# ARTICLES

## THE NEW PROPOSAL FOR A EUROPEAN UNION DIRECTIVE ON MARKET ABUSE

JESPER LAU HANSEN*

"The securities laws exist because of the unique informational needs of investors."[1] This is the opening sentence of one of the great American books on securities regulation,[2] expressing the insight of Francis Bacon that knowledge is power.[3] Every civilized country will try to protect its citizens from the abuse of power, and consequently, it should be no surprise that the regulation of information becomes ever more expanded and, regrettably, complicated.

Within the European Union ("EU"), a flurry of new initiatives has been launched to unite its segregated financial markets and emulate that coveted object of desire: the U.S. financial market of the National Market System with its awe-inspiring size and liquidity. One of these new initiatives is the proposal for a EU directive on *market abuse*, which is the chosen patois of British securities regulation for insider dealing and market manipulation, that was put forward on May 30, 2001.[4]

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* Dr. Jesper Lau Hansen is an associate professor in financial market law at the Institute of Legal Science A of the University of Copenhagen Law Faculty, Denmark.

1 JAMES D. COX ET AL., SECURITIES REGULATION 1 (2d ed. 1997).

2 *Id.*

3 JOHN BARTLETT, FAMILIAR QUOTATIONS (10th ed. 2000) (1919) (quoting Francis Bacon), *available at* http://www.bartleby.com/100/pages/page168.html.

4 Commission Proposal for a Directive of the European Parliament and of the Council on Insider Dealing and Market Manipulation (Market Abuse), COM(01)281 final, *available at* http://europa.eu.int/comm/internal_market/en/finances/mobil/com281en.pdf [hereinafter Proposal]. The phrases often differ. Insider trading is usually known as insider dealing in British law, and this is

This Article offers a closer look at the Proposal and the European approach to regulating securities fraud that it embodies, which is contrasted with the approach found in U.S. federal securities regulation.

### 1. THE ACTION PLAN AND ONWARDS

The European Union has among its foremost objectives the creation of a single European market with free movement of persons, goods, services, and capital. The most favored instrument of harmonization is the *directive*, which is aimed at the Member States that are obliged to implement its content into national law by way of the usual legislative processes of the Member States.[5]

Harmonization of the very fragmented European capital market was attempted by a string of directives in the 1980s, ending with the 1989 Insider Dealing Directive.[6] However, it is widely recognized that they have failed to accomplish their objective.

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also the label favored by the Proposal. Market manipulation, chosen by the European Commission, is also known as price manipulation, which is the preferred phrase in Nordic and German law.

[5] A *directive* of the European Union is only binding on the Member States, not on the citizens, and has to be implemented into national law by a legislative effort of the individual Member States, whereas a *regulation* has direct effect in national law. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC TREATY]. Implementation into national law can be carried out either by a new act, an amendment to an existing act, or by an executive order issued pursuant to an act. If national law already provides for the issues covered by the directive, no legislative effort is called for, and the provisions of national law will be construed as implementing the directive.

[6] *See* Council Directive 79/279, 1979 O.J. (L 66) 21 (coordinating the conditions for the admission of securities to official stock exchange listing); Council Directive 80/390, 1980 O.J. (L 100) 1 (coordinating the requirements for the drawing up, scrutiny, and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing); Council Directive 82/121, 1982 O.J. (L 48) 26 (listing information to be published on a regular basis by companies the shares of which have been admitted to an official stock exchange listing); and Council Directive 88/627, 1988 O.J. (L 348) 62 (giving the information to be published when a major holding in a listed company is acquired or disposed of). These directives and amendments have been joined in a codification directive. *See* Amendments Directive 001/34 Parliament and Council on the Admission of Securities to Official Stock Exchange Listing and on Information to be Published on Those Securities, 2001 O.J. (L 184) 1. The last directive of the 1980s was Council Directive 89/592, 1989 O.J. (L 334) 30 (coordinating regulations on insider dealing). This directive would be replaced by the new directive on market abuse. *See* Proposal, *supra* note 4. The 1980 Directive on Listing Particulars, now part of the codification directive, would be replaced by a new directive put forward by the European Commission on the same date as the proposal for a directive on market abuse. Commission Proposal for a Directive of the European Par-

In its *Action Plan for a Single Financial Market* of 1999, the European Commission announced its intention, *inter alia*, to put forward a directive concerning market manipulation commencing in late 2000.[7] The Forum of European Securities Commissions ("FESCO"), an organization of public supervisory authorities in the Member States, enthusiastically supported the idea.[8] FESCO furthermore suggested the initiative should imitate the British approach applied in the recent reform that led to the Financial Services and Markets Act 2000 ("FISMA 2000"), which in turn set up an administrative regime on market abuse, i.e., insider dealing and market manipulation.[9] In fact, FESCO's proposal was similar to the definition of market abuse found in FISMA 2000 Section 118.[10]

A group of wise men, the gender-biased term for a group of experts within securities regulation, chaired by Mr. Alexandre Lamfalussy and entrusted by the European Commission to map out the regulatory needs of the European financial markets, supported the idea in their report on the necessary regulation lacking to create a single European securities market.[11] Finally, the European Commission put forward its proposal on May 30, 2001, for a Directive on Insider Dealing and Market Manipulation (Market Abuse) that would replace the older directive on insider dealing from 1989 and introduce a new prohibition on market manipulation and a few new mandatory disclosure obligations.[12]

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liament and of the Council on the Prospectus to be Published When Securities are Offered to the Public or Admitted to Trading, COM(01)280 final, at 1, *available at* http://europa.eu.int/comm/internal_market/eu/finances/mob.1/com280eu.pdf.

7 Action Plan for a Single Financial Market, COM(99) at 1.

8 Forum of European Securities Commissions, Market Abuse: FESCO's Response to the Call for Views From the Securities Regulators Under the EU's Action Plan for Financial Services, COM(99)232, at 2 [hereinafter FESCO's Response], *available at* http://www.europefesco.org/documents/recentpub/99-0961.pdf.

9 The British administrative regime in FISMA 2000 was thus supplementing the original criminal regime on insider dealing and market manipulation that was left in force. Financial Services and Markets Act, 2000, c.8 (Eng.) [hereinafter FISMA 2000].

10 *Compare* FESCO's Response, *supra* note 8 (stating market abuse should cover material misuse of information and dissemination of false information), *with* FISMA 2000, *supra* note 9, art. 118 (defining market abuse in similar terms).

11 Committee of Wise Men, Final Report on the Regulation of European Securities Markets (2001), *available at* http://www.europa.eu.int/comm/internal_market/en/finances/general/lanfalussyen.pdf. [hereinafter Wise Men].

12 *See* Proposal, *supra* note 4, at 15.

### 2. COMITOLOGY

It should be pointed out here that the Lamfalussy Group's most important recommendation did not concern specific provisions of securities regulation but the overall legislative approach. The Wise Men recommended a four-level approach to securities regulation: framework principles, implementing measures, cooperation among the authorities of the Member States, and enforcement.[13] The Council of Ministers adopted this approach at the Stockholm Summit in March 2001.[14] Only the first two levels are of interest here and shall be discussed in the following.

The usual legislative procedure of the European Union is based on a division of powers between the European Commission, being a supra-national body on the one hand, and the Member States on the other hand represented by the Council of Ministers with some minor influence afforded to the European Parliament. The European Commission is headed by commissioners appointed by the Member States but, by oath, committed to pursue pan-European interests only. The Council of Ministers is comprised of representatives of the governments of the Member States. The European Parliament is placed somewhere in between, as it is comprised of politicians elected by popular vote in the individual Member States directly to the European Parliament. The right of initiative, i.e., the power to propose legislation, is vested with the European Commission, which normally fulfills an executive function, whereas the power to legislate is vested with the Council of Ministers, usually acting in cooperation with the European Parliament.[15] According to the new approach of the Lamfalussy Group, however, directives in this area should be drafted even more broadly than usual, i.e., as framework directives which simply state the overall principles, whereas the *comitology procedure* should be used to lay down the technical implementation measures.[16]

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[13] Wise Men, *supra* note 11, at 19.

[14] *See* Overview of Summit, *available at* http://europa.eu.int/comm/stockholm_council/.

[15] There are different procedures for passing legislation but the most common is the so-called co-decision procedure. *See* EC TREATY, *supra* note 5, art. 251 (implying certain cooperation between the Council of Ministers and the European Parliament).

[16] In its report, the Lamfalussy Group describes the level 1 framework principles: "The framework principles are the core political principles, the essential elements of each proposal. They reflect the key political choices to be taken by the European Parliament and the Council of Ministers on the basis of a proposal by

The current comitology procedure is based on the Council of Ministers' Decision of June 28, 1999.[17] By this procedure, the European Commission is authorized to settle the technical implementation of directives in cooperation with an independent committee consisting of experts appointed by the Member States. There are several such committees, each specialized to cooperate with the European Commission in different areas of regulation. In the area of securities regulation, the relevant committee is the newly established European Securities Committee ("ESC").[18] Thus, comitology has been applied for years in European law-making, but the change is in the emphasis. Comitology should no longer be restricted to minor technical issues but should carry the main responsibility of laying down the specific content of the directive within the framework set forth by the directive via the ordinary legislative process.

The comitology procedure is obviously intended to streamline and make more efficient the cumbersome legislative procedure originally intended by the founding fathers of what is now the European Union. However, the perceived need to speed up legislation in the financial area should not overshadow the more fun-

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the European Commission.... Level 1 principles should clearly specify the nature and the extent of the technical implementing measures that should be taken at the second level and the limits within which the resulting provisions can be adapted and updated at that level without requiring a change of framework legislation." Wise Men, *supra* note 11, at 22-23.

17 Council Decision 99/468, 1999 O.J. (L 184) 23. The predecessor was Council Decision 87/373, 1987 O.J. (L 197) 33. On the comitology decision, see Koen Lenaerts & Amaryllis Verhoeven, *Towards a Legal Framework for Executive Rule-Making in the EU? The Contribution of the New Comitology Decision*, 37 COMMON MKT. L. REV. 645 (2000). On comitology in general and the difficulties it raises in respect of law and policy, see EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS (Christian Joerges & Ellen Vos, eds., 1999) (noting that this book was written before the current decision).

18 The *European Securities Committee* (ESC) was instituted in Commission Decision 01/528, 2001 O.J. (L 191) 45. The ESC is composed of high ranking representatives of Member States and chaired by the European Commission. It may invite experts and observers to participate in its meetings. The ESC will be chaired by the European Commission, which will also provide the Secretariat. The votes of the representatives are weighed in the same manner as the votes cast in the Council of Ministers. *See* EC TREATY, *supra* note 5, art. 205(2). Thus, the ESC will replicate the balance of power within the Council of Ministers. On the same day, the European Commission also established the *Committee of European Securities Regulators* (CESR) in Commission Decision 01/527, 2001 O.J. (L 191) 43. CESR has in effect taken over the work done by FESCO. *See* Press Release, First Meeting of the Committee of European Securities Regulators (CESR) (Sept. 19, 2001), *available at* http://www.europefesco.org/v1/frmPressRelease.htm.

damental political problem raised by this new approach. Even a cursory reading of the *Federalist Papers* would make it clear that James Madison and the other founding fathers of the United States knew very well that the distribution of powers enshrined in the U.S. Constitution would make lawmaking in the Union difficult and sometimes even impossible, and that was a stifling effect that they found highly desirable.

It is not obvious that more legislation is what the financial market needs, especially since there seems to be a rapid development in the private norms of the financial players prompted by market forces.[19] Governments may feel that they have lost the upper hand in regulating their financial markets, but that may simply reflect that the financial players are being disciplined by other forces that are ahead of government regulation, such as, the forces unleashed by the relentless competition due to an increasingly globalized economy and the transparency brought about by the progress in information technology.[20] In fact, considering the tradition in Europe for interventionist lawmaking, one could argue that the financial market is better off with a European Union that is as slow at lawmaking as the United States.[21]

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[19] The inter-relatedness of the financial markets and the connected cross-border influence of securities regulation on foreign legal systems is by now well-known and debated. *See* John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641 (1999). The influence of American securities regulation in Europe is a favored topic, especially among American scholars. The influence of Europe on the United States is less noted but nonetheless important. Among other things, the advance of concentrated ownership and the dualistic approach to management with a separation of supervision and management reflect this influence.

[20] It is significant that the support for the Lamfalussy Group's proposals for enhanced European Union lawmaking has primarily come from FESCO, the association of supervisory authorities of the Member States, and that the Lamfalussy Group consisted of several former high ranking officials, including Mr. Alexandre Lamfalussy himself, a distinguished former president of the European Monetary Institute. A recent report published by *Finansinspektionen*, the Swedish financial watchdog, also emphasizes the importance of private norms as a valuable and viable alternative to legislative regulation. Jonas Niemeyer, *Where to Go After the Lamfalussy Report*, 8 FINANSINSPEKTIONEN REP. 1 (2001), *available at* http://www.fi.se/english/index.asp.

[21] The United States has done quite well with its securities acts of the 1930s, given a few amendments down the road. This observation is not disturbed by the fact that a general overhaul of the acts has been announced by U.S. Senator Phil Gramm of Texas, Chairman of the Senate Banking Committee. *See* Press Release, Senate Banking Committee, Gramm Outlines Committee Agenda for the 107th Congress (Jan. 22, 2001), *available at* http://banking.senate.gov/pre101/0122prcf.htm.

Besides this overall political problem, the procedure also has the effect of making it difficult to assess the content of a proposed framework directive, such as the one at hand on market abuse, because it is difficult to know exactly how the broad principles will be fleshed out during the comitology phase. This caveat should be kept in mind when discussing the said proposal.

The comitology procedure is elaborate and will not be discussed here; it will suffice to say that the procedure envisaged in the proposed directive is the regulatory procedure provided for in Article 5 of the Decision on Comitology, according to which the European Commission can issue binding rules within the framework set by the directive after negotiating the rules with the ESC and subject to its acceptance.[22] If the ESC opposes the rules, the European Commission may take its proposal to the Council of Ministers, which must respond by qualified majority within a certain time limit of not more than three months. If the Council of Ministers fails to respond, the European Commission may pass the measures. If the Council of Ministers approves, the measures are passed. If not, the European Commission can make amendments, put its proposal forward again, or use its ordinary powers of initiative under the EC Treaty to put forward a proposal for the Council of Ministers.[23]

### 3. THE REGULATION OF INFORMATION

Before we proceed to look at the proposal, it is wise to take a step back and look at the overall picture, that is, the perennial question of *why* we regulate information in the first place.

As pointed out by George Akerlof in his seminal Lemon Theory, informational asymmetries may lead to illiquidity as informationally disadvantaged buyers either stay away from the marketplace or reduce the prices they are ready to pay to account for risk, which in turn will keep sellers of higher quality goods away as they perceive the prices as being too low.[24] This leaves only sellers of inferior goods in the market, ultimately leading to adverse se-

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[22] The measures resulting from the comitology procedure correspond to the legal instrument authorizing the procedure. A framework directive would lead to implementing directives, and a regulation would lead to implementing regulations.

[23] Council Decision 99/468, *supra* note 17.

[24] George A. Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970).

lection.[25] Thus, any market, be it used cars, real estate, or securities, needs to alleviate informational asymmetries.

This can mainly be achieved in three ways. One way is to oblige the informed party to disclose any information and thereby eradicate his or her monopoly on information. The second way is to prohibit the informed party from making use of the informational advantage. These two ways both address the same problem: that one person knows more than the next. However, informational asymmetry may also exist if one person is misinformed and another is not. The third way to avoid informational asymmetries is consequently to prevent the creation of new asymmetries by prohibiting active misinformation, which occurs when one party misinforms another party.

Whereas the first two ways address the same problem, supplementing each other, the third way is complementary to the first, as they both concern the act of informing others; they are both about communication. The informed party can either be compelled to disclose the important bits of information or can be prohibited from disclosing false information. It is often unnecessary to compel the disclosure of information in relation to a seller of goods because the seller has to inform the public to attract buyers. Consequently, the common goal of preventing informational asymmetries is often achieved simply by prohibiting misinformation, such as lying or other forms of trickery. With an incentive to disclose and a prohibition against lying, the seller has no other choice than to speak the truth or forego the transaction. This is why prohibitions on misinformation are found in very old regulations of markets, such as the laws of the Babylonian ruler Hammurabi, whereas actual disclosure obligations are a feature of modern law, especially within consumer protection. Thus, as these three ways of alleviating informational asymmetries are common in the modern regulation of markets for various goods, we should not be surprised to find them in securities regulation, where they are well known as mandatory disclosure obligations, prohibitions on insider dealing, and market manipulation (securities fraud).

However, once we are directed at recognizing the close relationship between the regulation of information in securities markets and in markets for other goods, we should also notice that eliminating informational asymmetries is not the sole purpose of

[25] *Id.* at 488.

market regulation. On the contrary, granting the benefit of exclusivity to those who have gathered, processed, and enhanced the available information is common. Because information is essentially a common good, that is, there is no rivalry in its consumption and no way to confine its dissemination, the law has to offer exclusivity by regulation.[26] One such obvious example is the grant of patent rights for inventions, which, in the United States, is a constitutional affair.

The need for allowing one to enjoy the benefits and reap the rewards of private information is as necessary as the prevention of informational asymmetries because it leads to a beneficial quest for innovation that ensures the dynamic development of technology and an efficient use of resources. Consequently, these two conflicting interests must be balanced. Again, the old phenomenon of patents illustrates this balancing of conflicting interests. The inventor is granted exclusivity to the enhanced information, which is his or her invention, enabling the inventor to profit from it and thereby recoup expenses. The inventor will not be granted the patent unless the invention is indeed innovative because that would unfairly prejudice others from using it. The need to enhance technological development is met partly by obliging the patent-holder to disclose the information and make public the invention. This can be done without detriment, as the law protects the inventor's exclusive right to use the innovation, partly by putting a time-limit on the exclusivity of the patent, after which it will expire and go into the public domain. There are other examples of balancing the conflicting needs of disseminating information with exclusivity. A seller of goods must inform the customer of important defects in the goods for sale that are known to the seller and that the seller should understand are important to the buyer. But the seller need not disclose unimportant information or information of which the

[26] In contrast to common law, Nordic law finds it difficult to consider information as "property" due to its inherently immaterial character. Full residual authority cannot be exercised over information as it can be with a physical good. Rather, the right to certain information is considered to be a specific right limited to the extent afforded by the law in force. For example, a copyright is offered by the Copyright Act, but the rights conveyed are limited in time, that is, they expire, and a copyright holder has to accept bona fide copying, such as quotations. General, unrestricted and timeless ownership is thus not available. However, this is not so different from common law, where the right to exclude, which is the most important right in relation to information, is considered "one of the most essential sticks in the bundle of rights that are commonly characterized as property." United States v. Aetna, 444 U.S. 164, 176 (1979).

buyer should be aware (buyer beware, as the adage goes).[27] Thus, the seller should inform the buyer if a used car has a defective motor that is likely to break down after a few miles but does not have to disclose that a similar used car can be bought just around the corner at half the price. Although this is important information as well, the buyer should find that out for himself and is disciplined in this way if he does not.

It is important to point out that this balancing of interests is inherent in the regulation of information and that it consequently should apply within securities regulation as well.

### 4. THE EUROPEAN APPROACH TO INSIDER DEALING

It follows from the nature of European harmonization that directives cannot be viewed in isolation. Rather, the directives should be viewed as implemented in national law. This account of the European approach to insider dealing is consequently given in the background of Danish or Nordic law.

The regulation of insider dealing in Europe can trace its roots to U.S. federal securities regulation. In the early 1960s, the U.S. Securities and Exchange Commission applied the general anti-fraud provisions of the Securities Exchange Act 1934 Section 10(b) and Rule 10b-5, promulgated thereunder to transactions carried out on an exchange.[28] This was upheld by the Court of Appeals (2d Cir.) in its 1968 decision, *SEC v. Texas Gulf Sulphur Co.*[29] Although rejecting a parity-of-information doctrine, the Court upheld the equal access theory proposed by the Securities and Exchange Commission. The American approach was later restricted significantly by the Supreme Court in its 1980 decision, *United States v. Chiarella.*[30] Before that, however, the quest against insider dealing had leapt across the ocean to Europe, where legislation aimed at insider dealing was introduced in France (1970) and in Sweden (1971).[31]

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[27] This is the position in Nordic contract law and the law on the sale of goods. A similar position seems to apply to U.S. law. *See* Kim Lane Scheppele, *"It's Just Not Right": The Ethics of Insider Dealing*, 56 LAW & CONTEMP. PROBS. 123 (1993).

[28] In re Cady, Roberts & Co., 40 SEC 907 (1961).

[29] SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 833-889 (2d Cir. 1968).

[30] United States v. Chiarella, 445 U.S. 222, 222-52 (2d Cir. 1980). The American approach was later expanded again in United States v. O'Hagan, 521 U.S. 642 (1997), *infra* text accompanying note 44.

[31] An outright ban was not introduced at first in Swedish law. Rather, the insiders of a listed company were obliged to register their shares in a public registry.

The British solution was first, and predictably, to deal with the problem by self-regulation (1976). Inspired by this approach, the European Commission issued a non-binding recommendation covering, *inter alia*, insider dealing in 1977.[32] However, in 1980, the United Kingdom enacted criminal legislation against insider dealing, followed by Norway (1985), Sweden (1985), and Denmark (1986). As more and more countries adopted legislation to address the problem, the European Commission eventually proposed a directive, which became the 1989 Directive on Insider Dealing.[33]

The basis for regulating insider dealing in European law is a market approach, that is, an attempt to protect the market players and ensure their trust in the fairness of the market. Before this becomes too euphemistic, it should be pointed out, however, that this is not an attempt to protect the proverbial widows and orphans. The flock to be protected from the lurking insiders is the small, extremely rich, and in every way privileged class of professional investors and their band of securities analysts. It is only they who, with their substantial and expansive knowledge of the individual securities, can perceive it a threat if material information that is not publicly available and thus outside their reach is used to trade against them. The lay investor, on the other hand, is never on top of the available information and is thus always at a disadvantage when compared to the professionals. The risk of trading with an opponent using inside information is hardly discernible to lay investors compared with their general informational disadvantage. To put it bluntly, the support for action against insider dealing usually voiced by professional investors is provoked by a fear of being placed on the same dismal footing as that of the lay investor. However, considering the importance of the pricing mechanism to the professional investors, which includes moving large sums each day, it is justifiable to cater to their interests. Even though the belief vested in the efficient capital market hypothesis by regulators and academics alike is probably too sanguine, it is reasonable to contend that the absence of insider dealing, thus defined, will make the pricing of securities more sound, which also benefits the lay investor.

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[32] Recommendation 77/537/EEC of the Commission Concerning a European Code of Conduct Relating to Transactions in Transferable Securities, 1977 O.J. (L 212) 23. The recommendation foreshadowed the directives that were later passed in the 1980s. *See supra* note 6.

[33] *See* Council Directive 89/592, *supra* note 6.

This market approach, which is found not only in the Nordic countries but in European law generally, as expressed by the 1989 Insider Dealing Directive, differs from the approach found in U.S. federal securities regulation. With the decision in *Chiarella* in 1980,[34] the Supreme Court continued a trend to bridle the Securities and Exchange Commission's ("Commission") expansive application of Section 10(b) of the Securities Exchange Act of 1934 starting with *Ernst & Ernst v. Hochfelder* from 1976.[35] The gist of the problem caused by the Commission's approach to combat insider dealing was distinctly put in the dictum of Justice Powell in *Chiarella*: Section 10(b) is aptly described as a catch-all provision, but what it catches must be fraud.[36]

The ban on insider dealing in U.S. federal law is almost like the British Constitution: it is one of the world's finest, but it has never been put in writing. Neither of the two securities acts of the early 1930s prohibit insider dealing. No doubt the problem of insider dealing was very much a concern to President Roosevelt and his New Dealers, but they stopped short of promulgating a prohibition on insider dealing, opting instead for a prophylactic ban on short-swing profits in Section 16(b) of the Securities Exchange Act of 1934 that would catch insider dealing and other more harmless instances. Rather than addressing this shortcoming of the securities acts, the Commission tried to expand the scope of the provisions at hand, first by promulgating Rule 10b-5 in the early 1940s, effectively expanding the anti-fraud provision of Section 17 of the Securities Act of 1933 that only covers the sale of securities, and then in the early 1960s in *Cady, Roberts & Co.*, by expanding the use of Rule 10b-5 to transactions carried out through a stock exchange.[37]

However, an anti-fraud provision is not a useful weapon for attacking transactions in such an anonymous marketplace as a securities exchange because the personal relationship between buyer and seller is as absent as the proximity between them. In face-to-face transactions, it is reasonable to expect the informed party to take into account any apparent informational disadvantage that the other party may exhibit, and it is easy to contend that an informationally advantaged party has induced the less informed counterpart to the transaction. This is the stuff a person needs in order to

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[34] *Chiarella*, 445 U.S. at 222.

[35] Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

[36] *See Chiarella*, 445 U.S. at 234.

[37] *See Cady, Roberts & Co.*, 40 SEC at 907.

claim fraud. But exchange transactions are different. They are carried out between consenting adults who have decided to engage in the transaction purely out of their own will and inclination. There is no room for communication or inducements in exchange transactions except for the rudimentary forms of communication arising out of the indications to either buy or sell a given security at the preferred price.[38]

The prohibition on insider dealing is now an established part of U.S. federal securities regulation, supported by both extensive court practice and legislation by Congress, but the whole framework is still based on the anti-fraud provision of Section 10(b) of the 1934 Act.[39] So ever since *Chiarella*, the search has been on to find a relationship of trust, the breach of which could constitute fraud, whereas the main purpose of protecting the market players has been degraded to a more accidental, albeit highly desirable, byproduct.

Despite this deficiency of the U.S. approach, the practical implications are mostly small and insignificant. A bond of loyalty is readily available within the corporate entity, also known as the listed issuer. Contrary to the somewhat quaint proposition of British company law, company law in the United States has always recognized the fiduciary duties owed by the management of the company not only to the company itself but also towards its shareholders.[40] This loyalty has been extended to future shareholders, that is, investors opting to buy shares.[41] As most cases concerning

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[38] Naturally, this difference has not escaped the U.S. Supreme Court. In relation to the requirement of reliance, see Basic Inc. v. Levinson, 485 U.S. 224, 243-44 (1988) ("The modern securities markets, literally involving millions of shares changing hands daily, differ from the face-to-face transactions contemplated by the early fraud cases . . . ."). The Court's insistence on a special relationship of loyalty in Rule 10b-5 cases even in exchange transactions is thus not an oversight but prompted by the legislation at hand. The judiciary can hardly be blamed for the legislature's failure to provide the executive branch with the necessary measures.

[39] For example, the new Rule 10b5-1 defining when a purchase or sale constitutes trading "on the basis of" material non-public information in insider dealing cases carries the following proviso: "The law of insider dealing is otherwise defined by judicial opinions construing Rule 10b-5, and Rule 10b5-1 does not modify the scope of insider dealing law in any other respect." *See* Securities Exchange Act of 1934, 15 U.S.C. § 78 (2000).

[40] The difference between company law in the United Kingdom and in the United States can be explored by comparing Percival v. Wright, 2 Ch. 421 (1902), with Strong v. Repide, 213 U.S. 419 (1909).

[41] Nicely put by Justice Learned Hand in Gratz v. Claughton, 187 F.2d 46, 49

insider dealing are brought by insiders, the narrow confinement to a basis of loyalty does not seriously impair the operation of the prohibition.

However, the problems begin when addressing persons who are not insiders but who have been derivatively informed or who are informed by information that is not genuinely inside, that is, not relating to the internal affairs of the company at which the informed person works.[42] The first problem was solved effectively, though not graciously, by the U.S. Supreme Court in its 1983 decision in *Dirks v. SEC*, introducing the concepts of the temporary insider and tippee liability.[43] But again, this was based on strenuous concepts of loyalty towards the company and not, as one would expect, on a need to protect the persons entering into transactions with the informed tippee.

The second problem was solved by the Supreme Court in its 1997 decision in *United States v. O'Hagan*.[44] Here, a majority of justices opted for the misappropriation theory suggested by the dissenting justices in *Chiarella* and eagerly greeted by the Second Circuit shortly after the ruling in *Chiarella* in cases such as *United States. v. Newman* and *SEC v. Materia*.[45] According to this theory, the necessary loyalty is towards the rightful owner of the inside information. If the informed party has violated this obligation of loyalty by misappropriating the information in order to trade on it, the necessary requirement of fraud is present. From a European view, however, one feels obliged to agree with the dissenting Justices Thomas and Rehnquist, that this construction, as welcomed as the result may be, is only accomplished by a tortuous use of the law. The main problem is, surely, that if the issuer should follow the lead that has long been contended by distinguished law profes-

(2d Cir. 1951), "It would be a sorry distinction to allow him to use the advantage of this position to induce the buyer into the position of a beneficiary although he was forbidden to do so once the buyer had become one."

[42] It is testament to the huge influence of U.S. law on European law that we have borrowed the phrase "insider dealing" and "inside information," when we, by "inside information," actually mean non-public information of all kinds and by "insider" refer to all persons having inside information regardless of their position.

[43] *See* Dirks v. SEC, 463 U.S. 646 (1983).

[44] United States v. O'Hagan, 521 U.S. 642 (1997).

[45] SEC v. Materia, 745 F.2d 197 (2d Cir. 1984); United States v. Newman, 664 F.2d 12 (2d Cir. 1981).

sors such as Henry Manne[46] and allow for its directors to trade on inside information, there would be no misappropriation of the information and hence no offense of insider dealing.[47] Likewise, in the more practical example of *warehousing*, that is, the orchestrated buying up of shares in a target company usually initiated by the party who aims at taking over the target and who is consequently expected by the other parties to take over their shares at a later time.[48] Here, there is no misappropriation of the non-public information that a takeover is imminent by the parties buying the shares.

But again, consolation can be obtained from the practical observation that, when material information is non-public, it is usually because somebody controlling that information does not want it to be used in securities trading for somebody else's personal gain, and, consequently, we can expect the misappropriation theory to catch, if not all, then nearly all cases involving the exploitation of material non-public information. This does not catch warehousing, but, as the *O'Hagan* Court also upheld Rule 14e-3, which does not rely on a special relationship of trust but operates in a takeover context, warehousing operating in violation of the special disclosure rules pursuant to the Williams Act is likely to be punishable just the same.

Nevertheless, the European approach to insider dealing does seem to be more useful and logically consistent, emphasizing the market and the transactions carried out there and not the illusive bonds of loyalty that may or may not be spun between autonomous market players.

### 5. INSIDER DEALING

In its comments on the proposed directive, the European Commission states that the proposal has not materially changed the old 1989 Insider Dealing Directive that it will replace. This is true insofar as the proposal prohibits trading on inside information and selective disclosure, respectively, which is banned in Article 2

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[46] HENRY MANNE, INSIDER TRADING AND THE STOCK MARKET (1966).

[47] United States v. O'Hagan, 521 U.S. 642, 690 (1997). For a critique along the lines offered here, see Saikrishna Prakash, *Our Dysfunctional Insider Trading Regime*, 99 COLUM. L. REV. 1491 (1999).

[48] Warehousing was touched upon but left undecided in both *Chiarella*, 445 U.S. at 242-43, and *O'Hagan*, 521 U.S. at 672 n.17.

and Article 3 of the 1989 Directive. The proposal has, however, a different approach.

The 1989 Directive relies on the dichotomy between primary and secondary insiders. A primary insider would be informed by way of his position, e.g., as a member of the board of a listed company.[49] A secondary insider would be a person informed by a primary insider, i.e., a tippee.[50] The two prohibitions on insider dealing and selective disclosure would apply to a primary insider. A secondary insider would only be subject to the prohibition on insider dealing unless the Member State had opted to extend the prohibition on selective disclosure to secondary insiders.[51]

The dichotomy of primary and secondary insiders in the 1989 Insider Dealing Directive was probably inspired by the U.S. federal securities regulation's loyalty-based approach to insider dealing. In its early form, the U.S. ban on insider dealing aimed at corporate insiders of the *Texas Gulf Sulphur* kind, who had unique access to inside information, whereas outsiders such as securities analyst Raymond Dirks would only be liable if their source was an insider.[52] In a market context, however, such a dichotomy is moot. It is not relevant how the insider got the information but whether the informed party should be allowed to exploit it in a market transaction. Furthermore, the dichotomy is even more redundant now, as the prohibition on insider dealing in Article 2 and selective disclosure in Article 3 of the proposal must both apply to secondary insiders, whereas the 1989 Directive on Insider Dealing made it optional whether to extend the prohibition on selective disclosure to secondary insiders.

The reason for maintaining the dichotomy seems to be that the drafters have deleted the attribution of full knowledge of the facts in the description of the prohibition pertaining to primary insiders, which is the way the prohibition is worded in the existing 1989 Insider Dealing Directive, but have kept the attribution with respect to secondary insiders. The requirement of full knowledge indicates that *mens rea* requires proof of intent (*dolus*). The absence of this requirement would thus indicate that a lesser form of *mens rea* would suffice with respect to primary insiders, e.g., negligence

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[49] Council Directive 89/592, *supra* note 6, art. 2(1). The prohibition also covers legal persons, e.g., a listed issuer. *Id.* art. 2(2).

[50] *Id.* art. 4.

[51] *Id.* art. 6.

[52] Dirks v. SEC, 463 U.S. 646 (1983).

(*culpa*). Thus, the absence of the requirement with respect to primary insiders in the proposal is an indication that a negligence standard shall be applied in respect of primary insiders, whereas it is still up to the Member States whether they would apply the same low standard to secondary insiders. This is already the case in many Member States including the Nordic countries, as the Member States are at liberty under the 1989 Directive to implement stricter rules than what follow from the directive.[53] In Nordic law, for example, a person must be shown to be in possession of inside information, but his qualification of the information as inside information could be negligent; this applies to all persons so informed regardless of whether they would qualify as primary or secondary insiders according to the 1989 Directive.

## 6. DISCLOSURE

### *6.1. Selective Disclosure*

The prophylactic prohibition on selective disclosure by primary insiders in Article 3(a) of the 1989 Insider Dealing Directive was intended to prevent insider dealing. The proposal does not seem to present any real change compared with the existing prohibition. The prohibition on selective disclosure in Article 3 of the proposal has maintained the broad exemption for disclosure when it is done in the normal course of business.

The ban on selective disclosure by insiders in the Insider Dealing Directive has been supplemented by a ban on selective disclosure by the issuer itself in Article 6(2), which tries to emulate the recent Regulation Fair Disclosure of U.S. federal securities regulation. It does so quite faithfully and should not present any problems, especially as selective disclosure carried out in a setting of confidentiality is excluded from the obligation to disclose the information. This ban on selective disclosure by the issuer should be viewed against the background of the existing general disclosure obligation discussed in the following.

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[53] However, if stricter rules are made, they must apply generally. Council Directive 89/592, *supra* note 6, art. 6. The European Court of Justice has ruled that a stricter standard in national law in respect to primary insiders cannot exempt holding companies as a special group. The stricter standard must apply to all who qualify as a primary insider or be disregarded as contrary to Community law. Case C-28/99, Belgium v. Jean Verdonck, 2001 E.C.R. I-3399.

*6.2. A General Disclosure Obligation*

The 1979 Directive on the Conditions for the Admission of Securities to Official Stock Exchange Listing carried a general disclosure obligation in respect of any major new developments in its sphere of activity which are not public knowledge and which may, by virtue of their effect on its assets and liabilities or financial position or on the general course of its business, lead to substantial movements in the prices of its shares.[54] Disclosure should be done automatically at the initiative of the issuer itself and performed as soon as possible. Thus, selective disclosures by issuers have long been banned in Europe. The new proposal would introduce a mandatory disclosure obligation of its own, which is very close to that of the 1979 Directive.[55]

This general disclosure obligation of European law would seem to be very far reaching, apparently aiming at all price-sensitive material information. However, it is important to note that besides the explicit exemption that the directive provides, the disclosure obligation itself is construed as providing a further exemption. Thus, the competent authority, which is usually the stock exchange on which the issuer is listed, does not expect, and indeed does not get, all material price-sensitive non-public information. Rather, the issuers are only expected to inform of matters that will be made public at a certain time, either because the event to which the information is pertaining will become publicly known, or, more importantly, because the facts will appear in the public accounts published annually, semi-annually or quarterly. It is only in relation to this kind of information that the issuer is expected to file for an exemption which, by the way, is most often not granted. Trade secrets, ongoing research efforts, business plans, and tactical deliberations not yet implemented are thus not covered by this general mandatory disclosure obligation, though they may be material, unless and until they are covered by the obligation to disclose them

[54] Council Directive 79/279, Annex C, sec. 5(a), 1979 O.J. (L 66) 21, 30 (discussing obligations with respect to an issuer of shares). In respect of an issuer of bonds, a similar disclosure obligation follows from Annex D, Section 4(a); however, the effect of the non-public news is to be on the issuer's "ability to meet its commitments." *Id.* Annex D, sec. 4(a).

[55] *Id.* art. 6(1). According to the Proposal, "Member States shall ensure that issuers of financial instruments inform the public as soon as possible of inside information." Proposal, *supra* note 4.

directly or indirectly that may follow from other laws, notably those regarding accountancy.[56]

As demonstrated in Section 3, this construction of the mandatory disclosure obligation reflects a balancing of the interests involved: that is, the interests of the investors in the market on the one hand and the issuer who needs to keep certain kinds of information confidential for competitive purposes. The real effect of the provision is thus to oblige the issuer to speed up the process of disclosure rather than to delay the disclosure until the event becomes public or the accounts are published. Most petitions for exemption concern permission to delay disclosure, not to have the information exempted from disclosure altogether. The disclosure obligation of the proposal would probably be construed in the same way as justifying the non-disclosure of the kind of information necessary to protect the issuer's position in the competition.

Furthermore, another limitation must be read into the proposed provision. The disclosure obligation would apply to issuers of financial instruments, and financial instruments would cover transferable securities as defined in the 1993 Investment Services Directive.[57] But in that directive, the definition refers simply to various securities such as shares and bonds that are negotiable on the capital market.[58] Surely, the mandatory disclosure obligation envisaged in the proposal should only apply to issuers who have by their own decision admitted their securities to listing or trading on a regulated market, which is the common phrase of the proposal and the 1993 Investment Services Directive to signify recognized investment exchanges of the individual Member States.[59] Indeed, the report by FESCO, which probably inspired the proposal, has such a limitation.[60] A reference to regulated markets is present in Article 9 of the proposal, but that provision would only

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[56] The importance of accountancy in understanding securities regulation has been noted for U.S. law as well by Edmund W. Kitch, *The Theory and Practice of Securities Disclosure*, 61 BROOK. L. REV. 763, 765-66 (1995). The paper further argues that a similar trade-off between informing investors and protecting the value of the issuer is applied in U.S. law. *Id.*

[57] Council Directive 93/22, 1993 O.J. (L 141) 27 (discussing investment services in the securities field).

[58] *Id.* art. 1(4).

[59] *See id.* (referring to art. 1(13) of the 1993 Investment Services Directive, Council Directive 93/22).

[60] FESCO's Response, *supra* note 8 (limiting the definition of a financial instrument to those admitted to a regulated market).

seem to address the question of territoriality concerning trading, whereas a normal reading of the provision would not include disclosure being made or failing to be made.[61] A more precise wording of the proposed disclosure obligation in Article 6(1) would be advisable. However, as the technical modalities of Article 6(1) should be worked out by the European Commission using the comitology procedure, the necessary adjustments may be achieved that way even if the proposal were to be upheld in this respect by the European Parliament and the Council.

## 7. MARKET MANIPULATION

### *7.1. The Concept of Manipulation*

The balancing of conflicting interests that is so imperative when construing mandatory disclosure obligations and the related prohibitions on insider dealing and selective disclosure discussed in Section 3 are absent when we turn to the last of the three ways of preventing informational asymmetries, that of banning misinformation. Lies are never justified, although admittedly, we all have to do it sometime. This makes it more straightforward to regulate misinformation: Thou shalt not misinform.

However, two caveats should be observed. Communication in the securities markets is carried out by more than verbal communication. The transactions themselves convey important information that is rapidly interpreted and used by professional market players. Consequently, banning misinformation needs to address nonverbal communication as well.

The second and more difficult caveat is how to define misinformation. Regardless of the trust and prestige invested in the adoration of the efficient capital market hypothesis and the indistinguishable capital asset pricing model, it is unrealistic to assume that the quoted price of a security has the special propensity to be true or represent the fundamental value of the issuer's future earnings. The uncertainty of the future, the plethora of information available at any given time, and the differences in human comprehension all render such predictions impossible. Conse-

[61] See the proposed Article 9, "The provisions of this Directive shall apply to any financial instrument admitted, or going to be admitted, to trading on a regulated market in at least one Member State, irrespective of whether the transaction itself actually takes place on that market or not." Proposal, *supra* note 4.

quently, it is not wrong to disagree with the current market price, and indeed, the market price is constantly moved by the conflicting opinions of the market players.[62]

But the fact that the price of a security cannot be regarded as true, does not imply that it is impossible to lie. Even if the meaning of truth lies within the individual and may differ among individuals, it is nevertheless meaningful to talk of lying when one individual conveys a message that is different from his or her individual perception of the truth. This, in essence, is the meaning of misrepresentation: to induce a perception within others that is different from that of your own. This is an inescapably subjective test, almost a judicial form of lobotomy, where we must look into the mind of the communicator and make the individual perception the starting-point of our investigation. But this does not prevent us from applying objective means to establish this state of mind. Could the communicator reasonably believe what he or she said; how would a reasonable investor interpret the communication made, and so on.

When it comes to nonverbal information, it becomes clear that attention should be given to how the market players usually interpret certain actions, and it can often be assumed that the communicator of this nonverbal communication understands the effect his or her communication, that is, that person's actions, will have. This is why transactions such as wash sales and matched orders are considered manipulative. Consequently, such actions should be outlawed insofar as the parties do not take care to prevent any misunderstanding.

However, as helpful as these objective means may be, they do not change the underlying problem: misinformation can only be discerned if the subjective opinion of the communicator is taken into consideration. This leads to the problem of pursuing an administrative regime rather than a criminal regime, as has been done in the United Kingdom for market abuse.[63] The proposed directive would make administrative sanctioning mandatory as a supplement to the criminal regime already in force in most Mem-

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[62] Naturally, it is possible to make the more modest claim that the market price is the best guess at hand because it is the aggregated guess of the many market players. And of course it is possible to define this best guess as the "true" price. However, not only is this disturbingly tautological, it is also embarrassingly inapt because this effectively gives up the possibility of verification, usually associated with determining whether a statement is true.

[63] FISMA 2000, *supra* note 9.

ber States, and it is worthwhile to have a closer look at the dichotomy of criminal and administrative sanctioning.

*7.2. A Criminal or an Administrative Regime?*

As the case was with the Insider Dealing Sanctions Act of 1984 and the Insider Dealing and Securities Fraud Enforcement Act of 1988 with respect to U.S. federal securities regulation, the introduction of an administrative regime in the British FISMA 2000 was probably motivated to some extent by the promise that it would be more operational than criminal law, which bristles with stubborn old principles such as the presumption of innocence and a need to prove *mens rea*, which usually leads to lengthy trials with a high percentage of acquittals.

Naturally, the official position is to deny any such easement. In an early publication made before the FISMA Bill was put before Parliament on June 17, 2000, the British Financial Services Authority said:

> There is behavior which is capable of damaging markets which does not constitute either insider dealing or market manipulation and which the Government does not think it would be proportionate to subject to the full weight of the criminal law. It is not the intention of the new regime to provide an easier route for taking action against criminal insider dealing and market manipulation. These offences, which are necessary and important deterrents, will remain in place. Where criminal offences have been committed, criminal prosecutions will, as now, continue to be taken where appropriate.[64]

Although the administrative regime was subjected to amendments during the legislative process, this understanding was maintained. Criminal law is thus considered more narrow because a clear intention to abuse the market was a prerequisite.[65]

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[64] FINANCIAL SECURITIES AUTHORITY, FEEDBACK STATEMENT ON RESPONSES TO CONSULTATION PAPER 10: MARKET ABUSE 2 (Mar. 1999), *available at* http://www.fsa.gov.uk/pubs/cp/cp10_response.pdf.

[65] FINANCIAL SERVICES AUTHORITY, CONSULTATION PAPER 59: MARKET ABUSE: A DRAFT CODE OF MARKET CONDUCT (July 2000), *available at* http://www.fsa.gov.uk/pubs/cp/cp59.pdf.

Thus, two interrelated advantages of an administrative regime can be discerned. First, the cases can be kept out of the courts, which are overburdened in most countries and not necessarily filled with securities experts that have intimate knowledge of right and wrong in securities trading. Second, the problem of proving intent can be overcome simply by drafting the prohibitions differently, emphasizing bad acts (*actus reus*), ignoring *mens rea*, and making offenders solely liable for penalties and the latter-day version of the medieval pillory, known as the public censure (so-called naming-and-shaming), but not fines or incarceration. Each of these alleged advantages of the administrative regime should be considered more closely.

The promise of speeding up trials by having the cases handled by an administrative body rather than an old fashioned court is restricted somewhat by Section 1, Article 6(1) of the 1950 European Convention on Human Rights and Fundamental Freedoms, which guarantees the right of a fair trial by an independent and impartial tribunal.[66] The judicial body does not have to be a court, hence the word "tribunal," but it does have to be independent and impartial, which necessitates a division within the administrative body between those who bring the charge and those who decide these cases. In France, a similar administrative regime had to be changed to safeguard this right to a fair trial.[67] To avoid that problem, FISMA 2000 grants the right to bring administrative proceedings before an independent tribunal.[68]

Nevertheless, by setting up what effectively is a special jurisdiction court for the financial market equipped with expert judges, the administrative regime does seem to offer an improvement. The problems associated with the administrative regime spring from the other alleged advantage, that of prosecuting more people than under the criminal regimes.

As was the case with the procedural question of how to organize the administrative body deciding the charges made under an administrative regime, the 1950 Convention on Human Rights not

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[66] European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(1), 213 U.N.T.S. 221, *at* http://www.pfc.org.uk/legal/echrtext.htm.

[67] *See* CA Paris, Mar. 7, 2000, 2000 Bull. du Conseil National des Commissaires aux Comptes, No. 119 (holding that the persons who brought the charge were also represented on the tribunal deciding the case. The rules on procedure have now been changed).

[68] FISMA 2000, *supra* note 9.

only calls for independent and impartial tribunals, but Article 6(2) maintains the presumption of innocence in criminal cases, Article 6(3) states certain procedural safeguards in these cases, and Article 7 requires criminal charges to be based on reasonably clear prohibitions to comply with the principle of *nullum crimen sine lege*.[69] Whether a charge is criminal or administrative is not decided by the Member State but by an autonomous interpretation based on the Convention by the national courts and ultimately by the European Court of Human Rights itself.[70]

This is of particular interest in regard to market abuses, such as insider dealing and market manipulation. Insofar as the *raison d'être* of the administrative regime is to make the difficult proof of a guilty mind unnecessary, the administrative regime must be restricted to only a subset of the actions deemed as being market abuse in criminal law. It would be straightforward to include prophylactic measures, such as the Section 16(b) short-swing profit rule of the Securities Exchange Act of 1934, which operates on objective features: did the insider trade within the stated period or not? This formalistic approach has problems of its own, as evidenced by the jurisprudence developed in U.S. federal law in respect to unorthodox transactions, that is, transactions that are caught by the short-swing profit rule but which are deemed unfair because the underlying reason for applying the rule, the fear of insider dealing, is moot because the insider has no material inside information to speak of.[71] This does not, however, present a problem in the context discussed here.

Further, as discussed in Section 7.1, objective indications can be used to gauge whether a person engaged in certain transactions intended those transactions to convey a false impression to other market players. Thus, prohibiting certain forms of transactions, such as wash sales, which are matched orders or transactions that falsely appear to be arms-length, is feasible within an administrative regime, without violating basic principles of fairness. Objec-

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[69] European Convention on Human Rights and Freedoms, *supra* note 66, art. 7.

[70] *E.g.*, Ozturk v. Germany, 73 Eur. Ct. H.R. (ser. A) (1984), *available at* http://hudoc.echr.coe.int/Hudoc1doc/HEJUD/sift/138.txt (holding a traffic violation to be a criminal charge although it had been decriminalized in German law a few years earlier and was now considered to be an administrative offense. Consequently, the offender had the right to a trial before an independent and impartial tribunal and the right to be heard in an adversarial procedure).

[71] *See* COX, *supra* note 1, at 819-25.

tive fact-finding, such as determinations of whether the person engaged in this kind of transaction or not, is well-suited to the administrative regime. Persons engaging in such transactions should know that they are likely to mislead other market players, and this makes it appropriate to submit them to whatever sanctions an administrative regime can offer.

But even these cases must allow for defenses and exemptions if the parties engaged in the transactions are motivated by legitimate reasons, such as trading between group-related companies at prices that are inflated compared with the present market price. Although such a transaction would appear to be a matched order likely to mislead the market, it is not misleading if the parties to the transaction disclose to the market that they belong to the same group and that the transaction price does not reflect arms-length negotiations. The need for defenses and exemptions arises because the prohibitions are not just prophylactic but are aimed at crimes that involve a guilty mind, where the objective features, such as the transactions, are taken as proxies for the mental state of mind. Thus, the person charged with such an offense should either have the opportunity to prove his or her innocence or, at the very least, the offense should include an exemption if adequate disclosure to the market has been made.

The administrative approach becomes highly questionable, however, for activities other than these prophylactic measures and irregular transactions. This almost always applies to insider trading cases where the special state of mind of the informed party is what makes the transaction unfair. But it would also be a problem in most cases of market manipulation. When it cannot be said that the acting party knew, or ought to have known, that his or her actions would mislead the market, we must satisfy ourselves that the party did in fact aim to misinform.

This leads to the difficult problem of proving *mens rea,* known from criminal law, and the application of an administrative regime should not mitigate the substantial burden of proof that this leaves for prosecutors. The principles of criminal law are derived from the inherent imbalance of power between the state and the individual, an imbalance that is not removed by simply re-labeling the advisory relationship as administrative.

It would appear that these cases are not suitable for an administrative regime unless the regime is ready to forego the advantages and adopt the principles and procedures of criminal law. This is also the position taken by the government of Sweden, the

most recent among the Nordic countries to have a major reform of its securities regulation resulting in the Insider Penal Act and the Securities Reporting Act, both of which became effective on January 1, 2001.[72] Sweden's position in the Insider Penal Act of 2000 was that insider dealing and market manipulation should be kept within a criminal regime, and the new act continued the criminal regime of the old act except that it increased the criminal sanctions available.[73] The prophylactic measures of Swedish securities regulation, such as a reporting obligation for insiders and a short swing-profit rule similar to that found in Section 16 of the U.S. Securities Exchange Act of 1934, were placed in the administrative Securities Reporting Act of 2000 and only subjected violators to penalties, not the fines or imprisonment possible under the Insider Penal Act of 2000.[74]

In all fairness, British securities regulation, which is the proponent of the administrative regime, has taken these considerations into account. Thus, the British administrative regime on market abuse, according to the FISMA 2000, emphasizes in the vast majority of cases subjective features such as the knowledge of the person charged with market abuse and the purpose pursued through these actions. The British Financial Services Authority stands by its responsibility when acting as a prosecutor to prove these matters by carrying the full burden of proof.[75] Consequently, the British administrative regime would seem to comply with the high standards expected in criminal law, making their insistence on the distinction seem rather whimsical. It could be argued that the administrative regime changes the onus of proof from proving guilt

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[72] Insiderstrafflag, No. 1086 (2000) (Swed.) (describing the Swedish Insider Penal Act) [hereinafter Insider Penal Act]; Lag om anmaelningsskyldighet for vissa innehav av finansiella instrument, No. 1087 (2000) (Swed.), *available at* http://www.fi.se/english/index.asp (describing the reporting obligations for certain holdings of financial interest in the Securities Reporting Act) [hereinafter Securities Reporting Act].

[73] *See* Insider Penal Act, *supra* note 72, §§ 2, 4-6 (discussing penal sanctions for insider dealing) and § 9 (discussing penal sections for price manipulation).

[74] *See* Securities Reporting Act, *supra* note 72, §§ 19-20 (discussing administrative sanctions for violation of the ban on short swing-profits and for a failure to report).

[75] *See* FINANCIAL SERVICES AUTHORITY, CODE OF MARKET CONDUCT: FEEDBACK ON CP59 AND CP76: POLICY STATEMENT 10 (Apr. 2001), *available at* http://www.fsa.gov.uk/pubs/policy/ps59_76.pdf (explaining that the FSA has described in great detail, after considerable consultations with market players, the behavior amounting to market abuse).

beyond reasonable doubt to a mere balance of probabilities. However, the difference is marginal, as a criminal regime does not necessarily require intent (*dolus*) but can prescribe negligence (*culpa*) as is often the case in Nordic law. Rather, the real benefit of the British legislative reform is probably found in the elaborate and carefully designed financial regulation that has been achieved.

*7.3. The Proposal's Concept of Manipulation*

Whereas the British experience has led to an administrative regime with all the safeguards of a traditional criminal regime, the new proposal for a directive on market abuse seems influenced by the unrestrained boldness one might fear would motivate regulators to clamor for an administrative regime. The proposal itself calls for administrative *and* criminal sanctions.[76] The European Commission frankly expresses the perceived need for an administrative regime because the proceedings are faster. Furthermore, the Commission states that the definition of market manipulation relies on the behavior of its authors, and not on their intention or aim. This is in stark contrast to the more experienced observation of the British Financial Services Authority that, "Knowledge is an element in the description of behavior which amounts to market abuse."[77]

In the annex to the proposal, Section B provides a non-exhaustive list of conduct that would amount to market manipulation. Some of these examples are acceptable, such as wash sales. Others bristle with difficulties, such as trading specifically to interfere with the spot or the settlement price of derivative contracts. Here, an evaluation of the person's state of mind seems necessary. Likewise, making untrue statements of material fact may be justly sanctionable without reference to *mens rea* if committed by professional market players who are subject to prior obligations of due diligence with regard to those facts. This standard is, however, overly excessive for lay investors using chat rooms and the like on the Internet. Finally, non-disclosure of material facts or material interests is mentioned as an example of an information-related action that would constitute market manipulation, but surely must

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[76] As the European Community cannot expressly regulate sanctioning, the Member States are left with the discretion to determine the actual sanctions available. *See* Proposal, *supra* note 4, art. 14(1).

[77] FINANCIAL SERVICES AUTHORITY, *supra* note 75, at 22 (discussing Chinese walls in relation to avoiding false or misleading impressions being made).

presuppose an obligation to disclose or an intent to deceive, unless the situation is really about insider dealing, in which case establishing subjective knowledge is inescapable.

Thus, the examples given in Section B of the proposal are well-known schemes of manipulation and deceit in the financial market and as such, their inclusion in a directive aimed at combating market abuse is laudable. However, a substantial part of these examples are to be subjected to an administrative regime. Due to the framework character of the intended directive, it is not yet possible to tell how the comitology procedure will deal with this problem, but the enthusiasm for administrative sanctions expressed by the European Commission in the comments to the proposal does not bode well.

## 8. CONCLUSION

The recent proposal from the European Commission for a directive on market abuse would not lead to any greater change with respect to insider dealing or disclosure, be it selective or general. In regards to market manipulation, the framework directive itself does not seem to go further than what is already outlawed by the laws of most Member States. The devil is in the details, however, and the fact that the proposal is for a framework directive in which the technical details are to be hammered out by the European Commission working with the new technocratic European Securities Committee, combined with their enthusiasm for administrative sanctioning and neglecting the issue of *mens rea* in lieu of more objective features, could give cause for concern. Whether such a concern is justified remains to be seen.