# Insider Trading in European Law – from financial instruments to crypto-assets

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## Abstract

The chapter provides an overview on EU Insider Law. It includes comparative remarks on US and explores insider law under the EU Markets in Crypto Assets Regulation.



Keywords: Insider Law, MiCAR, EU Listing Act, protracted processes, ad hoc disclosure



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The history of European insider trading law starts as late as 1966 with an expert report for the European Commission, advocating a new legal framework for "The development of a European Capital Market." Named after one of its authors, the "Segré Report" viewed insider trading as a "technical" problem, having to do with directors or executives dealing in shares of their company.[1] Only in 1989 did the European Council pass a directive in order to coordinate the widely differing insider trading regimes in the Member States.[2] Fourteen years later, a new directive addressed insider trading and market manipulation.[3] Finally, in 2014, the Market

[1] Commission of the European Economic Community, The Development of a European Capital Market – Report of a Group of Experts Appointed by the EEC Commission 31 (1966).

[2] Council Directive 89/592/EEC of 13 November 1989, Coordinating Regulations on Insider Dealing, 1989 O.J. (L 334) 30.

[3] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003, On Insider Trading and Market Manipulation (Market Abuse), 2003 O.J. (L 96) 16.

Abuse Regulation entered into force.[4] It constitutes today's regime for insider trading. An accompanying Directive addresses criminal sanctions for insider trading.[5] At the time of writing this chapter, a European Commission Proposal, geared at making public markets in the Union more attractive, includes an important change to what counts as inside information under European Law.[6] Additionally, the EU Market in

[4] 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 of Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, 2014 O.J. (L 173) 1 [hereinafter MAR].

[5] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014, On Criminal Sanctions for Market Abuse (Market Abuse Directive), 2014 O.J. (L 173) 179 [hereinafter CS-MAD]. For case law see Cases C-596/16 and C-597/16, Di Puma and Zecca v. Consob, ECLI:EU:C:2018:192 (Mar. 20, 2018) and C-537/16, Garlsson Real Estate, Ricucci, Magiste International v. Consob, ECLI:EU:C:2018:193 (on *ne bis in idem* and *res judicata*) (Mar. 20, 2018); Case C-606/20, EZ v. Iberia, ECLI:EU:C:2021:184 (right to remain silent) (Feb. 26, 2021); Case C-339/20, VD and SR, ECLI:EU:C:2022:703 (investigative and supervisory powers) (Sep. 20, 2022).

[6] Commission Proposal for a Regulation of the European Parliament and of the Council, Amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to Make Public Capital Markets in the Union More Attractive for Companies and to Facilitate Access to Capital for Small and Medium-sized

Crypto Assets Regulation contains its own regime on insider trading in crypto assets which do not qualify as financial instruments.[7]

<a>I. Background: Regulations and Directives

European insider trading law rests on MAR, a 2014 regulation of the European Parliament and of the Council, and its accompanying directive, CS-MAD. Regulations and directives are distinct instruments of European law. The former provides the strongest form of unifying law across the EU, binding in their entirety and directly applicable in all Member States, Art. 288 para. 2 TFEU.[8] The latter are binding as to their aims but require transposition into national law of the Member States, granting discretion regarding the choice of form and methods, Art. 288 para. 3

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Enterprises, COM(2022) 762 final (Dec. 7, 2022) [hereinafter Listing Act]; see *infra* Part X.

[7] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023, On Markets in Crypto-assets and Amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives (EU) 2013/36/EU and (EU) 2019/1937, 2023 O.J. (L 150) 40 [hereinafter MiCAR]; see *infra* Part IV.

[8] Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Jun. 7, 2016, 2016 O.J. (C 202) 171-172 [hereinafter TFEU].

TFEU.[9] Since the 2014 reform, EU insider trading law comes in the form of a regulation, directly applicable across the Union.

## <a>II. Policy Goals: Market Integrity, Equal Access, and Fairness

USA law has heavily influenced European insider trading law. This is particularly true regarding doctrinal terms such as inside information, materiality, and the reasonable investor. As to policy goals, the influence is less pronounced.[10] Both legal orders generally aim at maintaining efficient markets and protecting investors. However, the policy goals underlying insider trading law diverge. The USA relies on classical and misappropriation theories of insider trading.[11] EU law, by contrast, conceptualizes insider trading law primarily as a contribution to efficient markets. Its trading prohibition goes hand in hand with an obligation to immediately disclose material information to the market.[12] As an afterthought, as it were, equal access and

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[9] See generally Paul Craig & Gráinne de Búrca, EU Law, 136-139, 233-238 (7th ed. 2020).

[10] Detailed analysis at Dörte Poelzig & Paul Dittrich, Insider Dealing by Outsiders in the U.S. and EU, 20 European Company and Financial Law Review 692 (2023).

[11] See Stephen M. Bainbridge, An Overview of Insider Trading Law and Policy: An Introduction to the Research Handbook on Insider Trading, in Research Handbook on Insider Trading 1, 15-17 (2013).

[12] See *infra* Part III.

fairness considerations apply. As this Chapter unfolds, we shall see that the comprehensive EU approach impacts who counts as an insider, what qualifies as inside information, and why insider trading prohibitions extend to digital assets.[13]

The MAR starts from the assumption that financial markets thrive on transparency and reporting of all material information. [14] “Market abuse” is harmful for both, “the integrity of financial markets and public confidence in securities and derivatives.”[15] Insider trading, unlawful disclosure of inside information and securities fraud (“market manipulation”) all count as market abuse.[16] They prevent “full and proper market transparency.”[17] Rather than explaining an insider trading prohibition USA-style as a breach of a fiduciary duty owed to the issuer or to the source of the information, EU law frames it as a cornerstone of market efficiency.[18] Allowing insiders to trade would slow down the absorption of new information by market actors.

Equal access to information and fairness for investors are additional goals underlying EU insider law. Neither goal has gained much traction in the USA, except

[13] See *infra* Parts V, VI, and XI.

[14] MAR, *supra* note 4, recitals (2), (7).

[15] MAR, *supra* note 4, recital (2), see Art. 1.

[16] MAR, *supra* note 4, recital (7).

[17] MAR, *supra* note 4, recital (7).

[18] But see Part X infra for a reconsideration of the role of disclosure.

for the short-lived period between *Texas Gulf Sulphur* and *Chiarella*.[19] EU law, by contrast, stresses the link between market integrity, "the assurance that investors will be placed on an equal footing"[20] and fairness considerations. Copying from a European Court of Justice[21] decision,[22] the MAR stipulates:

> The essential characteristic of insider dealing consists in an unfair advantage being obtained from inside information to the detriment of third parties who are unaware of such information.[23]

Against that background, EU law's markets- and fairness-based approach captures trading as well as tipping, the latter not necessarily bound by classical or misappropriation theories. Similarly, when assessing what counts as inside information, EU law will look to market efficiency. Painting in very broad strokes, inside information is whatever has the potential to impact investment decisions. No

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[19] SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir.), cert. denied, 394 U.S. 976 (1968); Chiarella v. United States, 445 U.S. 222 (1980). For a critique see Donald C. Langevoort, From *Texas Gulf Sulphur* to *Chiarella*: A Tale of Two Duties, 71 SMU L. Rev. 835 (2018).

[20] MAR, *supra* note 4, recital (24).

[21] Hereinafter E.C.J.

[22] See Case C-45/08, Spector Photo Group NV v. CBFA, ECLI:EU:C:2009:806 (Dec. 23, 2009) at ¶ 52.

[23] MAR, *supra* note 4, recital (23).

insider may trade on such information and the issuer must disclose it immediately. Asking what a reasonable investor would have considered, USA and EU law often end up arriving at similar results. However, EU law has struggled considerably with information, which is relevant, albeit speculative and contingent.[24] It did not help that a disclosure obligation applies in addition to the trading prohibition, having issuers worry what they must report.

Insider trading is not limited to classic financial instruments. Markets for digital assets have over the last years seen fundamental disruptions. USA regulatory agencies have had a head start when considering initial coin offerings which bear a certain resemblance to security offerings. Enforcement actions for currency tokens such as stablecoins are unfolding at the time of writing this chapter. The EU has opted for a different approach, still following the markets-and-fairness-based route. MiCAR[25] is a tailored piece of legislation, extending insider trading law to various digital assets.[26]

## <a>III. Design: Trading prohibition and disclosure obligation[27]

Conceptualizing insider trading law in the context of market efficiency and equal access has led to a core feature of EU insider law: combining an insider trading

[24] See *infra* Parts V.A.2. and IX.D.

[25] See *supra* note 7.

[26] See *infra* Part XI.

[27] See *infra* Part X on current reform proposals.

prohibition and a disclosure obligation. In *Chiarella,* the USA Supreme Court sharply declined to impose a duty of disclosure on all market actors possessing material non-public information about the issuer.[28] EU law has taken the opposite decision: "The public disclosure of inside information by an issuer is essential to avoid insider dealing."[29]

As Langevoort has noted, "a disclosure obligation would be coherent with the spirit of equal access, because prompt disclosure is a principal mechanism by which market prices could stay close to fundamental value for the benefit of all traders, and makes ample policy sense […] so long as there was some business judgment discretion given to issuers to keep secrets when there was a compelling competitive need for secrecy."[30] The MAR offers both, a disclosure obligation and legitimate reasons to delay disclosure, alongside the trading prohibition.

Under MAR, inside information entails a trading prohibition, Art. 14 MAR, which is in many ways similar to the USA trading prohibition under Rule 10b-5. Additionally, and in contrast to the USA, the MAR includes an obligation for the issuer to immediately disclose inside information to the market, Art. 17 para. 1 MAR.

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[28] See Chiarella v. United States, 445 U.S. 222, 233 (1980) (declining to recognize "a general duty between all participants in market transactions to forgo actions based on material, nonpublic information" absent clear evidence of Congressional intent to do so).

[29] MAR, *supra* note 4, recital (49).

[30] Langevoort, *supra* note 19, 850.

Further rules allow to delay disclosure (Art. 17 para. 4) and to lawfully conduct market soundings (Art. 11).

It is important for USA readers to note, that the MAR disclosure obligation has nothing to do with privity and, accordingly, does not automatically entail a private right of action. The MAR does require efficient sanctions for a violation of the disclosure obligation. However, it is up to Member States to decide on what fits best with national law. Most Member States have opted for administrative law sanctions, few include a private right of action.[31]

Arguably, the closest USA analogue to the MAR requirement to disclose material information is current event reporting under Section 13(a)(11) of the Exchange Act 1933 (filing a Form 8K).[32] However, USA current event reporting follows its own logic and policy goals which are distinct from insider trading law. EU law, by contrast, understands insider trading prohibitions and disclosure obligations as two sides of the same coin, as it were.

<a>IV. Defining Financial Instruments

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[31] See *infra* Part IX.D for Germany.

[32] Additionally, when thinking about adequate disclosure, a USA lawyer will look towards §§ 11(a) and 12(a)(2) of the 1933 Act, §§ 14(a) and (e) of the 1934 Act, Rule 10b-5 under § 10(b) of the 1934 Act, and to Regulation FD.

The MAR applies to transactions in financial instruments that are admitted to trading on a regulated market,[33] on a multilateral trading facility (MTF),[34] or any other type of organized trading facility (OTF).[35] A request for admission to trading is understood as equivalent. By contrast, financial instruments traded solely over the counter (OTC) are outside its scope, unless their price depends on the price of a financial instrument traded on a regulated market, a MTF, or an OTF.[36]

Defining financial instruments, Art. 3 para. 1 (1) MAR references Art. 4 para. 1 (15) of Directive 2014/65 (MiFID II). However, this rule does not define a "financial instrument" either.[37] Instead, it points to "instruments specified in

[33] For the definition of a regulated market, MAR, *supra* note 4, Art. 3 para. 1(6) references Art. 4 para. 1(21) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014, On Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU, 2014 O.J. (L 173) 349 [hereinafter MiFID II]; and Case C-248/11, Nilaş and others, ECLI:EU:C:2012:166 (Mar. 22, 2012) on two market operators merging.

[34] For the definition of a MTF, MAR, *supra* note 4 Art. 3 para. 1(7) references Art. 4 para. 1(22) of MiFID II, *supra* note 33.

[35] For the definition of an OTF, MAR, *supra* note 4 Art. 3 para. 1(8) references Art. 4 para. 1(23) of MiFID II, *supra* note 33.

[36] MAR, *supra* note 4, Art. 2 para. 1(d), recital (8).

[37] Thomas Jutzi & Andri Abbühl, Die Fintech-Massnahmen der EU und das "Finanzinstrument" [FinTech Measures of the EU and the "Financial Instrument"] Zeitschrift für Europarecht [EuZ][Journal for European Law] K11 (2022),

Section C of Annex I."[38] Under this section, one finds transferable securities, money-market instruments, and units in collective investment undertakings. The rule goes on to list eight different types of derivatives.

Art. 4 para. 1(44) MiFID II defines the term "transferable security" as excluding instruments of payment and requiring negotiability on capital markets. The rule gives three examples for a transferable security. The first concerns "shares in companies and other securities equivalent to shares in companies, partnerships or other entities" as well as depositary receipts. The second lists "bonds or other forms of securitized debt," again including depositary receipts. The third covers options and futures.

Specifying further what counts as a security, a share, or a bond has been delegated to the national laws of the Member States and their national competent authorities. Some stick to the MiFID II definition, some have broader, some narrower rules.[39] Jurisdictions with narrower rules include, for instance, compulsory book-entry, or requirements for the types of rights embodied in a financial instrument.[40]

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https://boris.unibe.ch/173540/1/EuZ_Digital_2022_09_Jutzi_Fintech-V1_01-20220928.pdf (last visited Jan. 19, 2024) (Ger.).

[38] Jutzi & Abbühl, *supra* note 37, at K7.

[39] ESMA, Annex 1 – Legal qualification of crypto-assets—survey to NCAs, ESMA50-157-1384, note 24 et seq. (2019), https://www.esma.europa.eu/sites/default/files/library/esma50-157-1384_annex.pdf (last visited Jan. 19, 2024).

[40] *Id.* at note 25.

## <a>V. Defining Inside Information

The main elements of Art. 7 para. 1 MAR's definition of inside information are similar to USA law's definition of material non-public information. It covers any non-public information, relating to an issuer or a financial instrument that, if made public, would be likely to have a significant effect on the prices of the instrument or a related derivative.

Exploiting information that is relevant for the fundamental value of the issuer is not the only strategy for insider dealing. An insider who knows about upcoming trades might profit, for instance via front-running.[41] Against this background, Art. 7 para. 1(d) MAR targets "persons charged with the execution of orders concerning financial instruments." Material information they obtain from their clients on impending orders qualifies as inside information.

Art. 7 paras. 2 to 4 MAR attempt to narrow down the broad definition. Again, the exercise is not very different from USA law. However, while USA law carves out immaterial information only, EU law – somewhat similar to SEC Regulation S-K's Item 303 under USA law – includes a preliminary threshold. What it calls "imprecise" information does not qualify, without the need to further discuss materiality.

### <b>A. Precision

[41] See MAR, *supra* note 4, recital (30).

Art. 7 para. 2 MAR defines when information is precise enough to qualify as inside information. The rule follows two goals: carving out vague, unclear information and dealing with events which unfold step by step.

<c>1. Vague information

The first goal, in the words of the (overly complicated) MAR reads as:

> "information shall be deemed to be of a precise nature (…) where it is specific enough to enable a conclusion to be drawn as to the possible effect (…) on the prices of the financial instrument."

Examples usually cited for imprecise, unspecific information are mere rumors,[42] opinions voiced, half-truths or thoughts, and hopes.[43] It is hard to see how a reasonable investor would consider information of that type material. However, even if he would, imprecise information does not pass the initial EU law threshold.[44]

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[42] On rumors see Case C-302/20, Mr A v. AMF, ECLI:EU:C:2022:190 (Mar. 15, 2022), below at IX.F.; Lars Klöhn, Financial Journalism, Unlawful Disclosure of Inside Information and Freedom of Press: Mr A v. Autorité des Marchés Financiers, 60 CMLR 547, 557 (2023).

[43] Christoph Kumpan & Robin Misterek in Eberhard Schwark & Daniel Zimmer, Kapitalmarktrechts-Kommentar [Commentary on Capital Markets Law], Art. 7 MAR at ¶ 42-44 (5th ed. 2020).

[44] See Opinion of Advocate General Kokott delivered on 16 September 2021 on Case C-302/20, Mr A v. AMF [hereinafter Opinion of GA Kokott],

<c>2. Speculative information[45]

The second goal of the precision test has to do with what the MAR calls an "intermediate step in a protracted process."[46] The paradigm case, tried at the E.C.J. while the MAR was drafted,[47] concerns a CEO stepping down. Before officially handing in his resignation and the board accepting it, the CEO had completed a myriad of small steps, ranging from discussion with friends and family, over informing board members, to initiating the search for a replacement. For each of these steps, one might wonder whether they qualify as inside information. The lower national courts, before referring the case to the E.C.J., had insisted that the CEO's resignation counted as a relevant "fact" only after it was approved by the board, hence

ECLI:EU:C:2021:747 (Mar. 30, 2021), ¶ 40; Case C-302/20, Mr A v. AMF, ECLI:EU:C:2022:190 (Mar. 15, 2022), at ¶ 42 et seq.; Case C-628/13, Lafonta, ECLI:EU:C:2015:162 (Mar. 11, 2015), at ¶ 31.

[45] See *infra* Part X on a current reform proposal.

[46] Art. 7 para. 3 MAR. The rule stipulates that an intermediate step can qualify as inside information. Put differently: If things end up differently than originally planned, this does not rule out that a step on the way was a piece of material inside information.

[47] See *infra* Part IX.D.

legally valid and final.[48] Against this background, none of the small steps would have qualified as inside information. Today, the somewhat tautological text of Art. 7 para. 3 MAR ("an intermediate step (…) shall be deemed to be inside information (…) if it satisfies the criteria of inside information") signals that this understanding runs contrary to the MAR's spirit.[49] Put differently: events which suggest a future course of action may qualify as inside information, even if that future action never materializes.[50]

However, while Art. 7 para. 3 MAR stipulates that a small step *may* qualify as inside information, it does not say every small step *does*. After all, and in the words of USA courts, we are still facing "contingent or speculative events."[51] This is where Art. 7 para. 2 MAR comes into play. We have seen above that information may not be vague but must instead be "specific enough" to assess price impact.[52] Additionally, contingent information is precise only "if it indicates (…) an event (…) which may reasonably be expected to occur."

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[48] Oberlandesgericht [OLG][Higher Regional Court] Stuttgart, Apr. 22, 2009, Neue Zeitschrift für Gesellschaftsrecht [NZG][New Journal of Company Law] 624, 626–627 (2009) (Ger.); see *infra* Part IX.D.

[49] MAR, *supra* note 4, recitals (16), (17).

[50] However, see *infra* Parts IX.D., E., F., and X.

[51] SEC v Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir.), cert. denied, 394 U.S. 976 (1968). See also TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988).

[52] See *infra* Part V.A.1.

To USA readers, SEC Regulation S-K's Item 303 on management's discussion and analysis of financial condition and results of operation might come to mind. The rule deals with "material events and uncertainties, that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results."[53] The rule differs from the Supreme Court's probability/magnitude standard for materiality under the securities law's antifraud provisions (such as Rule 10b-5).[54] Under *Basic*, materiality of an information is the product of the probability that an event will occur and the magnitude of price movements if it does.[55] By contrast, Item 303 sets a minimum level of probability. Its disclosure standard is lower than a 50 %, "more likely than not" threshold, but higher than a mere (but potentially remote) possibility.[56]

Along a similar vein, the MAR asks whether there is "a realistic prospect" that an event "will come into existence (…) on the basis of an overall assessment of the factors existing at the relevant time."[57] Very explicitly, the MAR rules out a probability/magnitude test at this stage of the inquiry: "that notion should not be interpreted as meaning that the magnitude of the effect of (…) that event on the prices

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[53] 17 C.F.R. § 229.303(a).

[54] J. Anthony Terrell, Materiality in Review 10 (2021), https://bracewell.com/sites/default/files/knowledge-center/Revised%20Materiality.pdf (last visited Jan. 9, 2024).

[55] Basic Inc. v. Levinson, 485 U.S. 224, 238 (1988).

[56] Terrell, *supra* note 54, at 11.

[57] MAR, *supra* note 4, recital (16).

of financial instruments (…) must be taken into consideration."[58] It follows from there that a small-step, contingent information pointing towards a future event which has a remote, unrealistic chance of materializing, does not qualify as inside information. This is true even if the magnitude of the future event's price effect would be considerable.

### <b>B. Significant effect on prices

One of the more challenging tasks any insider trading law faces is to draw a line between irrelevant facts and material information. A rule-maker will typically weigh the potential damage of being over-inclusive against the risks of drafting an under-inclusive rule. Over-inclusiveness is not only objectionable because tough sanctions may attach to insider law violations but also because, under EU law's disclosure obligation,[59] over-inclusiveness additionally carries the risk of flooding the market with irrelevant information.

In distinguishing relevant from irrelevant information, USA law relies on materiality from the point of view of a reasonable investor. Information is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[60]

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[58] MAR, *supra* note 4, recital (16).

[59] See *supra* Part III.

[60] TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

EU law employs a very similar test. Art. 7 para. 1(a) MAR requires a significant price effect of inside information if it were made public. Para. 4 explains that this covers information "a reasonable investor would be likely to use as part of his or her investment decision."

The standard for modeling this investor is, under EU law, as unclear as under USA law. Are they "babes in the woods" with "child-like simplicity,"[61] given to mood swings and behavioral anomalies,[62] or rather professionals with a grasp of financial markets? Are they interested in fundamental value and long-term investing or are they eager to make a quick buck on a short-term strategy? Note that this is not an empirical, but a normative question. Understanding the model investor as rational and oriented towards fundamental values offers a tool to limit what counts as inside information. Stressing irrational behavior, herding effects and "guessing games,"[63]

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[61] *Flamm v. Eberstadt*, 814 F.2d 1169, 1175 (7th Cir. 1987), quoted in *Basic Inc. v. Levinson*, 485 U.S. 224, 234 (1988).

[62] Daniel Kahneman & Amos Tversky, On the Psychology of Prediction, 80 Psychological Rev. 237 (1973); Amos Tversky & Daniel Kahneman, Judgment under Uncertainty: Heuristics and Biases, 185 Sci. 1124 (1974); Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision under Risk, 47 Econometrica 263 (1979); Kahneman, Maps of Bounded Rationality: Psychology for Behavioral Economics, 93 Am. Econ. Rev. 1449 (2003).

[63] See Richard H. Thaler, Misbehaving: The Making of Behavioral Economics 203-215 (2015), for the comparison to a "beauty contest" and understanding investment decisions as a "guessing game."

extends its scope. Under this reading, information qualifies as inside information if at least some people will use it for an investment decision, regardless of whether they fall prey to biases or because they exploit foreseeable biases of others.

Any interpretation, literal or extensive, requires back-up by policy arguments. Due to its combination of a trading prohibition and a disclosure obligation,[64] the EU MAR faces a complicated trade-off. Realizing fairness for all investors might require a broad understanding of the model investor. This would account for a trading prohibition to kick in early. However, with the trading prohibition comes the disclosure obligation.[65] In that space, a broad reading will often make much less sense. Against the background of market integrity, the more restrictive, fundamental-value understanding, arguably, is more convincing. Any broader reading extends disclosure obligations and risks to flood markets with information. Still, a 2021 EU Commission suggestion to define inside information as "information a rational investor would be likely to consider relevant for the long-term fundamental value of the issuer"[66] never made it into law. An additional argument points to the MAR capturing inside information on impending orders, irrespective of fundamental value

[64] See *supra* Part III.

[65] See *supra* Part III.

[66] European Commission, Targeted Consultation – Listing Act, Question 46(b) 37 (2021), https://finance.ec.europa.eu/regulation-and-supervision/consultations/finance-2021-listing-act-targeted_en (last visited Jan. 19, 2024).

of the issuer.[67] Various E.C.J. decisions have confronted these issues, and the current reform of the EU Listing Act proposes a reform.[68]

<a>VI. The insider

Arguably, the definition of who qualifies as an insider is where USA and EU law diverge most markedly. USA law rests on a rather narrow definition, exemplified by the long-winded discussion on liability of tippers and tippees.[69] The focus on corporate insiders or, alternatively, on misappropriating information, which is required under USA doctrine, has no analogue under EU law. Instead, the EU goals of protecting market integrity and investors allow for a much broader understanding of who should not be allowed to trade.

The MAR starts from the principle that anyone who possesses inside information qualifies as an insider if that person knew or ought to know that it is

[67] Misterek, Die Insiderinformation im Spannungsverhältnis von Ad-hoc Publizität und Insiderhandelsverbot [Inside Information and the Conflict between Ad-Hoc Disclosure and the Prohibition on Insider Trading], Zeitschrift für Wirtschaftsrecht [ZIP] 400, 404-405 (2023) (Ger.).

[68] See *infra* Parts IX.D., E., F., and X.

[69] On the question of who is an insider under USA law, see Iman Anabtawi, Toward a Definition of Insider Trading, 41 Stan. L. Rev. 377, 381 (1989).

inside information.[70] It then distinguishes between persons for whom such knowledge is irrefutably presumed ("primary insiders") and others, for whom this is not the case ("secondary insiders").[71]

Art. 8 para. 4 contains the list of primary insiders. Lit. (a), (b), and (d) cover, *firstly*, persons who gain access to inside information because of their position at the issuer (officers, directors, and certain employees), *secondly*, shareholders, and, *thirdly*, persons who gain inside information through criminal behavior.[72] *Fourthly*, persons qualifying as "constructive insiders" or as insiders because of a "non-traditional relationship" under U. S. law[73] fall under Art. 8 para. 4(c) MAR if they have access to inside information in a professional context.

The group of secondary insiders is considerably larger than the group of tippees, "constructive," and "non-traditional" insiders under USA law. It covers not only employees and business connections of the issuer but also the notorious taxi

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[70] Confusingly, this rule is the very last sentence of Art. 8 para. 4 MAR, *supra* note 4, see further recital (26).

[71] Katja Langenbucher, Aktien- und Kapitalmarktrecht, § 15 ¶ 67 et seq. (5th ed. 2022) (Ger.).

[72] At first glance, the provision seems broader than its U. S. equivalent in Securities Exchange Act § 16(b)15 U.S.C. § 78p(b) which applies only to shareholders owning more than 10 % of the company's stock. However, Art. 8 MAR requires causation ("as a result of") between holding and knowledge which suggests that most cases will in practice follow similar rules.

[73] See Bainbridge, *supra* note 11, at 22–28.

driver overhearing the CEO's conversation on the backseat, or the seatmate on an airplane catching a glimpse of the laptop next to him. The underlying policy goal goes back to considerations of fairness and market integrity.[74] Both the taxi-driver, and the seatmate, if they are aware of being in possession of privileged information, have an advantage over outsiders. European law prohibits them from profiting from this windfall.

<a>VII. Insider dealing

The MAR's insider trading prohibitions encompass trading and tipping situations, Art. 14(a), (b), 8 para. 1, 3 MAR. The prohibition on trading closely resembles USA law. By contrast, the rule on tipping is broader and unfettered by an equivalent of USA theories on classical insiders or misappropriation. It includes a prohibition geared specifically at the tippee. Additionally, Art. 14(c), 10 MAR prohibits unlawful disclosure of inside information.

Art. 9 MAR contains various situations of legitimate behavior which, under a strict reading of Art. 8 MAR would qualify as insider trading. It captures, for instance, market makers (Art. 9 para. 2(a)), following up on premeditated plans (paras. 3, 5), and certain take-over situations (para. 4). The rule also privileges internal arrangements for legal persons.

<b>A.Trading

[74] See *supra* Section B.

Art. 14(a), 8 para. 1 addresses trading, defined as possessing and using inside information. The MAR defines "using" as acquiring or disposing of financial instruments to which the inside information relates, directly or indirectly, for the account of the insider or a third party.[75] The same goes for cancelling or amending an order if the original order was placed before the insider gained the inside information.

The USA debate on "possession/use"[76] has its equivalent in the early E.C.J. decision *Spector*.[77] The court had held that using the information was a necessary element, but if possession was established this created a rebuttable presumption of use. Recital (24) MAR follows up on that decision, attempting to strike a balance between efficient enforcement and the presumption of innocence. If a person possesses inside information and goes ahead with a relevant transaction, "it should be implied that that person has used that information."[78] The presumption is rebuttable, respecting "the rights of the defence."[79] If an order to trade was placed before

[75] MAR, *supra* note 4, Art. 8 para. 1 s. 1.

[76] See Bainbridge, An Overview of USA Insider Trading Law: Lessons for the EU? 7 et seq. (2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=654703 (last visited Jan. 19, 2024); Hui Huang, The Insider Trading "Possession Versus Use" Debate: An International Analysis, 34 Sec. Reg. L. J. 130 (2006); Karen Schoen, Insider Trading: The "Possession versus Use" Debate, 148 U. Pa. L. Rev. 239 (1999).

[77] See *infra* Part IX.C.

[78] MAR, *supra* note 4, recital (24) s. 1.

[79] MAR, *supra* note 4, recital (24) s. 2.

possession was acquired, and the insider did not touch the order after acquiring possession, the MAR does not consider this using the information, Recital (25) s. 1. By contrast, changing a previous order will usually be considered use, unless the person provides proof to the contrary, recital (25) s. 2.

Additionally, Art. 9 MAR outlines several exceptions. For legal persons, Art. 9 para. 1 looks to internal compliance arrangements. For natural persons, Art. 9 para. 2 covers market makers and brokers, para. 3 a pre-existing obligation, para. 4 take-over and merger due diligence, and para. 5 pre-meditated plans.

<b>B. Tipping

Tipping situations are captured by Art. 14 (b), 8 para. 2, 3 MAR. For the tipper, Art. 14 (b) MAR prohibits recommending to a third party to acquire or dispose of the relevant financial instrument, to cancel or to amend a relevant order. An inducement for the third party to transact falls under the same rule. To violate the rule, the tipper must be in possession of inside information and act based on that information. Passing on inside information as such is not required. As soon as a recommendation is made, tipper liability ensues.

Additionally, disclosing inside information without adding a recommendation or an inducement is prohibited under Art. 10 para. 1 MAR. Moderating this rule, the

MAR provides for a market soundings regime in Art. 11.[80] For journalists, Art. 21 mandates that courts balance the trading prohibition against freedom of the press.[81]

The tippee, under Art. 8 para. 3 MAR, violates the insider trading prohibition, if he follows up on the recommendation or inducement and knows or ought to know that the tip was based on inside information. Similar to the tipper, he is liable under Art. 10 para. 2 MAR if he discloses a recommendation or inducement he received to a third party. Again, he is liable only if he knows or ought to know that this was based on inside information.

<a>VIII. Sanctions for unlawful insider trading: the CS-MAD

The MAR harmonizes the definition of illegal behavior across EU Member States. However, due to subsidiarity principles of EU law, the sanctions regime is left to Member States' discretion. When implementing the MAR's predecessor, not all

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[80] Under the market soundings regime, a seller of financial instruments discloses inside information to potential investors in order to gauge their interest in a possible transaction, its pricing, size, and structuring. The disclosing party draws up a report on inside information contained in the market sounding. The supervisory authority may request that report. The potential investors must consent to receiving inside information and to being restricted from trading on that information. Reasonable steps must be taken to ensure confidentiality, this includes record-keeping of natural and legal persons to whom the information is disclosed.

[81] See *infra* Part IX.F.

Member States had provided for criminal sanctions.[82] To work towards a level playing field and limit regulatory arbitrage, the CS-MAD today requires Member States to foresee criminal sanctions for certain cases.

Art. 3 CS-MAD deals with insider trading, recommending, and inducing another person to trade. Member States must provide for criminal sanctions for serious cases and intentional conduct. Art. 4 CS-MAD adds unlawful disclosure of inside information to this list.

## <a>IX. Landmark E.C.J. Cases

The E.C.J. does not settle legal disputes between private individuals. Instead, the court may be invoked by referral of a national court under Art. 267 TFEU if a question on the interpretation of EU law arises in a legal dispute. It is important to bear in mind that the court's competence is referral-based, which means it is not comparable to an appeals system. The E.C.J. rules on an isolated question referred by a national court, applying EU law. It will send the case back to the national court to

[82] CS-MAD, *supra* note 5, recital (7); ESMA, Report on the Actual Use of Sanctioning Powers under MAD, ESMA/2012/270, 8-20 (2012), https://www.esma.europa.eu/sites/default/files/library/2015/11/2012-270.pdf; European Commission, Report by the High-Level Group on Financial Supervision in the EU 84 (Feb. 25, 2009), https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf (last visited Jan. 19, 2024).

apply EU law, as interpreted by the E.C.J., and render the final verdict under national law.[83]

Some, but not all E.C.J. decisions on insider law have to do with an insider trading on his information.[84] Additionally, the disclosure obligation of EU law[85] requires issuers to report inside information to the market,[86] entailing administrative law sanctions if they do not. Some Member States attach liability to an issuer not reporting inside information or reporting too late.[87] Both types of cases can give rise to a referral to the E.C.J., asking for an interpretation of the legal term “inside information.”

<b>A. *Grøngaard & Bang*: unlawful disclosure of inside information

The case *Grøngaard & Bang* arose in Denmark. Mr. Grøngaard was a supervisory board member. He held the board position, under Danish co-determination law, by virtue of being a member of a labor union.[88] In this capacity,

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[83] See Craig & de Búrca, *supra* note 9, at 264.

[84] See *supra* Part VII.

[85] See *supra* Part III for this feature of EU law.

[86] MAR, *supra* note 4, Art. 17 para. 1. The rule requires an issuer to immediately report inside information which directly concerns that issuer unless he has a lawful reason under para. 4 to temporarily delay disclosure.

[87] See *infra* Part IX.D. for an example.

[88] Case C-384/02, Grøngaard & Bang, ECLI:EU:C:2005:708 (Nov. 22, 2005).

Mr. Grøngaard received information on an imminent merger which he passed on to his superior, the head of the labor union, Mr. Bang. Mr. Bang informed a member of his staff who ended up trading on the information. The Danish authorities brought charges against all three of them. In this context, the Danish court asked the E.C.J. to clarify the scope of the (then 1989) insider trading directive as far as employee-elected board members are concerned.

The legal rule in question remains unchanged. Today's Art. 10 MAR prohibits the disclosure of inside information to a third party unless "such disclosure is made in the normal course of the exercise of his employment, a profession or duties."

At first glance, Grøngaard's case seems squarely in point, given that he passed on information to his supervisor in a professional context. However, the court relied on a narrow reading of the law. It held that the rule's "normal exercise of professional duties" requires a close link between the disclosure and the exercise of the board member's professional duties. Disclosure is only lawful if it was absolutely necessary for the exercise of those duties.[89] The court's reasoning stressed the importance of investors' confidence in a functioning securities market which it viewed as depending

[89] *Id.* at ¶ 56; On *Grøngaard & Bang*: Heinz-Dieter Assmann in Heinz-Dieter Assmann, Uwe H. Schneider & Peter Mülbert, WpHG-Kommentar Bd. 1 [Commentary on the WpHG], Art. 10 MAR ¶ 19 (8th ed. 2023) (Ger.); Kumpan & Ronny Grütze in Schwark & Zimmer, *supra* note 43; Art. 10 MAR ¶ 23-24 (5th ed. 2020) (Ger.); see also Case C-302/20, Mr A v. AMF, ECLI:EU:C:2022:190 (Mar. 15, 2022) at ¶ 76 et seq.; Opinion of GA Kokott, *supra* note 44, at ¶ 89 et seq.

on “being placed on an equal footing and protected against the improper use of inside information.”[90]

<b>B. *Georgakis*: using inside information/1

The *Georgakis* case concerned members of a Greek family who were both board members and block holders of a listed stock corporation.[91] They engaged in transactions commonly referred to as “painting the tape” in order to artificially augment the volume of trading. Today, such behavior would qualify as market manipulation and fall within the scope of Art. 12 MAR. However, there was no prohibition of market manipulation under the terms of the 1989 Directive. The Greek court referred the case to the E.C.J., characterizing the relevant transactions as insider trading.

The 1989 prohibition did not address “use” of inside information. Instead, it required the insider to “take advantage” of such information vis-à-vis the contractual partner. Under this rule, the E.C.J. threw out the claim. Since the entire Georgakis family took part in those transactions, none of them took advantage of inside information with regard to their respective counterparty. What remains of interest today is the fact that the E.C.J. again opted for a narrow reading, stressing the

[90] Case C-384/02, *supra* note 88, at ¶ 33.

[91] Case C-391/04, Georgakis, ECLI:EU:C:2007:272 (May 10, 2007).

importance of protecting confidence in financial markets and placing investors on an equal footing.[92]

<b>C. *Spector*: using inside information/2

*Spector* was the first case decided under the MAR’s 2004 predecessor, the market abuse directive.[93] The Belgian company Spector Photo Group NV bought shares to implement a stock option scheme offered to its employees. Those transactions were spread over five similarly structured installments. The last one had been subject to several changes as to price limits, the number of shares concerned, and the timing of the transaction. A week after that last transaction, the company announced positive news to the market, causing the share price to rise significantly. The Belgian financial services authority fined both the company and its director. The director challenged this in court, claiming that the Belgian authority had failed to prove causation between possession of the information (in the form of positive news) and the relevant transaction. There can be no “use,” so he claimed, if there were other reasons for going ahead with the transaction.

[92] Id. at ¶ 37; see also Kumpan & Finn Schmidt in Schwark & Zimmer, *supra* note 89, Art. 8 MAR at ¶ 89.

[93] Case C-45/08, *supra* note 22.

The issues raised in *Spector* bear a close resemblance to the USA "use-or-possession" debate.[94] The wording of the 2004 Directive (unchanged in today's Art. 8 para. 1 MAR) required the insider to "possess" information and "use" it, for instance by purchasing or selling relevant shares. The E.C.J., once again, went for a narrow interpretation of the wording. It held that possession of relevant information entails a presumption of "use." Recognizing the need for exceptions, the court acknowledged a right to rebut the presumption, however, without offering a bright line between situations which violate the prohibition and those which do not. Instead, the decision vaguely referenced the policies and goals underlying insider trading law. In the same vein as both *Grøngaard & Bang* and *Georgakis*, the E.C.J. pointed to the need to ensure "equality between the contracting parties in stock-market transactions" and to avoid unjustified economic advantages at the expense of outsiders.[95] The fairness argument which, today, forms part of recital (23) MAR was first pronounced in that decision: insider trading's "essential characteristic consists in an unfair advantage."[96]

<b>D. *Geltl*: Contingent information

The *Geltl* case is a leading insider trading law case that has not only triggered an enormous amount of follow-up scholarship but, additionally, has heavily

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[94] See Katja Langenbucher, The Use or Possession Debate Revisited – Spector Photo Group and Insider Trading in Europe, 5 CMLJ 452, 460 and 466 (2010).

[95] Case C-45/08, *supra* note 93, at ¶ 48 – 49.

[96] *Id.* at ¶ 52.

influenced the drafting of the MAR and, currently, of a reform proposal.[97] The CEO of a German corporation (then in the form of DaimlerChrysler) stepped down from his position in July 2005. This led to a significant rise in stock prices. DaimlerChrysler had only reported the official resignation in July, once it was accepted by the board, final, and legally valid under German law. However, a series of intermediate steps, such as discussions with supervisory and executive board members, employees of the marketing department, and employee representatives, had preceded the final decision taken by the supervisory board. The issue at stake was whether some of these steps constituted inside information, triggering the obligation to disclose inside information.[98] The corporation had insisted that (at the time) these steps were speculative, contingent information which did not qualify under the precision requirement of the definition of inside information.[99] Mr Geltl, the claimant, disagreed.

Mr Geltl's incentive for litigation has to do with a special feature of German law. A corporation that fails, deliberately or grossly negligent, to disclose inside information that directly concerns said corporation risks liability for damages. Somewhat similar to the rule the USA Supreme Court announced in *TSC*,[100] an investor is eligible for damages if he executed a transaction that he would not have

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[97] On the reform proposal, see *infra* Part X.

[98] On this feature of EU law, see *supra* Part III.

[99] See *supra* Part V.A.

[100] TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 444–449 (1976).

pursued, had the corporation reported the inside information in time.[101] Mr Geltl claimed that he had sold his shares during the period preceding the CEO's official resignation. He would not have done so, he argued, had he known of the impending resignation, given that a rise in stock prices was to be expected.

<c>1. Events as they unfolded

*Geltl* was decided under the MAR's 2004 predecessor. Like today's Art. 7 para. 1(a) MAR, the former law required inside information to be precise and its disclosure to have a significant price effect. An accompanying directive[102] defined precision along the lines of today's Art. 7 para. 2 s. 1 MAR and price effects in the same words as today's Art. 7 para. 4 MAR.

Clearly, the official resolution of the supervisory board on the CEO's resignation was inside information. During the months preceding the board resolution,

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[101] Wertpapierhandelsgesetz [WpHG][Securities Trading Act], July 26, 1994, BGBl. I at 1749, last amended by Gesetz [G], Dec. 11, 2023, BGBl. I No. 354, § 97 para. 1 (Ger.), https://www.gesetze-im-internet.de/wphg/__97.html (last visited Jan. 19, 2024). For details of this rule, including further situations where liability of the issuer ensues, see Langenbucher, *supra* note 71, § 15 ¶ 141 et seq. (Ger.).

[102] Commission Directive 2003/124/EC of 22 December 2003, Implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the Definition and Public Disclosure of Inside Information and the Definition of Market Manipulation, 2003 O.J. (L 339) 70.

the CEO's resignation qualified as an "event" which "may reasonably be expected" to occur (today under Art. 7 para. 2 MAR). Hence, the company was supposed to scrutinize daily whether the probability of his resignation had increased to the level of "reasonably to be expected."[103] Once the board reached the conclusion that the resignation was indeed "reasonably to be expected" to occur, DaimlerChrysler was under the obligation to publicly report the CEO's plans.[104]

The E.C.J. insists that a probability/magnitude test does not apply at this stage. Rather, this test can inform price significance.[105] With this understanding, the E.C.J. sent the case back to the German court. It read "reasonably to be expected" as "more

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[103] On USA Regulation S-K Item 303, which articulates a similar standard, see *supra* Part V.A.2.

[104] See OLG Stuttgart, Feb. 15, 2007, NZG 352, 357-58 (2007) (Ger.); OLG Stuttgart, *supra* note 48, 624, 626-27 (Ger.). DaimlerChrysler had not stated that they were unsure whether the resignation would actually materialize. Instead, they seemed to have interpreted the term narrowly, as not encompassing something which was "not yet fact." This understanding might have had to do with German law prior to October, 28, 2004, which addressed "Insidertatsachen" (roughly translatable into inside facts), rather than "Insiderinformationen," see Regierungsentwurf [Cabinet Draft], Deutscher Bundesrat: Drucksachen [BR] 341/04 at 64 (Ger.). This might also explain why the corporation did not decide to delay disclosure.

[105] Case C-19/11, Geltl, ECLI:EU:C:2012:397 (Jun. 28, 2012), ¶ 44, 46, 50, 55.

likely than not,"[106] a point on which the E.C.J. has remained silent. Unhelpfully, it stated that the probability of the event materializing does not have to be "high,"[107] as long as it is "not implausible"[108] and there is a "realistic prospect that (the event) will come into existence."[109] Against that background, it is for the national courts to assess events which unfold in stages.

<c>2. Zooming in on each step

Events which unfold step by step carry additional complexity if we zoom in on each step in isolation. During the period preceding the resignation, each of these steps, for instance a conversation between the CEO and the board or the PR department, potentially qualify as inside information in their own right, with or without the CEO stepping down in the end.[110]

This is evident if we assume that there were rumors about the CEO's resignation in the market. In that case, investors have an incentive to balance the

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[106] Bundesgerichtshof [BGH][Federal Court of Justice] Apr 23, 2013, NZG 708 (2013) (Ger.).

[107] E.C.J., *supra* note 105, ¶ 46.

[108] *Id.* at ¶ 48.

[109] *Id.* at ¶ 49.

[110] Langenbucher, *supra* note 71, § 15 ¶ 29–30 (Ger.).

potential gain, if he steps down, against the potential loss[111] if he does not. Their investment behavior will depend on the probability they assign to the CEO's resignation coming through. Any piece of information which impacts that probability assessment is relevant for these investors.

The assessment does not change much if we drop the assumption of rumors in the market while leaving intact the assumption that investors seek out information more generally. Learning that a CEO might step down can be relevant in two ways: *first*, as an indication that there is a certain probability that he will eventually step down or, *second*, as a piece of information which has the potential to incentivize others to trade (even without a good fundamental-value reason). The former, narrow reading looks towards fundamental value and adequate pricing, the latter, broad understanding towards the "guessing game"[112] of predicting what others might do.

As I have suggested above, deciding which interpretation to follow is a normative question.[113] Arguably, with integrity of markets and reasonable investors in mind, EU law, like USA law, does not wish to encourage an "avalanche of trivial information."[114] This is even more salient under EU law, given that a broad reading

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[111] Loss could be due to stock prices going down or – if they do not move – to opportunity costs.

[112] See *supra* note 63.

[113] See *supra* Part V.B; see also Langenbucher, *supra* note 71, § 15 ¶ 35 (Ger.).

[114] TSC Industries, Inc. v Northway, Inc., 426 U.S. 438, 448-49 (1976); see further Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); Matrixx Initiatives, Inc.

triggers a disclosure obligation combined with the trading prohibition.[115] At the same time, to the extent that trivial, irrelevant, or contingent information is likely to move prices, at least for short-term gain, the narrow reading leaves something of a loophole for insider trading and sloppy disclosure.

Against this background, it is interesting to note that received understanding under UK law started from any relevant information not generally available (the RINGA-concept).[116] Similarly, the German *Bundesgerichtshof* has included irrational investor reactions in the total mix of information a reasonable investor would be likely to include in his decision.[117]

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v. Siracusano, 563 U.S. 27 (2011).; see Case C-19/11, Markus Geltl v DaimlerAG, Opinion of Advocate General Mengozzi delivered on Mar. 21, 2012, at ¶ 30, https://curia.europa.eu/juris/document/document.jsf?docid=120661&doclang=EN (last visited Jan. 9, 2024) [hereinafter Opinion of GA Mengozzi].

[115] See *supra* Part V.B. Along those lines: Opinion of GA Mengozzi, *supra* note 114, at ¶ 71, assuming that the "reasonable investor" is dismissive of trading for "merely speculative purposes.".

[116] FSA v. Massey [2011] UKUT 49 (TCC) ¶ [38], [41], following the RINGA-concept, however, providing room to narrow down an overly broad understanding using a "regular test."

[117] BGH Dec. 13, 2012, ZIP 318 (2012) at ¶ 44 (Ger.); see Langenbucher, *supra* note 71, § 15 ¶ 48 (Ger.).

The E.C.J. decision in *Geltl* does not engage in this debate, nor do follow-up cases. A current reform proposal, geared at providing legal security for markets, would offer some relief.[118]

### <b>E. Lafonta/precision

In *Lafonta*, the E.C.J. held that inside information is "precise,"[119] if its price significance is certain, even if it is impossible to predict the direction of the movement.[120] The case concerned the CEO of Wendel, a French corporation. Wendel had entered into total return swaps with four different banks. Shares of the company Saint Gobain were underlying these swaps. To hedge their positions, the banks had acquired Saint Gobain shares. Wendel later phased out the swaps and, instead, acquired shares representing 17.6 % of Saint Gobain's capital. The French market authority AMF found that Wendel had pursued its plan to "creep in" from the outset yet failed to report this to the market. Mr Lafonta argued that it was at the time impossible to anticipate the direction of share price movements; hence, the information was not precise.

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[118] See *infra* Part X.

[119] See *supra* Part V.A.

[120] Case C-628/13, Lafonta, ECLI:EU:C:2015:162 (Mar. 11, 2015).

The court threw out Mr Lafonta's argument. It held that information is imprecise solely if it is so vague or general that it is "impossible to draw a conclusion as regards its possible effect on the prices of the financial instruments concerned."[121]

## <b>F. The *Mr A* case/rumors, speculative information, and journalists

The *Mr A* case also revolved around interpreting the precision threshold. Mr A was a journalist, reporting *inter alia* on financial market rumors. In 2011 he published articles on LVMH potentially taking over Hermès, offering an 86 % premium on their shares. The day after the publication, prices increased by 4.55 %. Similarly, in 2012 Mr A published takeover rumors concerning Maurel & Prom, leading to a 17.69 % price increase the following day. An investigation by the French market authority AMF revealed that shortly before the articles appeared, purchase orders on the shares of Hermès and Maurel & Prom had been made, followed by sales after the publication.[122]

The referring court asked the E.C.J. to clarify whether a newspaper article about a market rumor qualified as precise information. Additionally, it wanted to know whether Art. 21 MAR might allow for a journalist to disclose inside information to his sources.

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[121] *Id.* at ¶ 31.

[122] See also Klöhn, *supra* note 42, 60 CMLR 547, 548 et seq. (2023).

The E.C.J. confirmed that for information to fail passing the precision threshold, it must be “vague or general” information “from which it is impossible to draw a conclusion as regards its possible effects on prices.”[123]

The case evidences the difficulties of separating the precision threshold from the assessment of price significance. The forthcoming press articles and their substantive content (the takeover bids) are two potential pieces of inside information. However, the more unlikely it is that the takeovers will come to fruition, the less relevant the press article. Against that background, the court emphasizes a case-by-case approach.[124] Publishing a press article on what is merely a rumor does not disqualify the press article as inside information.[125]

The court recognized that Mr A’s job as a journalist entails a need to protect his sources. Balancing the integrity of financial markets against freedom of the press (which extends to gathering information via sources), it understands the important role of the press as a “public watchdog,”[126] yet emphasizes the disclosure of inside information must have been “strictly necessary” (as explained in *Grøngaard & Bang*) as well as proportionate.

<a>X. Current reform: The EU Listing Act

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[123] Case C-302/20, *supra* note 42, at ¶ 38.

[124] *Id.* at ¶ 40-41, 48; Klöhn, *supra* note 122, at 558.

[125] *Id.* at ¶ 45-46.

[126] Opinion of GA Kokott, *supra* note 44, ¶ 94.

In 2020, the EU Commission launched a reform initiative (the "High Level Forum"), geared at making access to capital markets in the EU less burdensome by lowering thresholds for various listing requirements.[127] Among the rules eventually proposed by the Commission in late 2022, there is a significant modification of the disclosure obligation.[128] While keeping the definition of inside information intact, the new rule moderates the disclosure obligation in Art. 17 para. 1 MAR. Following the High Level Forum's recommendation, the Commission proposes to re-assess the role of disclosure obligations in the context of market efficiency.[129]

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[127] European Commission, Call for Applications for the Selection of Members of the High Level Forum on Capital Markets Union (Oct. 10, 2019), https://finance.ec.europa.eu/system/files/2019-10/191010-cmu-high-level-forum-call-interest_en.pdf (last visited Jan. 19, 2024); followed up by European Commission, Final Report of the High Level Forum on the Capital Markets Union (Jun. 10, 2020), https://finance.ec.europa.eu/system/files/2020-06/200610-cmu-high-level-forum-final-report_en.pdf (last visited Jan. 19, 2024), and leading to the Listing Act, *supra* note 6.

[128] See *supra* Part III.

[129] See *supra* Part V.B; Katja Langenbucher, Building a Capital Market – the Final Report of the High Level Forum on the EU Capital Market Union, 17 Eur. Comp. Fin. Law Rev. 601, 607-608 (2020); Rüdiger Veil, Marc Wiesner, & Moritz Reichert, Die Aktiengesellschaft [AG][The Corporation] 57, 60 (2023) (Ger.).

The proposal carves out “intermediate steps in a protracted process (…) where those steps are connected with bringing about a set of circumstances or an event.”[130] Additionally, the proposal empowers the EU Commission to adopt a delegated act to set out a list of relevant information along with “the moment when the issuer can be reasonably expected to disclose it.”[131]

Introducing a delegated act to explain what triggers a disclosure obligation might remind USA readers of current reports under Section 13 or 15(d) of the Securities Exchange Act of 1934, using a Form 8-K. It is a step forward towards providing a clear legal framework on what to report for issuers, arguably, lowering compliance costs.

The EU Commission allocates the task to itself rather than to ESMA. Relying on ESMA would have had the advantage of a considerably quicker reaction time. Still, the proposal seems hesitant to delegate the issue to the market authority, even at the cost of a lengthier procedure.

It is unclear, whether the E.C.J. decision in *Geltl* would have looked differently under the proposed new rule. On the one hand, the proposal exempts only preliminary, contingent information. Under this reading, the expected result still qualifies, at least when its occurrence is more probable than not.[132] On the other hand, recital (58) spells out what the Commission seems to have had in mind, namely inside

[130] Listing Act, *supra* note 6, Art. 2 ¶ 38 (a).

[131] *Id.* at Art. 2 ¶ 38 (b).

[132] For this reading see Misterek, *supra* note 67, at 400 and 405; Veil, Wiesner & Reichert, *supra* note 129, at 57 and 65-66.

information at a “very early stage and (…) of a preliminary nature.” It confirms that the disclosure obligation presupposes that “such information is sufficiently precise.” The proposal goes on to provide an example, modelled closely on the *Geltl* decision. In the Commission’s example, the disclosure obligation kicks in only, “when the management board has taken the relevant decision to bring about that event.” Following this example, in a case like *Geltl*, insider trading, tipping, and disclosing inside information would still be prohibited. However, the proposal puts the disclosure obligation on hold until the board has taken the final decision. In practice, it is likely to lead to a situation which many issuers have so far dealt with by delaying reporting under Art. 17 para. 4 MAR.[133] However, delaying does not fix the problem in its entirety. The time frame to delay disclosure ends abruptly if confidentiality is no longer ensured, for example if there are explicit market rumors, Art. 17 para. 7 MAR.

[133] Art. 17 para. 4 MAR allows an issuer to “delay disclosure to the public (…) provided that all of the following conditions are met: (a) immediate disclosure is likely to prejudice the legitimate interests of the issuer (…), (b) delay of disclosure is not likely to mislead the public, and (c) the issuer (…) is able to ensure the confidentiality of the information. Under this rule, it would have been possible to delay reporting in the *Geltl* case, at least as long as confidentiality was ensured. However, DaimlerChrysler did not see the need to initiate a delay procedure, because it was not aware of possessing inside information. According to DaimlerChrysler’s legal assessment, *only* the final vote of the supervisory board qualified as inside information.

<a>XI. Insider trading in digital assets: The EU MiCAR

Insider trading law has (so far) in both the USA and the EU applied to financial instruments (securities under USA law) only. The surge of various types of digital assets raises the question whether insider trading prohibitions extend to cover digital assets as well. While some commentators are unenthusiastic as to crypto and would prefer to "let it burn,"[134] most regulators and legislators see a need for regulation. The EU legislator openly embraces crypto markets,[135] but insists on providing integrity of these markets along the same lines as traditional financial markets.[136]

<b>A. Digital Assets

The approach regulators take when confronting a digital asset will usually depend on the type of asset. This accounts for the efforts of various agencies, including bank supervisors, to bring digital assets under their purview.

[134] Stephen Cecchetti & Kim Schoenholtz, Let Crypto Burn, Financial Times online (Nov. 17, 2022), https://www.ft.com/content/ac058ede-80cb-4aa6-8394-941443eec7e3 (last visited Jan. 19, 2024).

[135] MiCAR, *supra* note 7, recital (1).

[136] MiCAR, *supra* note 7, recital (95).

The Swiss Finma early on provided a taxonomy of tokens.[137] Their 2018 guidelines distinguish between three types of tokens, according to their functionality: payment, utility, or asset tokens. Payment tokens (also referred to as currency tokens or cryptocurrencies) provide payment services. Utility tokens give access to an application or service. Asset tokens are usually referred to as security or investment tokens. They represent an underlying such as participation in a company, an earnings stream, dividend, or governance rights. Today, various hybrid tokens as well as tokens which change their nature over time have emerged.[138]

When applying insider trading law to digital assets, two strategies come to mind. Either one stretches the definition of a financial instrument (security under USA law) to encompass digital assets, or one introduces a new category. The SEC (and to some extent the CFTC) currently opt for the first strategy, the EU for the latter.

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[137] Swiss Financial Market Supervisory Authority FINMA, FINMA publishes ICO guidelines (Feb. 16, 2018), https://www.finma.ch/en/news/2018/02/20180216-mm-ico-wegleitung/ (last visited Jan. 19, 2024).

[138] For the famous Hinman speech, claiming that a security-token can change its nature over time, see William Hinman, The Securities and Exchange Commission, Remarks at the Yahoo Finance All Markets Summit: Crypto (Jun. 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418 (last visited Jan. 19, 2024); James J. Park, UCLA School of Law, Law-Econ Research Paper No. 18-13 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3298965 (last visited Jan. 19, 2024).

<c>1. Investment tokens

Investment tokens seem to naturally qualify as a financial instrument/security. However, not much is gained by calling a digital asset an "investment token," unless we have clear criteria to distinguish these from other tokens. So far, neither USA nor EU law have developed hard and fast rules for this distinction.

A simple form has an investment token replicate an existing security to allow for more efficient transfer of ownership. Depending on the applicable legal regime, this can reduce costs when securitizing and trading financial instruments.[139] These cases do not cause much difficulty as to applying insider law: if the tokenized asset is a financial instrument/security, insider law applies.

Hard cases concern digital assets that offer various features. In determining whether these qualify as a financial instrument, a natural approach is to ask whether

[139] The German *Gesetz über elektronische Wertpapiere* provides an illustration, combining digital creation with a book-entry requirement, see Matthias Casper, Das Zukunftsfinanzierungsgesetz [Financing for the Future Act], 187 Zeitschrift für das gesamte Handels- und Wirtschaftsrecht [ZHR][Periodical for Overall Commercial and Business Law] 5, 35 (2023) (Ger.); Matthias Casper, Das Gesetz über elektronische Wertpapiere [The Law on Electronic Securities] AG 714, 721 (2022) (Ger.).

they provide a tool bringing together a capital-seeker and an investor.[140] The capital seeker has a venture in mind and is looking for financing. The investor is interested in some form of payback for the money he hands over.[141] Debt-like investors will traditionally expect recurring payments that do not depend on the capital seeker's return from his venture. Equity-like investors get a share in profits, have some form of ownership rights, and, flowing from those, usually enjoy some form of participation in governance.[142] In fact, offering efficient governance tools has been one of the first promises of digital investment tokens. DAOs were promoted as providing for efficient voting procedures on a blockchain. Today, smart contracts on management decisions provide another example.[143]

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[140] However, see ESMA, *supra* note 39, at ¶ 31: while a majority of NCAs agreed that a "transferable security" under MiFID II must have an investment component, nine disagreed.

[141] Langenbucher, Capital Markets Union and Virtual Funding: Initial Coin Offerings, Tokens, and Digital Corporations in Capital Markets Union and Beyond 215 (Franklin Allen, Ester Faia, Michael Haliassos, & Katja Langenbucher eds., 2019).

[142] See ESMA, *supra* note 39, at ¶ 43.

[143] Michael Sockin & Wei Xiong, Decentralization through Tokenization, 78 Journal of Finance 247 (2023) (developed a model on tokenization as a tool to mitigate tension between platforms and users, comparing this to governance tools between owners and management); *Id.* at 249 for the claim that shifting ownership and control from initial equity providers to users entails the loss of equity holder

<c>2. Currency tokens

At first glance, payment instruments fall outside the scope of insider law. However, a digital asset which combines a payment functionality with other features might still qualify. While regulators tend to, for instance, rule out bitcoin and Ethereum as a security, this is not necessarily the case for stablecoins.

<c>3. The lack of a European *Howey*-test and the move towards a crypto-asset definition

USA law has the advantage of a substance-over-form approach under the Supreme Court's *Howey* test.[144] This allows the SEC to remind issuers of ICOs that the agency will qualify most of these tokens as securities.[145] As to stablecoins, the USA initially relied on state money transmitter laws only. Later, commentators and the President's working group explored a crypto bank charter as an appropriate

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subsidizing user participation to maximize the platform's network effect (which is essential for its success).

[144] See Section 2(a)(1) Securities Act, 3(a)(10) Securities Exchange Act, 15 U.S.C. § 77b, 78c; *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946).

[145] Overview at Langenbucher, Initial coin offerings - where do we stand and should we move?, Revue Trimestrielle de Droit Financier [RTDF][Corporate Finance and Capital Markets Law Review] 40, 44 et seq. (2018).

model.[146] At the time of writing this chapter, the USA SEC has alerted investors that it considers most stablecoins as a security.[147]

Under EU law, the regulatory situation is inverted as compared to the USA. The MiFID II definition of a financial instrument has largely followed a form-over-substance approach.[148] There is no equivalent to the USA *Howey* decision which would have allowed to qualify digital assets as financial instruments. Instead, Member States have broad discretion in transposing MiFID II, hence, in defining what counts as a security under their national law. Across the Union, Member States have dealt very differently with investment and currency tokens.[149] Some, such as

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[146] Kathryn G. Wellmann & Neil. T. Bloomfield, President's Working Group Report Calls For Stablecoin Regulation, Thomson Reuters online (Dec. 2, 2021), https://www.reuters.com/legal/transactional/presidents-working-group-report-calls-stablecoin-regulation-2021-12-02/ (last visited Jan. 19, 2024); Howell E. Jackson, Timothy G. Massad, & Dan Awrey, How We Can Regulate Stablecoins Now – Without Congressional Action, Hutchins Center Working Paper #76 (Aug. 2022), https://www.brookings.edu/wp-content/uploads/2022/08/WP76-Massad-et-al_v4.pdf (last visited Jan. 19, 2024).

[147] SEC, Exercise Caution with Crypto Asset Securities: Investor Alert (Mar. 23, 2023), https://www.sec.gov/oiea/investor-alerts-and-bulletins/exercise-caution-crypto-asset-securities-investor-alert (last visited Jan. 19, 2024).

[148] See *supra* Part IV.

[149] On Italian law providing a broader definition of a financial instrument, see Dirk A. Zetzsche, Filippo Annunziata, Douglas W. Arner, & Ross P. Buckley, The

France, have passed sweeping laws to provide a regulatory environment for ICOs.[150] Others, such as Germany, have focused on particular questions, for instance on bringing currency tokens under the purview of banking regulators.[151]

In 2019, ESMA published a report summarizing the various approaches Member State regulators had taken towards digital asset tokens.[152] All regulators stressed a technology-neutral approach, however, most had trouble providing a hard

Markets in Crypto-Assets regulation (MiCA) and the EU Digital Finance Strategy, 16 CMLJ 203, 207 (2021).

[150] Loi 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises [Law 2019-486 of May 22, 2019 on the Growth and Transformation of Businesses], Journal Officiel de la République française [J.O.][Official Gazette of France], May 23, 2019.

[151] The German Federal Financial Supervisory Authority [Bundesanstalt für Finanzdienstleistungsaufsicht][BaFin] has qualified Bitcoin and similar cryptocurrencies as units of account [Rechnungseinheiten] under § 1 Abs. 11 S. 1 Nr. 10 KWG, hence financial instruments under § 1 Abs. 11 S. 1 Nr. 7 KWG (which, however, says nothing about their qualification as financial instruments under MiFID II), see Jens Brauneck, Wertpapiermitteilungen – Zeitschrift für Wirtschafts- und Bankrecht [WM][Securities News – Journal of Banking Law and Banking] 1258, 1266 (2022) (Ger.).

[152] See *supra* note 39.

and fast rule on categorizing tokens.[153] The bottom line was a lack of anything resembling a standard approach across the EU.

As to stablecoins, the EU E-Money Directive of 2009, not having gained much attention when it was passed, has offered a conceptual framework for understanding stablecoins. Arguably, anxiety in the face of Meta's diem-coin project, taken together with the inconsistency across Member State regulators were the driving forces behind the EU's proposal for the Markets in Crypto Assets Regulation (MiCAR).[154] MiCAR introduces the novel definition "crypto asset." If a crypto asset is admitted to trading or has applied to be, insider law applies.

One advantage of MiCAR is that it comes in the form of a regulation.[155] Regulations mandate a unified approach across Member States, hence, carry the promise of a standardized approach which the MiFID II definition did not deliver on.

The disadvantage of MiCAR introducing a novel definition is the need to distinguish MiCAR-crypto-assets from MiFID II-financial instruments. This distinction is especially salient where MiCAR provides a more lenient framework, for instance, allowing a white paper-regime (rather than a prospectus) or mandating

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[153] Since then, ESMA has not issued further guidelines on how to understand security tokens; see Jutzi & Abbühl, *supra* note 37, at K2, K13. For the future, Art. 2 para. 5 MiCAR, *supra* note 7, mandates the agency to explain when crypto-assets are financial instruments. Additionally, MiCAR encourages the ESAs to promote discussion on this topic.

[154] See *supra* note 7.

[155] See *supra* Part I.

capital requirements. It is interesting to note the remarkably unusual path chosen by MiCAR. Its art. 17 para. 1(b)(ii), 18 para. 2(e) require the crypto-asset issuer to provide a legal opinion that the asset is not a financial instrument. Critics have highlighted "explosive conflicts of interest and regulatory arbitrage" inherent in delegating this decision to private actors.[156] One might hope that, over time, best practices will surface.[157] However, as far as insider law is concerned, MiCAR and MAR insider law do not seem to diverge much in substance.

<b>B. MiCAR insider law

With MiCAR, EU law features two distinct groups of digital assets to which insider law applies: *firstly*, crypto-assets admitted to trading. They qualify under MiCAR's insider trading prohibition. *Secondly*, digital investment tokens which qualify as a financial instrument under MiFID II. These fall under MAR's insider law. This comprises derivatives with an underlying crypto-asset which, in the USA, have fallen under the purview of the CFTC. In the EU, the derivative will qualify under

[156] Zetzsche, Annunziata, Arner & Buckley, *supra* note 149, at 220. For a further critique, see Jutzi & Abbühl, *supra* note 37, K2, K27 (due process concerns).

[157] MiCAR, *supra* note 7. Art. 84 encourages ESMA and EBA to develop guidelines as to content and form of these legal opinions. Art. 2 para. 5 MiCAR mandates ESMA to publish guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments.

MiFID II, the crypto-asset under MiCAR.[158] A *third* group is outside insider law's scope: digital assets which qualify neither as a financial instrument under MiFID II nor as a crypto-asset under MiCAR.

<c>1. Crypto-assets

A crypto-asset under Art. 3 para. 1(5) MiCAR is "a digital representation of a value or a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology." The proposal distinguishes three categories of crypto assets: e-money tokens, asset-referenced tokens, and "other" crypto-asset tokens which include utility tokens. Many of the compliance requirements under MiCAR vary according to type of token. This is not the case for the insider trading regime. It applies to all crypto-assets as long as they are admitted to trading or a request for admission to trading has been made.

MiCAR does not attempt to comprehensively cover the crypto universe. Excluded from its scope are non-fungible, unique tokens, Art. 2 para. 3, as are deposits and structured deposits, para. 4 lit. (b), funds, lit. (c), securitization positions, lit. (d), insurance and various pension products, lit. (e)-(i), social security schemes (j), and, as explained above,[159] financial instruments, lit. (a).

<c>2. Insider dealing

[158] MiCAR, *supra* note 7, recital (97).

[159] See *supra* Part XI.A.3.

MiCAR insider law captures behavior concerning crypto-assets which have been admitted to trading or for which a request to trade has been made, Art. 86 para. 1 MiCAR.[160] The relevant transactions or behavior are covered on a trading platform as well as outside a platform, Art. 86 para. 2, both in the EU and in third countries, para. 3.

Art. 89 MiCAR prohibits insider trading and tipping, Art. 90 prohibits the unlawful disclosure of inside information and Art. 88 requires reporting of inside information that directly concerns a crypto-asset issuer, an offeror or a person seeking admission to trading.

Art. 87 MiCAR defines inside information. The regime is modelled closely on the MAR, copying large parts of the definition. MAR's "reasonable investor" morphs into MiCAR's "reasonable holder of crypto-assets."

Some modifications stand out. MAR targets information relating to issuers or financial instruments. MiCAR adds issuers and crypto-assets. Furthermore, MiCAR captures inside information on offerors of a crypto-asset, and persons seeking admission to trading.

As to price significance, MAR includes effects on the financial instrument and on related derivatives. Under Art. 87 para. 1(a) MiCAR, information is relevant if it affects the price of the crypto-asset to which information relates or the price of a related crypto-asset.

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[160] MiCAR, *supra* note 7, Art. 5, 14, 16, 48.

MiCAR's prohibition of insider dealing in Art. 89 para. 1 copies Art. 8 para. 1 MAR, with two modifications. The MAR prohibition is strict ("insider dealing arises"), the MiCAR has opted for a prima facie assumption, allowing a rebuttal ("insider dealing shall be deemed to arise"). The MAR prohibition lists acquiring and disposing of a financial instrument, along with cancelling or amending an order as relevant use cases. Submitting, modifying, and withdrawing a bid qualify under MAR as to auctioned products if the auction platform is a regulated market of emission allowances or similar auctioned products, Art. 8 para. 1 s. 3 MAR. MiCAR takes up these market behaviors, proscribing "submitting, modifying, and withdrawing a bid." The rule does not clarify further, which auctioned products it refers to.[161]

Art. 89 paras. 2, 3 and Art. 90 MiCAR copy Art. 14(a), (b), Art. 8 para. 2, Art. 10 MAR, prohibiting insider dealing, tipping situations, and unlawful disclosure of inside information.[162] Para. 4 follows the MAR model by requiring that the tippee knows or ought to know that the recommendation or inducement he received goes back to inside information.

Defining who counts as an insider, Art. 89 para. 5 MiCAR again follows in MAR's steps.[163] Modifications concern primary insiders, they capture directors,

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[161] Interestingly (and worryingly), there are no rules on legitimate behavior as captured under Art. 9 MAR. See *supra* Part VII.

[162] Arguably, the rule's distinction between regular insider dealing as defined in para. 1 and pure "use," as mentioned in para. 2, is due to a drafting inconsistency, as it is not clear what "use" without "possession" would look like.

[163] See *supra* Part VI.

officers, and shareholders of the issuer and, additionally, the offeror as well as the person seeking admission to trading. When qualifying persons who have access to inside information based on professional duties, MiCAR adds persons who have a “role in the distributed ledger technology or similar technology.”

Art. 88 MiCAR follows Art. 17 MAR in requiring disclosure of inside information, again extending this obligation beyond issuers to offerors and persons seeking admission to trading.

MiCAR does not provide for an analogue to CS-MAD.[164] While MiCAR proposes a fines-based regime, it is in the Member State’s discretion to add criminal sanctions.[165]

## <a>XII. Conclusion

European insider trading law has clearly been influenced by USA law and continues to closely monitor the USA debate. Topics such as the “probability/magnitude” or the “total mix of information” test, the “use versus possession” debate and the model person of the “reasonable investor” figure as prominently in the European discourse as they do in its USA counterpart.

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[164] See *supra* Part VIII.

[165] Philipp Maume, Die Verordnung über Märkte für Kryptowerte (MiCAR) – Stablecoins, Kryptodienstleistungen und Marktmissbrauchsrecht [The Markets in Crypto-Assets Regulation (MiCAR) – Stablecoins, Crypto-Assets Services and Market Abuse Law] Recht Digital [RDi][Law Digital] 497, 505 (2022) (Ger.).

Strikingly, the influence of USA law is considerably stronger on a technical than at the policy level. While USA law relies on classical and misappropriation theories, European law explains insider trading prohibitions from the perspective of promoting market integrity, investor protection and fairness to individual investors. This leads to European law's egalitarian disclosure obligation which stands in contrast to the lack of affirmative duties to disclose under USA law. It is also the reason for the comparatively broad scope of European insider law, catching on to any person that profits from an information asymmetry. Again, EU law reaches far beyond USA law's constructive and non-traditional insiders.

Arguably, the policy focus on market integrity and investor protection allows to capture insider trading on crypto markets more comprehensively if compared to the USA policies underlying classical insider or misappropriation theories. This goes to crypto-assets which qualify under the MiCAR regime but fall outside the scope of USA securities regulation. However, given that the USA regime is still evolving, these cases might be rare. More importantly, profit gained at the expense of others in crypto markets is not necessarily tied to classical insiders nor does it have to do with misappropriating information and fiduciary duties. Rather, informational advantages will often go back to the opaque nature of many digital assets, issuers, exchanges, and intermediary market actors as well as the services they offer. Using the law to force material information out in the open, and leveraging insider law to that effect, should be as helpful on crypto markets as it has proven to be on traditional financial markets.

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