “When in possession of inside information, using that information by causing an acquisition or disposal of financial instruments to which that information relates inherently” constitutes a use of inside information.⁷⁵

6. Financial instruments⁷⁶

The term financial instrument gets diluted by way of a labyrinthine and inaccurate technique of cross-referencing:

According to Art. 3 (1) (1) of the directive, financial instrument “means a financial instrument as defined in point (15) of Article 4 (1) of Directive 2014/65/EU.” Arriving there, the term “financial instrument” is referred to as “those instruments specified in Section C of Annex I”.

We can finally find a definition in Annex I. List of Services and Activities and Financial Instruments of that directive 2014/65/EU. There, in section C, financial instruments are listed as follows: “(1) Transferable securities; (2) Money-market instruments; (3) Units in collective investment undertakings; (4) Options, futures, swaps, forward rate

⁷⁰ ECJ, Judgment of 23.12.2009 – C-45/08, para. 57.

⁷¹ Cf. Assmann (fn. 50), § 14 para. 25.

⁷² See Hilgendorf (fn. 13), § 14 WpHG paras. 140 f. with further references concerning the German situation.

⁷³ Cf. Assmann (fn. 50), § 14 para. 26.

⁷⁴ Vogel, in Assmann/Schneider (fn. 50), § 38 para. 5.

⁷⁵ Cf. Assmann (fn. 50), § 14 paras. 23 f.; Klöhn (fn. 53), § 14 paras. 113 f.; Altenhain, in: Hirte/ Möllers (fn. 52), § 38 paras. 38 f.

⁷⁶ For an in-depth analysis of this term in German see Lehmann, Finanzinstrumente, Vom Wertpapier- und Sachenrecht zum Recht der unkörperlichen Vermögensgegenstände, 2009. See also Klöhn (fn. 53), § 12 para. 10; Assmann (fn. 50), § 12 para. 5.

agreements and any other derivative contracts relating to securities, currencies [...]; (8) Derivative instruments for the transfer of credit risk; (9) Financial contracts for differences [...].”

The term money market instruments remains undefined here, but enjoys at least some clarification in Art. 4(1)(14) of the Directive of the European Parliament and of the Council on Markets in Financial Instruments (Directive 2004/39/EC) as “those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment”. Eventually, it remains unsettled what “instruments of payment” are, when this marathon mercifully ends.⁷⁷

7. It shall not be deemed [...] that a person [...] has [...] engaged in insider dealing [...] where its behaviour qualifies as legitimate behaviour under Article 9 of Regulation (EU) No 596/2014

At first sight, this wording seems unambiguous as it disqualifies behaviour from fulfilling the *actus reus* of this offence as long as one of those reasons of legitimacy is given (“not [...] engaged in insider dealing”). Unfortunately, Art. 9 of Regulation 596/2014 details a different story: It lists different cases in which a person acts legitimately in the course of professional occupation (paras. 2 to 5).⁷⁸ Certainly, nobody pursues

⁷⁷ See the mordant reviews by Schröder (fn. 14), p. 501, and Hammen, ZIS 2014, 303 (304).

⁷⁸ 2. [...] where that person:

(a) for the financial instrument to which that information relates, is a market maker or a person authorised to act as a counterparty, and the acquisition or disposal of financial instruments to which that information relates is made legitimately in the normal course of the exercise of its function as a market maker or as a counterparty for that financial instrument; or

(b) is authorised to execute orders on behalf of third parties, and the acquisition or disposal of financial instruments to which the order relates, is made to carry out such an order legitimately in the normal course of the exercise of that person's employment, profession or duties.

3. [...] where that person conducts a transaction to acquire or dispose of financial instruments and that transaction is carried out in the discharge of an obligation that has become due in good faith and not to circum-vent the prohibition against insider dealing and:

(a) that obligation results from an order placed or an agreement concluded before the person concerned possessed inside information; or

(b) that transaction is carried out to satisfy a legal or regulatory obligation that arose, before the person concerned possessed inside information.

4. [...] where such person has obtained that inside information in the conduct of a public takeover or merger with a company and uses that inside information solely for the purpose of proceeding with that merger or public takeover, provided that at the point of approval of the merger or acceptance of the offer by the shareholders of that company,

to punish a market maker for any action in the ordinary exercise of his function. This does mean that such a behaviour is a socially accepted behaviour which therefore cannot be included in the actus reus of the offence. If all these acts are legitimate, then the actus reus of Art. 3 is clearly going too far. It would be far better to exclude such action from the offence by using a more abstract and straightforward phrase: "It is no case of insider dealing if a person acts in the normal course of his or her professional occupation."⁷⁹

Another problem is Art. 9 (6), which allows a confusing counter-exception, leading back to illegitimacy "if the competent authority establishes that there was an illegitimate reason for the orders to trade, transactions or behaviours concerned". Not only is this rule very complicated, it also constitutes a breach of the rule of law: The establishment of reasons for justification or legitimacy may well be left to the judiciary. Counter-exceptions, however, which lead back to illegitimacy are subject to the maxim of *nullum crimen sine lege scripta* and have therefore to be written down in a statute or directive.⁸⁰ It is the law which has to serve that function of declaring certain conduct to be illegal, not the judges or any other non-legislative authority.

8. Unlawful disclosure of inside information

Article 4 Unlawful disclosure of inside information

1. Member States shall take the necessary measures to ensure that unlawful disclosure of inside information as referred to in paragraphs 2 to 5 constitutes a criminal offence at least in serious cases and when committed intentionally.

2. For the purposes of this Directive, unlawful disclosure of inside information⁸, arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties, including where the disclosure qualifies as a market sounding made in compliance with Article 11 (1) to (8) of Regulation (EU) No 596/2014. [...]

any inside information has been made public or has otherwise ceased to constitute inside information. [...]

5. [...] the mere fact that a person uses its own knowledge that it has decided to acquire or dispose of financial instruments in the acquisition or disposal of those financial instruments shall not of itself constitute use of inside information.

6. Notwithstanding paragraphs 1 to 5 of this Article, an infringement of the prohibition of insider dealing set out in Article 14 may still be deemed to have occurred if the competent authority establishes that there was an illegitimate reason for the orders to trade, transactions or behaviours concerned.

⁷⁹ In this sense, *Assmann* (fn. 50), § 14 para. 73.

⁸⁰ Cf. *Ashworth/Horder*, *Principles of criminal law*, 7th ed. 2013, p. 62 ff.; *Jescheck/Weigend*, *Strafrecht, Allgemeiner Teil*, 5th ed. 1996, p. 133 ff.

Article 5 Market manipulation

1. Member States shall take the necessary measures to ensure that market manipulation as referred to in paragraph 2 constitutes a criminal offence at least in serious cases and when committed intentionally.

2. For the purposes of this Directive, market manipulation shall comprise the following activities:

(a) entering into a transaction, placing an order to trade or any other behaviour which:

(i) gives false or misleading signals⁹, as to the supply of, demand for, or price of, a financial instrument or a related spot commodity contract; or

(ii) secures the price of one or several financial instruments or a related spot commodity contract at an abnormal or artificial level; unless the reasons for so doing of the person who entered into the transactions or issued the orders to trade are legitimate, and those transactions or orders to trade are in conformity with accepted market practices on the trading venue concerned;

(b) entering into a transaction, placing an order to trade or any other activity or behaviour which affects the price of one or several financial instruments or a related spot commodity contract, which employs a fictitious device or any other form of deception or contrivance¹⁰;

(c) disseminating information through the media, including the internet, or by any other means, which gives false or misleading signals as to the supply of, demand for, or price of a financial instrument, or a related spot commodity contract, or secures the price of one or several financial instruments or a related spot commodity contract at an abnormal or artificial level,⁸¹ where the persons who made the dissemination derive for themselves or for another person an advantage or profit from the dissemination of the information in question¹¹; or

(d) transmitting false or misleading information or providing false or misleading inputs or any other behaviour which manipulates the calculation of a benchmark.⁸²

The term disclosure is broad. It means any behaviour that allows somebody else to take note of that information. Of course, the necessary restriction comes from the adjunct unlawful: Disclosure of inside information will not amount to market abuse if it is required or permitted by law, e.g., if it is made to any regulatory body or authority for the purposes of fulfilling a legal or regulatory obligation or otherwise to such a body in connection with the performance of the functions of that body. Factors to be taken into account in determining whether or not the disclosure was made by a person in the proper course of the exercise of his employment, profession or duties are:

⁸¹ Here, the wording of the regulation adds: "including the dissemination of rumours, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading".

⁸² Here, the wording of the regulation adds: "where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading."

- (1) whether the disclosure is permitted by the rules of a prescribed market, a prescribed auction platform etc.; or
- (2) whether the disclosure is accompanied by the imposition of confidentiality requirements upon the person to whom the disclosure is made and is: (a) reasonable and is to enable a person to perform the proper functions of his employment, profession or duties; or (b) reasonable and is (for example, to a professional adviser) for the purposes of facilitating or seeking or giving advice about a transaction or takeover bid; or (c) reasonable and is for the purpose of facilitating any commercial, financial or investment transaction or (d) reasonable and is for the purpose of obtaining a commitment or expression of support in relation to an offer which is subject to the takeover code; or (e) in fulfilment of a legal obligation, including to employee representatives or trade unions acting on their behalf; or
- (3) whether (a) the information disclosed is trading information; (b) the disclosure is made by a person only to the extent necessary, and solely in order to offer to dispose of the investment to, or acquire the investment from, the person receiving the information; and (c) it is reasonable for that person to make the disclosure to enable him to perform the proper functions of his employment, profession or duties.⁸³

At all events, any disclosure – inside or outside those cases – is lawful if it is a suitable, necessary⁸⁴ and appropriate means to achieve a generally accepted purpose, i.e., if it facilitates an interest of disclosure.⁸⁵ This method of balancing requires a consideration of counter-interests: objectives of the law of insider dealing on the one hand, and the requirements of legal and economic institutions on the other.⁸⁶ These fundamentals should be included in the wordings of both the directive as well as any subsequent implementing legislation.

9. False or misleading signals

According to the directive, manipulative behaviour has to give false or misleading signals. Already the term “signal” is an unfortunate choice since it is too specific. The term “statement” would be not so narrow and would allow for the inclusion of every kind of information that can have an effect on the price of a financial instrument. Unfortunately even this change would not hit the mark: A statement is false when it pretends facts which are not real or true, e.g., if it pretends incorrect economic circumstances of a financial instrument.⁸⁷ Therefore how can a statement be misleading if it is not false

but true? Something true can only be misleading when it is placed in a misleading context. This context is then of falsifying character. So, this double-tracked wording (“false or misleading”) is very problematic⁸⁸ and should consequently be abandoned. It would be a much better idea to strike the deceptive nature of market manipulation by phrasing the directive: “behaviour which deceives about facts as to the supply of, demand for, or price of, a financial instrument or a related spot commodity contract” shall be seen as misleading behaviour.

10. [...] any other activity [...] which affects the price of [...] financial instruments [...] or any other form of deception [...]

A wording like any other activity in financial markets affecting the price of a financial instrument is far too unspecific. It should be supplemented by a more constructive wording. US SEC rule 10b-5 offers a good example: “to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.” Although in the United States there is a lively debate about what in connection exactly means,⁸⁹ this phrase in rule 10b-5 adds a clear characterisation of effects and purposes of those acts, which produces a pleasant restriction in contrast to the much wider EU wording. Together with the EU phrase (“affects the price of a financial instrument”) it would then provide for a clear deceptive component (“fraud or deceit”) and define this catchall element much more precisely.⁹⁰

11. Disseminating information [...] where the persons [...] derive [...] an advantage or profit [...]

Setting aside the questions, what dissemination exactly means in this context, and if there can be any advantage besides a profit, this draft raises one important issue. Most of all, the derivation of such an advantage incorporates intent of obtaining for himself or a third person an unlawful material benefit. Such an intention is difficult to prove in practice, especially in the face of this kind of deviance. So, the frequent method of establishing intention as mens rea by judging from the commission of actus reus is obstructed.⁹¹ To make matters worse, in cases of work-sharing action, those who disseminate that information do not necessarily have to be the ones who trade the financial instruments.⁹² Therefore, this criterion should be reconsidered.

⁸³ <http://fshandbook.info/FS/html/handbook/MAR/1/4> (18.6.2015).

⁸⁴ The term “strictly necessary” in the Grongaard-Bang decision of the ECJ, Judgement of 22.11.2005 – C-384/02, does not intensify this requirement of necessity, cf. *Klöhn* (fn. 53), § 14 paras. 322, 325; *Assmann* (fn. 50), § 14 paras. 74, 74a.

⁸⁵ *Klöhn* (fn. 53), § 14 para. 296 et seq.

⁸⁶ See *Assmann* (fn. 50), § 14 para. 73.

⁸⁷ Cf. *Vogel* (fn. 74), § 20a para. 150; *Stoll*, in: *Assmann/Schneider* (fn. 50), § 20a para. 223.

⁸⁸ See *Vogel* (fn. 74), § 20a para. 150 with further references; *Stoll* (fn. 87), § 20a para. 223.

⁸⁹ See, for example, *Fletcher*, *Pepperdine Law Review* 16 (1989), 913; *Molony*, *Santa Clara Law Review* 53 (2013), 767.

⁹⁰ Cf. *Vogel* (fn. 74), § 20a para. 211; *Stoll* (fn. 87), § 20a paras. 232, 234.

⁹¹ Cf. *Vogel* (fn. 74), § 20a paras. 126 f.; *Stoll* (fn. 87), § 20a paras. 246 f.

⁹² *Schröder*, *HRRS* 2013, 253 (262).

12. Full commission of the offence and attempt

In Art. 6 (2), the directive includes a prohibition against the attempt to engage in market manipulation, assuming that failed attempts to manipulate the market should also be sanctioned. According to recital 41 of the Regulation 596/2014, the attempt to engage in market manipulation should be distinguished from situations where behaviour does not have the desired effect on the price of a financial instrument. Such behaviour is – by virtue of the unmistakable wording of the directive – considered to be market manipulation because it was likely to give false or misleading signals. This concept has to be refused as inappropriate. It is unable to clearly demarcate the three stages of preparation, attempt and full commission due to the fact that full commission is already accomplished without an effect on the price. It would be a much better – but less punitive – way to demand an effect on the price as a prerequisite for full commission and to let taking the criminal action by itself suffice for an attempt.⁹³

IV. Results and conclusion

In conclusion, this analysis has shown that Europe’s commitment to countering insider dealing and market manipulation on the basis of Art. 83 para. 2 TFEU remains a disputable endeavor, mainly for two reasons:

The first contentious point is the question of competence, particularly the implications of essentiality in Art. 83 para. 2 TFEU. Legislation is essential only if new provisions on crime and punishment are really needed to achieve an effective realisation of EU policies. They are unnecessary in contrast if such a proper implementation can already be based on the national laws of the Member States (II. 2.). They say, “Necessity is the mother of invention.” If this is true, the Commission’s Proposal for a Directive on Criminal Sanctions for Market Abuse could be considered an orphan – at least, where the traditional national area of market abuse is concerned (II. 4.). Laudable as this project may be in principle,⁹⁴ it obscures the fact that Member States have already made sure that such behaviour is a criminal offence, punishable with effective sanctions everywhere in Europe (II. 3.).

The vagueness of the provisions themselves displays a second great weakness. The aim to restrict criminalisation to “at least serious cases” makes it hard to draw the line towards less serious conduct (III. 2.). The mere wording “intentional commitment” fails to render mens rea of the crimes more precisely, especially in the light of the Spector-decision (III. 3.). The central term “inside information” suffers from its

characterisation to be of “precise nature” (III. 4.). The actus reus of using an information by acquiring or disposing fails to clarify the question if possession of the information by itself is enough (III.5.). The definition of financial instruments would have benefited from a much more straightforward and less obscure method of legislation (III. 6.). The exemption from punishment in case of “legitimate behaviour” misses the point, as such behaviour already steps outside the actus reus (III. 7.). The provision on unlawful disclosure of inside information fails to clarify the conflicting interests (III. 8.). The misleading phrase “false or misleading signals” should have been replaced (III. 9.). The wording “any other activity [...] which affects the price of [...] financial instruments” is much too vague and should be replaced, too (III. 10.). The feature “derive for themselves or for another person an advantage or profit” is hard to handle and should thus be reconsidered (III. 11.). Lastly, the criminalisation of an attempted market manipulation has to be refused – at least in this manner – as it lacks a clear demarcation between preparation, attempt and full commission of the offence (III. 12.). Hence, many of the proposed suggestions remain unclear or incoherent. They even dilute achievements of the past. This has to be changed by legislation, as outlined above, prior to any implementation into national laws by the Member States. In order to avoid such token legislation in future, the EU has to meet the requirements of Art. 83 para. 2 TFEU, and it should pay more attention to numerous published suggestions which have been taken as a basis here and which can be taken as such by anybody else.⁹⁵

⁹³ See for the German situation BGH, Judgement of 27.11.2013 – 3 StR 5/13, <http://www.hrr-straftrecht.de/hrr/3/13/3-5-13.php> (18.6.2015); and Kudlich, wistra 2011, 361 (363 f.), who even suggests to restrict the offence to effects on the general market price leading to too high or low a price being paid by third persons, as only this constitutes a punishable detriment caused by price arrangements.

⁹⁴ Cf. Vervaele/Luchtman, New Journal of European Criminal Law 5 (2014), 192 (209 f., 218 f.).

⁹⁵ The highly questionable provisions contained in Art. 8 and 9 of the Directive concerning general prevention and the criminalisation of corporate bodies have been excluded from this article; cf. Vervaele/Luchtman, New Journal of European Criminal Law 5 (2014), 192 (211 f.).

Offence/ Member State	Market manipulation	Insider dealing
<i>Austria</i>	§ 48c BörseG: fine up to 150,000 €	§ 48b BörseG: fine or up to 5 years imprisonment
<i>Belgium</i>	Artt. 25 and 39 Law of 2 August 2002 on the Supervision of the Financial Sector and on Financial Services: fine from 300 to 10,000 € and 1 month to 2 years imprisonment	Art. 40 Law of 2 August 2002 on the Supervision of the Financial Sector and on Financial Services: fine from 50 to 10,000 € and 3 months to 1 year imprisonment
<i>France</i>	Art. L. 465-2 Code Monétaire et Financier: fine up to 1,500,000 € and up to 2 years imprisonment	Art. L. 465-1 Code Monétaire et Financier: fine up to 1,500,000 € and up to 2 years imprisonment
<i>Germany</i>	§ 38 (2) WpHG: fine or up to 5 years imprisonment	§ 38(1) WpHG: fine or up to 5 years imprisonment
<i>Greece</i>	Artt. 7, 23 (1), 30 Law 3340/2005 on Market Abuse: fine from 10,000 to 6,000,000 € and up to 10 years imprisonment	Artt. 3-5, 23(1), 29 Law 3340/2005 on Market Abuse: fine from 10,000 to 6,000,000 € and up to 10 years imprisonment
<i>Ireland</i>	sec. 6, 49 (2) Market Abuse (Directive 2003/6/EC) Regulations 2005 and s. 32 Investment Funds, Companies and Miscellaneous Provisions Act 2005: fine up to 10,000,000 € and/or up to 10 years imprisonment	sec. 5, 49(2) Market Abuse (Directive 2003/6/EC) Regulations 2005 and s. 32 Investment Funds, Companies and Miscellaneous Provisions Act 2005: fine up to 10,000,000 € and/or up to 10 years imprisonment
<i>Italy</i>	Art. 185 Decreto legislativo 58/1998: fine from 20,000 to 3,000,000 € and 1 to 6 years imprisonment	Art. 184 Decreto legislativo 58/1998: fine from 20,000 to 3,000,000 € and 1 to 6 years imprisonment
<i>Luxembourg</i>	Art. 11 Loi du 9 mai 2006 relative aux abus de marché: fine from 125 to 1,500,000 € and 3 months to 2 years imprisonment	Artt. 8 f. Loi du 9 mai 2006 relative aux abus de marché: fine from 125 to 1,500,000 € and 3 months to 2 years imprisonment
<i>Netherlands</i>	sec. 5-58 Wet op het financieel toezicht, Artt. 1 (3), 2 (3), 6 Wet op de economische delicten: fine up to 20,250 € or up to 2 years imprisonment	sec. 5-56 Wet op het financieel toezicht, Artt. 1 (3), 2 (3), 6 Wet op de economische delicten: fine up to 20,250 € or up to 2 years imprisonment
<i>Spain</i>	Art. 284 (1) Nr. 1, 2 Código Penal: fine from 12 to 24 months or 6 months to 2 years imprisonment	Art. 285 Código Penal: fine up to three times the profit obtained or 1 to 6 years imprisonment
<i>UK</i>	sec. 118 Financial Services and Markets Act 2000: unlimited fine	sec. 52, 61 Criminal Justice Act 1993: unlimited fine and/or up to 7 years imprisonment