

EC Securities Regulation, A Single Regime for an Integrated Securities Market: Harmonised We Stand, Harmonised We Fail? Part 2.

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LT [keywords to follow]

The Market Abuse Regime

The Market Abuse Directive

At the heart of the European Union's Action Plan for Financial Services (FSAP)¹ sat a proposal for the enactment of a Directive that would prohibit both insider dealing and market manipulation,² partly replacing the Insider Dealing Directive.³ In an integrated financial market, investors may access a multiplicity of trading venues across the European Union. A uniform regime protects financial markets from abusive practices which undermine investor confidence. Thus, the Commission correctly perceived a pressing need to enact harmonised rules for the detection and punishment of market manipulation and insider dealing. These harmonised rules would remove the possibility of national rule conflict and of a regulatory "race to the bottom" in the integrated EU market for financial products. Another advantage of the harmonised regime was that it would ensure a higher level of regulatory co-operation across the European Union in market abuse investigations and enforcement.

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1. See Commission Communication, *Financial Services: Implementing the Framework for Financial Markets: Action Plan*, COM (1999) 232.

2. For a detailed analysis of the EU market abuse regime see E. Avgouleas, *The Mechanics and Regulation of Market Abuse, A Legal and Economic Analysis* (Oxford University Press, 2005), Ch.6.

3. Directive 89/592 co-ordinating regulations on insider dealing [1989] O.J. L334/30 (hereinafter "Insider Dealing Directive").

The Market Abuse Directive⁴ was formally endorsed in December 2002 following a great deal of consultation. Its principal aim was "to ensure the integrity of Community financial markets and to enhance investor confidence in those markets".⁵ The Directive provides a Community-wide prohibition of insider dealing and market manipulation and prohibits selective disclosure. Furthermore, it upgrades the EU regimes for disclosure of inside information by issuers of financial instruments, and creates a harmonised regime for, inter alia, the disclosure of analysts' (and other producers and disseminators of financial information) conflicts of interests. The respective regimes have been further specified through the enactment of three Commission Directives⁶ and one Regulation,⁷ which constitute the Level 2 implementing measures.

The prohibition of insider dealing

The Directive defines insider dealing⁸ as an objective, three-pronged offence committed through:

(a) dealing in ("acquiring or disposing or attempting to acquire or dispose of")⁹ financial instruments,¹⁰ on the basis of inside information, by the persons listed in Art.2(1), the so-called primary insiders, or any other person, who possesses inside information,¹¹ if that person knows, or ought to have known that it is inside information¹²;

4. Directive 2003/6 on insider dealing and market manipulation (market abuse) [2003] O.J. L96/16.

5. *ibid.*, Recital 11.

6. Directive 2003/124 implementing Directive 2003/6 as regards the definition and public disclosure of inside information and the definition of market manipulation [2003] O.J. L339/70 (hereinafter the "Commission Directive on the Definition of Inside Information"). Directive 2003/125 as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest [2003] O.J. L339/73 (hereinafter the "Commission Directive on Fair Presentation and Disclosure"). Directive 2004/72 implementing Directive 2003/6 regarding accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions [2004] O.J. L162/70 (hereinafter the "Commission Directive on Accepted Market Practices").

7. Commission Regulation 2273/2003 implementing Directive 2003/6 as regards exemptions for buy-back programmes and stabilisation of financial instruments [2003] O.J. L336/33 (hereinafter the "Regulation on Share Buy-Backs and Stabilisation").

8. For an analysis of the mechanics of insider dealing and for a summary of the very interesting debate concerning the (non-)desirability of insider dealing prohibition, see Avgouleas, fn.2 above, Chs 3 and 5.

9. Market Abuse Directive, Art.2(1).

10. Dealing on the basis of inside information is usually called the "primary offence" of insider dealing.

11. Usually such persons are called "secondary insiders" or "tippees".

12. Market Abuse Directive, Arts 2(1) and 4.

(b) the disclosure of inside information by “primary insiders” to third persons, unless such disclosure is made in the normal course of its employment or profession, or by secondary insiders¹³; and

(c) a recommendation or inducement made by primary insiders, or by secondary insiders,¹⁴ to another person, on the basis of inside information, to deal in (“acquire or dispose of”) financial instruments to which the information relates.¹⁵

The Art.2(1) list of “primary insiders” includes persons who possess inside information:

- (a) by virtue of their membership of the administrative, management, or supervisory bodies of the issuer;
- (b) by virtue of their holding in the capital of the issuer;
- (c) by virtue of their having access to the information through the exercise of their employment, profession or duties; or,
- (d) by virtue of their criminal activities.

Therefore, judicial and regulatory authorities do not have to prove that persons under investigation intended to use inside information to obtain a gain. Since intent is usually the hardest element to prove, regulatory and judicial authorities prosecuting insider dealing cases in the European Union have a lower burden than their US counterparts when they prosecute insider dealing cases under s.10(b) of the Securities Exchange Act 1934 and SEC Rule 10b-5. Furthermore, if a primary insider is a legal person, then the prohibition extends to the natural persons “who take part in the decision to carry out the transaction” on behalf of the legal person in question.¹⁶ The list of primary insiders is almost the same as that provided under Art.2(1) of the Insider Dealing Directive, with the addition of the new element of access to inside information by virtue of criminal activities. This addition was necessitated by the alleged involvement of organised crime and terrorist groups in securities markets as a means to profiteer or finance their illegal activities,¹⁷ including instances of theft of inside information, or running of extortion rackets aimed at the acquisition of inside information.

“Secondary insiders” may be acquitted if they prove that they did not know or did not have to know that they were in possession of inside information.¹⁸ The determining criterion is what “a normal or reasonable person would know or should

have known in the circumstances”.¹⁹ The defence of lack of “actual knowledge” or of lack of a reasonable obligation to know that the relevant information was inside information is not available to primary insiders.²⁰

The Market Abuse Directive offers a definition of inside information that is much more complex than that included in the Insider Dealing Directive.²¹ In this respect, the Market Abuse Directive provides a general definition of “inside information” and two special (complementary) definitions. Under Art.1(1) “inside information” means information, which:

- (a) is of a precise nature;
- (b) has not been made public;
- (c) relates directly or indirectly to one or more issuers of financial instruments or to one or more financial instruments; and,
- (d) if such information was made public, it would be likely to have a significant impact on the prices of relevant “financial instruments or on the price of related derivative financial instruments”.

This general definition of inside information seems to be applicable to all persons in possession of inside information and to all financial instruments, other than commodity derivatives, which fall within the scope of the Directive. The two special (complementary) definitions of inside information are respectively used in relation to trading in derivatives on commodities, and in relation to persons “charged with the execution of orders”.

Thus, in relation to derivatives on commodities, inside information means information of a precise nature, which has not been made public, and which relates directly or indirectly to one or more derivatives on commodities, provided that users of markets, on which such derivatives are traded, would expect to receive such information, in accordance with “accepted market practices” on those markets. Article 4 of the Commission Directive on Accepted Market Practices clarifies that users of markets on which derivatives on commodities are traded, are deemed to expect to receive such information, when this relates directly or indirectly to one or more derivatives on commodities, and is:

- (a) routinely made available to the users of those markets; or
- (b) is required to be disclosed in accordance with legal or regulatory provisions, market rules, contracts or customs on the relevant underlying commodity market or commodity derivatives market.

Furthermore, in relation to “persons charged with the execution of orders concerning financial instruments”, inside information means information conveyed by a client, which relates “to the client’s

13. *ibid.*, Arts 3(a) and 4.

14. *ibid.*, Arts 3(b) and 4.

15. Disclosing inside information, and recommending or inducing, on the basis of inside information, constitute the so-called secondary offence of insider dealing, although the Directive does not make such distinctions.

16. Market Abuse Directive, Art.2(2).

17. Above fn.16, Recitals 17 and 14.

18. Above fn.16, Art.4.

19. Above fn.16, Recital 18.

20. Above fn.16, Art.4 grants the “knowledge” defence only to secondary insiders, whereas Arts 2 and 3 make no mention of such defence for primary insiders.

21. Insider Dealing Directive, Art.1(1).

pending orders”, provided that it is of a precise nature and relates directly or indirectly to one or more issuers of financial instruments, or to one or more financial instruments, and which, if it were made public, would be likely to have a significant impact on the prices of those financial instruments, or on the price of related derivative financial instruments.

Within the ambit of the second of the special definitions fall intermediate or executing brokers (or any other person “charged with the execution of orders concerning financial instruments”), who are in possession of client information regarding their pending orders. Thus, the second special definition clearly targets the elimination of “front-running”.²² Article 13(2) of MiFID and Art.12 of the implementing Directive²³ set out a framework of strict requirements for the operational implementation of the prohibition of front-running. In this context, investment firms are required “to establish, implement and maintain adequate arrangements aimed at preventing” directors, managers, employees of the firm or other natural persons who are otherwise connected to the firm (“relevant persons”)²⁴ or persons related to relevant persons from, inter alia, dealing on the basis of inside information within the meaning of Art.1(1) of the Market Abuse Directive. Such dealing falls within the framework set by the MiFID regime for “personal transactions”.²⁵

Safe harbours for insider dealing

Under Art.8 and Recital 33 of the Market Abuse Directive, trading in one’s own shares in the context of buy-back programmes and the stabilisation of financial instruments are exempted from the prohibitions of the Directive, if they comply with the requirements of the Regulation on share-buy backs and stabilisation.²⁶ Furthermore, Art.2(3) of the Directive creates a “safe harbour” from the prohibition of transactions conducted in the discharge of an obligation (contractual or legal) to acquire or dispose of financial instruments. This safe harbour exists provided that the relevant obligation has arisen in the context of an agreement that was concluded before the person concerned possessed inside information, and before the parties’ obligations have become due.²⁷ In this manner, the Directive protects the certainty of contracts and allows for the proper performance of pre-existing contractual obligations, which in the absence of the

safe harbour could have been exposed to the threat of voidability as a result of supervening illegality, creating unnecessary risks in the conclusion of financial transactions.

In addition, market makers, bodies authorised to act as counterparties (as for instance, exchanges and related organisations that act as “central counterparties”), settlement and payment systems, custodians, and persons authorised to execute orders on behalf of third parties who possess inside information, will not be found in violation of the prohibition, provided that: (a) market makers, central counterparties, or settlement and payment systems restrict themselves to activities that involve the mere buying or selling of financial instruments, and (b) brokers, who act for third parties, simply carry out “an order dutifully”.²⁸

Another safe harbour is granted by Recital 29, which provides that the mere fact of having access to inside information relating to another company and using it in the context of a public takeover bid for the purpose of gaining control of that company, or proposing a merger with that company, should not in itself be deemed to constitute insider dealing. This provision should be read and interpreted in conjunction with Art.6 of the Takeover Bids Directive.²⁹ Article 6 requires bidders to disclose without delay their decision to make a bid, and pre-notify the supervisory authority of their decision, being also obliged to draw up in a timely fashion an offer document addressed to the shareholders of the offeree company.

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

The prohibition of market manipulation

The second offence proscribed by the Market Abuse Directive is that of market manipulation. As in the case of insider dealing, the Directive has dispensed, to the extent possible, with any requirement of intent in the definition of market manipulation, in order to increase the rate of successful prosecutions and of similar regulatory actions. Accordingly, under the Directive, market manipulation is an objective, effect-based offence, at least in the majority of its manifestations. Under Art.1(2) of the Directive,

22. See also Market Abuse Directive, Recital 19.

23. Directive 2006/73 implementing Directive 2004/39 of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive [2006] O.J. L241/26.

24. *ibid.*, Art.2(3).

25. Above fn.23, Arts 12 and 13.

26. See fn.6 above.

27. Market Abuse Directive, Art.2(3).

28. *ibid.*, Recital 18.

29. Directive 2004/25 on takeover bids [2004] O.J. L142/12 (hereinafter the “Takeover Bids Directive”).

market manipulation is a three-pronged offence committed through:

- (a) transactions or orders to trade:
- which give, or are likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments, or
 - which secure, by a person, or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level,

unless the person who entered into the transactions or issued the orders to trade establishes that his reasons for so doing are legitimate and that these transactions or orders to trade conform to accepted market practices on the regulated market concerned;

(b) transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance; and

(c) dissemination of information through the media, including the internet, or by any other means, which gives, or is likely to give, false or misleading signals as to financial instruments, including the dissemination of rumours and false or misleading news, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading.

The Directive indicates a number of market practices and instances of market behaviour which are likely to amount to market manipulation under the above definition³⁰:

- conduct by a person, or persons acting in collaboration, to secure a dominant position over the supply of, or demand for, a financial instrument which has the effect of fixing, directly or indirectly, purchase or sale prices or creating other unfair trading conditions;
- the buying or selling of financial instruments at the close of the market with the effect of misleading investors acting on the basis of closing prices; and
- taking advantage of occasional or regular access to the traditional or electronic media by voicing an opinion about a financial instrument (or indirectly about its issuer), while having previously taken positions on that financial instrument and profiting subsequently from the impact of the opinions voiced on the price of that instrument, without having simultaneously disclosed that conflict of interest to the public in a proper and effective way.

Therefore, the Directive prohibits most known forms of market manipulation including: (a) trade-based manipulations or misleading trades; (b) artificial

30. Market Abuse Directive, Art.1(2).

transactions and “wash sales”; and (c) information-based manipulations effected through the dissemination of false and misleading information.³¹ The Commission Directive on the Definition of Public Disclosure of Inside Information and Market Manipulation describes a number of objective (market) events and perspectives that Member States’ competent authorities and market participants should regard as “signals” of market manipulation and examine when considering whether particular behaviour constitutes, or may lead to, the first form of market manipulation: “misleading trades”.

Safe harbours for market manipulation

In addition to the safe harbours/defences discussed above, Art.8 and Recital 33 of the Market Abuse Directive provide that trading in one’s own shares in the context of buy-back programmes and the stabilisation of financial instruments are exempted from the prohibitions of the Directive, if they are carried out in accordance with the requirements of the Regulation on share buy-backs and stabilisation. It appears that, by choosing the more rigid means of an EC Regulation instead of a Directive, the Commission aimed at maximum harmonisation of Member States’ legal and regulatory regimes governing share buy-backs and stabilisations.³² The use of a Regulation leads to greater legal certainty in the implementation and application of the relevant rules. This does not, however, mean that share buy-back schemes and stabilisations that do not comply with the provisions of the Commission Regulation should in themselves be deemed to constitute market abuse.³³ They should be examined by the Member States’ competent authorities on an ad hoc basis for the purposes of enforcing the prohibition of market manipulation in the Directive.³⁴

The Commission Regulation on share buy-backs and stabilisation defines buy-back programmes as trading (by an issuer) in one’s own shares in accordance with Arts 19 to 24 of the Second Company Law Directive.³⁵ Under Art.3 of the Regulation the exemption of the Market Abuse Directive extends only to buy-back schemes which lead to reduction of the issuer’s share capital, satisfy obligations

31. See Avgouleas, fn.2 above, pp.103–154 (providing extensive analysis of these types of market manipulations).

32. The Regulation has, to a large degree, endorsed recommendations from the Committee of European Securities Regulators following a very extensive round of consultations on the subject undertaken by CESR and its predecessor, the Forum of European Securities Commission (FESCO). See *Stabilisation and Allotment, A European Supervisory Approach, Consultative Paper*, FESCO (September 15, 2000), Ref. Fesco/00-099b. See also *Second Consultation Paper: Stabilisation and Allotment—an European Supervisory Approach*, FESCO (June 2001), Ref. Fesco/01-085.

33. Regulation on Share Buy-Backs and Stabilisation, Recital 2.

34. *ibid.*, Recital 3.

35. Above fn.33, Art.3.

arising from debt financial instruments exchangeable into equity instruments, obligations arising from allocations of shares to employees of the issuer of an associate company, or by virtue of employee share option programmes. In addition, in order to benefit from the share buy-back programmes exemption, issuers must comply with disclosure and trading obligations imposed by Arts 4, 5 and 6 of the Regulation, and with the conditions on share capital maintenance³⁶ laid down by Art.19(1) of the Second Company Law Directive,³⁷ requiring the approval of the programme by the competent (company law) authorities.

Under the Commission Regulation, stabilisation schemes may only be undertaken in connection with “transferable securities” (as defined in the Investment Services Directive³⁸ and now in MiFID),³⁹ which are admitted to trading on a regulated market or for which a request for such admission has been made, provided that they are subject to (a) a “significant distribution”,⁴⁰ and (b) the stabilisation is undertaken exclusively for the purpose of supporting the market price of securities “due to a selling pressure in such securities”.⁴¹ Moreover, a number of disclosure, reporting, time, and price conditions must be fulfilled for the carrying out of lawful stabilisation.⁴² Therefore, the permitted forms of stabilisation comprise:

(a) purchases of transferable securities⁴³ and transactions in “associated instruments”⁴⁴ undertaken “in the context of significant distribution” of such securities and exclusively for the purpose of supporting the market price of these securities (for a predetermined period of time)—all transactions must be conducted by investment firms or credit institutions⁴⁵ which act for the issuer or the offeror;⁴⁶ and

(b) the use of ancillary stabilisation devices such as the use of the “overallotment facility”⁴⁷ and of “greenshoe options”.⁴⁸

Complementary features of the EC market abuse regime

Issuer continuous disclosure obligations, selective disclosure, and notifications by insiders

Article 6(1) of the Market Abuse Directive imposes on issuers of financial instruments, which have “requested or approved admission of their financial instruments to trading on a regulated market in a Member State”, a duty to disclose inside information as soon as possible. The manner in which such disclosure should be effected is specified in Art.2 of the Commission Directive on the Definition of Public Disclosure of Inside Information. The relevant disclosure must be made in such a mode as to allow “fast access and complete, correct and timely assessment of the information by the public”. The same provision requires prompt disclosure of the occurrence of an event or of a set of circumstances, even if there is no formal assurance about their occurrence.⁴⁹ It also requests that publicly disclosed inside information is continuously updated.⁵⁰ The regulatory authorities of Member States shall ensure that issuers of financial instruments, for an appropriate period, post on their internet sites all inside information that they are required to disclose publicly.

Article 6(2) of the Market Abuse Directive allows an issuer of financial instruments to delay the public disclosure of inside information, if such disclosure would prejudice his legitimate interests. Any such delay must satisfy two requirements: (a) the omission would not be likely to mislead the public, and (b) the issuer is able to ensure the confidentiality of the inside information whose disclosure has been delayed,⁵¹ in order to prevent insider dealing.⁵² An issuer who has decided to delay the disclosure of inside information for the aforementioned reasons must inform the competent authority of this decision without delay.⁵³

36. Above fn.33, Art.4(1).

37. Second Council Directive 77/91 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by member states of companies within the meaning of the second paragraph of Article 58 of the Treaty, with respect to the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1977] O.J. L26/1.

38. Directive 93/22 on investment services in the securities field [1993] O.J. L141/27.

39. Directive 2004/39 on markets in financial instruments [2004] O.J. L145/1 (hereinafter “MiFID”), Art.4(1)(18).

40. Regulation on Share Buy-Backs and Stabilisation, Art.2(6).

41. “Stabilisation” is “any purchase or offer to purchase relevant securities, or any transaction in associated instruments equivalent thereto, by investment firms or credit institutions, which is undertaken in the context of a significant distribution of relevant securities exclusively for supporting their market price for a predetermined period of time, due to a selling pressure in such securities”. *Ibid.*, Art.2(7).

42. *Ibid.*, Arts 7–11.

43. Above fn.40, Art.2(6), (7).

44. Above fn.40, Art.2(8).

45. Above fn.40, Art.2(7).

46. “Offeror” means the prior holders of, or the entity issuing, the relevant securities.” Above fn.40, Art.2(10).s

47. Above fn.40, Art.2(13).

48. Above fn.40, Art.2(14).

49. Commission Directive on the Definition of the Public Disclosure of Inside Information, Art.2(2).

50. “Any significant changes concerning already publicly disclosed inside information shall be publicly disclosed promptly after these changes occur, through the same channel as the one used for public disclosure of the original information.” *Ibid.*, Art.2(3).

51. Above fn.49, Art.3(2) provides that the issuer ensures the confidentiality of the retained inside information if an issuer controls access to such information through “effective arrangements”, such as Chinese walls, and other means.

52. Above fn.49, Recital 4.

53. Market Abuse Directive, Art.6(2).

Furthermore, the Market Abuse Directive prohibits the practice of selective disclosure by issuers of financial instruments to investment analysts.⁵⁴ Selective disclosure by issuers of non-public information to a selected group of analysts (selective briefing) has been the subject of considerable debate over recent years.⁵⁵ In the United States, selective disclosure by issuers is prohibited by SEC Regulation FD (Fair Disclosure).⁵⁶

The Market Abuse Directive has also opted for a complete prohibition, perceiving it as a practice that harms investor confidence in the integrity of the market.⁵⁷ Article 6(3) of the Directive provides that:

“whenever an issuer, or a person acting on his behalf or for his account, discloses any inside information to any third party in the normal exercise of his employment, profession or duties . . . he must make complete and effective public disclosure of that information.”

Effective public disclosure of the information in question must be made through officially appointed mechanisms. The disclosure of relevant information should take place either simultaneously with any selective briefing to a third party, in the case of intentional disclosure, or “promptly in the case of a non-intentional disclosure”. There is no obligation to effect simultaneous disclosure, where the person receiving the information owes a regulatory, contractual or otherwise imposed duty of confidentiality. This is, of course, a “safe harbour” covering disclosure of inside information to the issuer’s non-executive directors, its lawyers, auditors and other professional consultants for the purpose of facilitation of the issuer’s business, the auditing of its financial statements, or the carrying out of due diligence surveys for the purpose of a merger or an acquisition.

Finally, issuers and “persons acting on their behalf or for their account” are required to draw up lists of persons “working for them, under a contract of employment or otherwise, who have access to inside information”. The relevant lists shall be regularly updated, and capable of being transmitted “to the competent authority whenever the latter requests it”.⁵⁸

Article 6(4) of the Market Abuse Directive requires “[p]ersons discharging managerial responsibilities within an issuer of financial instruments and, where applicable, persons closely associated with them”

54. *ibid.*, Art.6(3).

55. See Zohar Goshen and Gideon Parchomovsky, “On Insider Trading, Markets, and ‘Negative’ Property Rights in Information” (2001) 87 *Virginia Law Review* 1229, who are firmly in favour of selective disclosure, favouring analysts over insiders. For a more balanced approach, see Donald C. Langevoort, “Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation” (2002) 97 *Northwestern University Law Review* 135, 164–176.

56. Securities Act Release No.33-7881, 17 C.F.R. 243.100-243.103 (August 15, 2000) (prohibiting management from privately disclosing material non-public information to analysts).

57. Market Abuse Directive, Recital 24.

58. *ibid.*, Art.6(3).

to notify the relevant competent authority of any transactions conducted on their own account relating to shares of the issuer in question, “or to derivatives or other financial instruments linked to them”. This form of information is particularly relevant in order to monitor the compliance of such persons with the prohibition of insider dealing. It also constitutes very important market information and its disclosure significantly enhances both the transparency and the information efficiency of the marketplace.⁵⁹ For this reason, the Market Abuse Directive requires Member States to ensure that “public access to information concerning such transactions, on at least an individual basis, is readily available as soon as possible”.⁶⁰

Investment recommendations and disclosure of interests

Article 6(5) of the Market Abuse Directive requests Member States to implement regulations which will oblige producers and disseminators of investment research and investment recommendations to present *fairly* “research concerning financial instruments or issuers of financial instruments” and information “recommending or suggesting investment strategy”, where such research or investment recommendation is intended for submission to distribution channels or for dissemination to the public and not for internal use. The same persons are assigned the duty to disclose relevant interests and conflicts of interests “concerning the financial instruments to which that information relates”. The Directive addresses through the introduction of the dual duty of “fair presentation” and disclosure of interests and conflicts of interests, the very serious issue of production and dissemination of tainted investment research. The best-known examples of published investment analysis guided by colossal conflicts of interests are the investment reports and recommendations produced by “star analysts” within major US investment banks during the 1990s.⁶¹

The Commission Directive on Fair Presentation and Disclosure defines investment “recommendations” as:

“research or other information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers of financial instruments, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public.”⁶²

59. Above fn.57, Recital 26; see also Commission Directive on Accepted Market Practices, Recital 7.

60. Market Abuse Directive, Art.6(4).

61. See Office of New York State Attorney General Eliot Spitzer, *Statement by Attorney General Eliot Spitzer Regarding the ‘Global Resolution’ of Wall Street Investigations* (April 28, 2003), available from www.oag.state.ny.us.

62. Commission Directive on Fair Presentation and Disclosure, Art.1(3).

Furthermore, Art.1(4) of the Commission Directive defines the term (of Art.6(5) of the Market Abuse Directive) “[r]esearch or other information recommending or suggesting investment strategy” as:

- (a) information produced by an independent analyst, an investment firm, a credit institution, any other person whose main business is to produce recommendations or a natural person working for them under a contract of employment or otherwise, that, directly or indirectly, expresses a particular investment recommendation in respect of a financial instrument or an issuer of financial instruments;
- (b) information produced by persons other than the persons referred to in (a) which directly recommends a particular investment decision with respect to a financial instrument.

Therefore, the production and dissemination of macro-economic analysis, general market commentary, and research concerning broad markets, which do not carry investment recommendations, need not comply with the above duties. Also, credit rating agencies’ reports on the creditworthiness of specific issuers fall outside the above definition of investment “recommendations”.⁶³

Moreover, the fact that the production and dissemination of investment research has come within the scope of MiFID (as an ancillary service)⁶⁴ means that the conduct of this activity by investment firms is subject to the additional safeguards⁶⁵ on conflicts of interests, objectivity and independence provided by MiFID.⁶⁶

Articles published in the press that disseminate the findings of investment research or recommend investment strategy could be seen as falling within the scope of Art.6(5), and they must incorporate disclosure of relevant interests or conflicts of interest. However, the Commission leaves it to the discretion of Member States to determine the form of applicable regulation, including self-regulation in this area.⁶⁷

Directive of 1980 and the Public Offer Prospectus Directive of 1989. It provides a harmonised regime for the drawing up, and scrutiny of, the disclosure documents that are used for the public offer of equity and non-equity securities, or the admission of such securities to trading on regulated markets in the European Union. The Directive provides a definition of what constitutes an “offer of securities to the public”, which it extends to the placement of securities through financial intermediaries. It grants the issuer of the securities a “single passport” which, on the basis of the country of origin principle, enables the issuer or offeror to offer the securities in any EU Member State, or have them admitted to trading on any regulated market located within the European Union without having to comply with any regulatory requirements, other than those imposed by the country, where the offer was first made or the securities were first admitted to trading.

The draft Directive became the subject of fierce debate and disagreement during the consultation process, and this led to a hesitant political compromise. As a result, it is doubtful whether the multi-document format of the passported prospectus, one of the Directive’s most important innovations, will ever be utilised by the critical mass of EU or third country issuers. Furthermore, POPD II has not been successful at creating a “lighter touch regime” for small and medium-sized enterprises.⁶⁹ It is also puzzling why EU policymakers have not addressed, with the degree of seriousness required, the necessity and desirability of such an extensive, detailed and inflexible regime for mandatory disclosure and its costs. Nor has there been any debate (with the exception of a limited number of academic voices)⁷⁰ about the possible interplay between mandatory regulation and self-regulation in the area of issuer disclosure rules.⁷¹

The public offers and admissions to trading regime

The Public Offers Prospectus Directive II

The Public Offers and Admissions Prospectus Directive II (POPD II)⁶⁸ has replaced the Listing Particulars

63. *ibid.*, Recital 10.

64. MiFID, Annex I, Section B(5).

65. Directive 2006/73, Recital 38.

66. MiFID, Art.19(2) and Directive 2006/73, Arts 24–25 and Recitals 28–30, 36.

67. Commission Directive on Fair Presentation and Disclosure, Art.2(4).

68. Directive 2003/71 on the prospectus to be published when securities are offered to the public or admitted to trading [2003] O.J. L345/64.

69. See Eilis Ferran, *Building an EU Securities Market* (Cambridge University Press, 2004), pp.179–180. For a perceptive critical assessment of POPD II, see Ferran, pp.201–205.

70. See, e.g. Eddy Wymeersch, “Regulating European Markets: The Harmonisation of Securities Regulation in Europe in the New Trading Environment” in Eilis Ferran and Charles Goodhart, eds, *Regulating Financial Services in the Twenty First Century* (Hart, 2001), pp.189, 196–200, 204–206.

71. See Paul G. Mahoney, “The Exchange as Regulator” (1997) 83 *Virginia Law Review* 1453; Merritt B. Fox, “Securities Disclosure in a Globalizing Market: Who Should Regulate Whom” (1997) 95 *Michigan Law Review* 2498; Daniel R. Fischel, “Organised Exchanges and the Regulation of Dual Class Common Stock” (1987) 54 *University of Chicago Law Review* 119; Emiliós Avgouleas, “Financial Market Regulation and the New Market Landscape: In Search of a New Regulatory Framework for Market Abuse” (2000) 2 *International and Comparative Corporate Law Journal* 89, pp.116–117.

The regime for the public offer and admission of securities

POPD II grants the issuer of securities, once the prospectus has been approved by the competent authority, the right (via a “single passport”) to offer its securities anywhere in the European Union or have them admitted to trading on a regulated market located in any EU Member State. Such a prospectus must contain all the information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and any guarantor of the rights attaching to such securities.⁷² This information must be presented in an easily analysable and comprehensible form. The Directive’s disclosure requirements, as specified by a Level 2 Regulation,⁷³ reflect to a significant extent the standards for cross-border offerings of the International Organisation of Securities Commissions (IOSCO).⁷⁴

Furthermore, a prospectus drawn in accordance with the provisions of POPD II must include a “summary” which is a brief statement, no more than 2,500 words, drafted in non-technical language in order to convey to investors the essential characteristics and risks associated with the issuer, any guarantor and the securities.⁷⁵ The prospectus, subject to the updates requested by Art.16 (filing of supplements), remains valid for 12 months.⁷⁶

As mentioned earlier, one of POPD II’s biggest innovations is that it allows issuers to divide the prospectus into a number of documents. Thus, issuers and offerors, at their discretion, may either draw a prospectus as a single document or divide the information to be disclosed into the following documents⁷⁷:

- (a) “Registration document”: containing the information relating to the issuer;
- (b) “Securities note”: containing the information concerning the securities to be offered to the public or be admitted to trading on a regulated market; and
- (c) “Summary note”.⁷⁸

Another innovation of the Directive is the introduction of a “base prospectus”. A “base prospectus” may be drawn in the case of programmes for non-equity securities such as notes and warrants of any form, and for continuous and repeated issues of non-equity securities by credit institutions.⁷⁹ The “base prospectus” remains valid for 12 months.⁸⁰

The principal aim of POPD II, that of fostering market integration by facilitating cross-border offers of financial instruments and multiple admissions to trading (for example, cross-listings), is facilitated through the following:

- (a) incorporation of documents containing information required to be disclosed in the prospectus by reference to one or more previously or simultaneously published documents that have been approved by the competent authority of the home Member State;⁸¹
- (b) harmonisation of the law on the publication of prospectuses⁸² and advertisement of public offers;⁸³
- (c) introduction of a new concept of “language that is customary in the sphere of international finance” that may be used in prospectuses drawn in relation to cross-border offers or multiple admissions to trading.⁸⁴ Thus, issuers’ obligation to translate the full prospectus in the case of multi-jurisdictional offers is abolished—the home and host state regulators may only require the translation of the summary prospectus into their official language.⁸⁵

In the same mode as the Market Abuse Directive, POPD II requires the establishment of a single competent authority for the scrutiny and approval of the public offer and admissions prospectus, which should be an administrative authority “completely independent from all market participants”.⁸⁶ This provision excludes privatised securities exchanges from discharging the role of the competent authority,

72. POPD II, Art.5.

73. Regulation 809/2004 implementing Directive 2003/71/EC of the European Parliament and of the Council with regard to information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements [2004] O.J. L149/1. The Regulation lays down: (1) the format of the prospectus referred to in Art.5 of the Directive; (2) the minimum information requirements to be included in a prospectus provided for in Art.7 of the Directive; (3) the method of publication referred to in Art.10 of the Directive; (4) the modalities according to which information can be incorporated by reference in a prospectus provided for in Art.11 of the Directive; (5) the publication methods of a prospectus in order to ensure that a prospectus is publicly available according to Art.14 of the Directive; and (6) the methods of dissemination of advertisements referred to in Art.15 of Directive.

74. IOSCO, *International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers* (September 1998).

75. POPD II, Art.5(2), Recital 21.

76. *ibid.*, Art.9(1).

77. Above fn.75, Art.5(3).

78. Above fn.75, Art.5(3). Furthermore, Art.12(1) provides that an issuer which already has a registration document approved by the competent authority is required to draw up only the securities note and the summary note when securities are offered to the public or admitted to trading on a regulated market.

79. Above fn.75, Art.5(4).

80. Above fn.75, Art.9(2).

81. Above fn.75, Art.11.

82. Above fn.75, Art.14.

83. Above fn.75, Art.15.

84. Above fn.75, Art.19.

85. Above fn.75.

86. Above fn.75, Art.21(1).

unless Member States allow the central competent authority to delegate to them specified powers with respect to scrutiny and approval of public offers and admissions prospectus.⁸⁷ Any such delegation of tasks under the Directive is to be reviewed by 2008, and end in 2011.⁸⁸

As regards the liability of issuers and their professional advisers for the contents of the prospectus, POPD II requests Member States to ensure that their laws, regulations, and administrative provisions on civil liability are fully applicable to those responsible for the information given in a prospectus.⁸⁹ Arguably, issuers or even the offerors do not have much involvement with the drafting of an offer or admission prospectus, as this is a job usually entrusted to professionals such as investment bankers, corporate lawyers, tax specialists, and translators. As a result, the Directive's definition of "persons responsible for drawing up the prospectus" and for auditing the financial statements extends to directors, senior management, advisers, and auditors.⁹⁰ A possible "safe harbour" is created for the professional advisers who have drafted the summary under Art.5(2)(d) of the Directive, which provides that such persons—frequent litigation targets because of their "deep pockets"—are liable only if the "summary" is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.

Finally, as regards securities admitted to trading in a regulated market in the European Union, issuers of such securities must comply with a number of additional requirements imposed on them by the listing/admission requirements of the market itself, which must in turn follow the general requirements imposed by MiFID and its implementing Regulation.⁹¹ More specifically, transferable securities are eligible to be admitted to trading on a regulated market only if they are freely negotiable and they are capable of being traded in a fair, orderly, and efficient manner. Regulated markets in determining (exercising their discretion) whether transferable securities are capable of being traded in a fair, orderly, and efficient manner should consider whether the securities satisfy the following criteria⁹²:

- (a) the terms of the security are clear and unambiguous and allow for a correlation between the price of the security and the price or other value measure of the underlying;
- (b) the price or other value measure of the underlying is reliable and publicly available;

87. Above fn.75, Art.21(2).

88. Above fn.75.

89. Above fn.75, Art.6(2).

90. Above fn.75, Annexes I and III.

91. MiFID, Art.40(1); Regulation 1287/2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards recordkeeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive [2006] O.J. L241/1, Art.35.

92. Regulation 1287/2006, Art.35(6).

(c) there is sufficient information publicly available of a kind needed to value the security;

(d) the arrangements for determining the settlement price of the security ensure that this price properly reflects the price or other value measure of the underlying; and

(e) where the settlement of the security requires or provides for the possibility of the delivery of an underlying security or asset rather than cash settlement, there are adequate settlement and delivery procedures for that underlying as well as adequate arrangements to obtain relevant information about that underlying.

Furthermore, in determining whether shares are capable of being traded in a fair, orderly and efficient manner, regulated markets must consider in addition to the above criteria the "free float" of the relevant share, namely:

"the distribution of those shares to the public, and the information available about the issuer and the security concerned that provides a business overview in accordance with the requirements of POPD II, or is otherwise publicly available."⁹³

Exemptions

The lack of a comprehensive definition of the institutional and professional investors exemption under the previous regime created conditions of market fragmentation and insurmountable problems in the conduct of private placements on a pan-European basis. For this reason, POPD II introduces a formal private placement and professional investors exemption. As a result, there is no obligation to draw a prospectus where the offer of securities is addressed solely to qualified investors and/or where the number of offerees is up to 100 natural or legal persons per Member State, other than qualified investors (private placement).⁹⁴ Subsequent resale of the securities by qualified investors or private placees shall be regarded as a separate offer and may be caught by the public offer regime. Under the Directive the term "qualified investor" means:

(a) "Legal entities which are authorised or regulated to operate in the financial markets, including: credit institutions, investment firms, other authorised or regulated financial institutions, insurance companies, collective investment schemes and their management companies, pension funds and their management companies, commodity dealers, as well as entities not so authorised or regulated whose corporate purpose is solely to invest in securities"⁹⁵;

(b) "national and regional governments, central banks, international and supranational institutions such as the International Monetary

93. *ibid.*, Art.35(4).

94. Above fn.92, Art.3(2).

95. Above fn.92, Art.2(1)(e)(i).

Fund, the European Central Bank, the European Investment Bank and other similar international organizations⁹⁶;

(c) other legal entities which are not small or medium-sized enterprises⁹⁷;

(d) natural persons, subject to mutual recognition, if they expressly ask to be considered as qualified investors and meet at least two of the following criteria⁹⁸:

(i) "the investor has carried out transactions of a significant size on securities markets, at an average frequency of, at least, 10 per quarter over the previous four quarters"⁹⁹;

(ii) "the size of the investor's securities portfolio exceeds 0.5 million euros"¹⁰⁰;

(iii) "the investor works or has worked for at least one year in the financial sector in a professional position which requires knowledge of securities investment"¹⁰¹.

(e) SMEs which have expressly asked to be considered as "qualified investors"¹⁰². In accordance with Art.2(1)(f) of the Directive, SMEs are companies which, in light of their last annual or consolidated accounts, meet at least two of the following three criteria: the average number of employees during the financial year is less than 250, their balance sheet does not exceed €43 million, and their annual turnover does not exceed €50 million.¹⁰³

Public offers or admissions to trading of units of collective investment vehicles, government securities, and securities issued or guaranteed by central banks or other defined public bodies are not subjected to the obligation to issue a prospectus under POPD II,¹⁰⁴ though they may be subject to similar obligations under other regimes.¹⁰⁵ Securities issued under debt programmes established by credit institutions are also exempt, when the total consideration of the offer is less than €50 million, provided that the relevant securities are not exchangeable or convertible, the issued debt is not subordinated, and the securities do not serve as rights warrants nor are they linked to derivative instruments.¹⁰⁶ Furthermore, certificates of deposit and other money market instruments¹⁰⁷ and securities included in an offer where the total consideration for the offer is under €2.5 million also fall outside the scope of the Directive.¹⁰⁸

96. Above fn.92, Art.2(1)(e)(ii).

97. Above fn.92, Art.2(1)(e)(iii), (f).

98. Above fn.92, Art.2(1)(e)(iv).

99. Above fn.92, Art.2(2)(a).

100. Above fn.92, Art.2(2)(b).

101. Above fn.92, Art.2(2)(c).

102. Above fn.92, Art.2(1)(e)(v).

103. Above fn.92, Art.2(1)(f).

104. Above fn.92, Art.1(2).

105. e.g. Directive 85/611 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), last amended by Directive 2005/1 [2005] O.J. L79/9.

106. POPD II, Art.1(2)(j).

107. *ibid.*, Art.1(2)(f).

108. Above fn.106, Art.1(2)(h).

Finally, POPD II provides exemptions based on numerical thresholds, which are quite similar to those provided by its predecessor, the Public Offers Prospectus Directive of 1989. These exemptions may be utilised cumulatively with the "qualified investors" exemption and the "private placement" exemption for offers to fewer than 100 natural or legal persons. Thus, there is no obligation to draw a prospectus where:

(a) the total consideration is at least €50,000 per investor for each separate offer;

(b) the denomination of the offered securities is at least €50,000; or

(c) the consideration for the entirety of the offered securities does not exceed €100,000 over a period of 12 months.¹⁰⁹

The regime for periodic disclosure and the Transparency Directive

The Directive on Transparency Obligations of Traded Companies¹¹⁰ complements the Market Abuse Directive, the EC Regulation on International Accounting Standards¹¹¹ and the POPD II in constructing an all-encompassing EU market integrity regime. It introduces new disclosure (transparency) requirements with regard to information on issuers whose securities are admitted to trading on a regulated market in the European Union.

The Directive aims at the improvement of the EU regulatory framework governing the reports that issuers of securities admitted to trading on a regulated market produce on a regular basis. It mandates the publication of an annual financial report within four months from the end of the financial year.¹¹² In the case of depositary receipts representing securities, an issuer is regarded as the issuer of the underlying securities.

Another improvement the Directive brings about is in the area of issuer periodic disclosure obligations, through the introduction of mandatory periodic disclosure obligations for issuers of debt securities. These must be made public as soon as possible after the end of the relevant six-month period, and at the latest two months thereafter.¹¹³ Exemptions to the above obligations are provided for credit institutions whose shares are not admitted to trading on a

109. *ibid.*, Art.3(2).

110. Directive 2004/109 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34 [2001] O.J. L184/1 (hereinafter the "Transparency Directive").

111. Regulation 1606/2002 on the application of international accounting standards [2002] O.J. L243/1. For the Commission's implementing and updating Regulations in respect of the adoption of IAS and of International Financial Reporting Standards, see <http://ec.europa.eu>.

112. Transparency Directive, Art.4.

113. *ibid.*, Art.5(1).

regulated market and who have only issued debt securities in the context of a “program”, provided that the total nominal amount of all such debt securities remains below €100 million and that they have not published a POPD II prospectus.¹¹⁴ An exemption is also granted to issuers of debt securities, who have not issued shares, on the basis of an individual denomination per unit starting at €50,000.¹¹⁵

Issuers of shares admitted to trading on a regulated market, who do not publish quarterly reports acting under a national law obligation or on their own initiative, acquire an obligation to publish half-yearly statements by their management, which shall contain information covering the period from the beginning of the relevant six-month period to the date of publication of the statement.¹¹⁶ The management statement should include at least an indication of important events that occurred during the first six months of the financial year and their impact on the condensed set of financial statements, together with a description of the principal risks and uncertainties for the remaining six months of the financial year.¹¹⁷

In addition, the Directive acts in a complementary way with Art.6(1) of the Market Abuse Directive on the issuer’s obligation to publish price-sensitive information on a continuous basis.¹¹⁸ It also lowers the threshold for the reporting of changes to important shareholdings (5 per cent) and provides procedures for the notification and disclosure of major shareholdings and their acquisition or disposal where the proportion of voting rights of the issuer held by the shareholder as a result of the acquisition or disposal reaches, exceeds, or falls below the thresholds of 5, 10, 15, 20, 25, 30, 50 and 75 per cent.¹¹⁹ The notification obligation extends to the rights of a natural person or legal entity to acquire, to dispose of, or to exercise voting rights attached to shares held by a third party in various ways, including shares held as collateral or placed in the hands of depository for safe custody.¹²⁰

Article 20 of the Transparency Directive introduces into annual and periodic reports the concept of language customary in the international sphere of finance. This may be used for ongoing disclosure by issuers of securities with cross-border listings, and also may be chosen by issuers who offer their securities to the wholesale market (for example, issuers of Eurobonds).¹²¹

Furthermore, the Directive harmonises EU issuers’ reporting obligations with certain provisions of the Sarbanes-Oxley Act¹²² on issuer reporting. The most prominent example is the inclusion in the yearly and

half-yearly reports of statements made by persons responsible within the issuer to the effect that financial statements and the condensed financial statements have, to the best of their knowledge, been prepared in accordance with the applicable set of accounting standards and give a true and fair view of the assets, liabilities, financial position, and profit or loss of the issuer.¹²³

Finally, liability, including civil liability, for the accuracy of the aforementioned reports is attached to the issuer or its administrative, management, or supervisory bodies and persons responsible within the issuer for drawing up and making public relevant information.¹²⁴ A number of other important features of the Transparency Directive are summarised below.

First, the Directive delegates the supervision of issuer compliance with ongoing and periodic disclosure obligations to the same competent authority that scrutinises the POPD II prospectus. Therefore, this power is also removed from securities exchanges and other regulated markets and transferred to the relevant capital market commission.¹²⁵ Secondly, the concept of the home Member State used in the Directive refers to the issuer and not to the issued securities.¹²⁶ The “annual financial report” constitutes a complete source of financial information and consists of the audited financial statements, the management report, and statements made by persons responsible within the issuer.¹²⁷

Thirdly, the half-yearly report comprises a condensed set of financial statements and a management report on company activities.¹²⁸ Finally, when the registered office of the issuer is in a third country, the competent authority of the home Member State may exempt that issuer from the periodic and continuous disclosure requirements of the Directive, provided that the law of the third country concerned provides equivalent requirements or the issuer in question complies with requirements of the law of a third country that the competent authority of the home Member State considers as equivalent.¹²⁹ In addition, an issuer whose registered office is in a third country may be exempted from preparing its financial statements (for its annual and half-yearly reports) in accordance with Art.4 or Art.5 prior to the financial year starting on or after January 1, 2007, provided that such issuer prepares its financial statements in accordance with internationally accepted standards referred to in Art.9 of Regulation 1606/2002.

The usefulness of the Transparency Obligations Directive has been questioned in many quarters of the European financial services industry. Since most Member States have already enacted legislation that mandates the filing of quarterly reports by listed

114. Above fn.112, Art.8(2).

115. Above fn.92, Art.8(1)(b).

116. Above fn.92, Art.6.

117. Above fn.92, Art.6(1).

118. Above fn.92, Arts 16(1), 21(6).

119. Above fn.92, Arts 9 and 12.

120. Above fn.92, Art.10.

121. Above fn.92, Art.20.

122. Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7201–7266 (2002).

123. Transparency Directive, Arts 4(2)(c) and 5(2)(c).

124. *ibid.*, Art.7.

125. Above fn.123, Art.24(1).

126. Above fn.123, Art.2(1)(i).

127. Above fn.123, Art.4(2).

128. Above fn.123, Art.5(2).

129. Above fn.123, Art.23(1).

companies and have set very low thresholds for the reporting of changes in major shareholdings, the Directive does not seem to present any significant breakthrough in the reporting regime of EU and third country issuers whose securities are admitted to trading in European markets.

Conclusion

The preceding analysis has shown that FSAP securities regulation is, in some cases, flexible and disclosure based, but in many others is overly legalistic and bureaucratic. This is justified, to a certain extent, by the demands of an integrated market, which in certain areas such as the rules of conduct, require maximum harmonisation. On the other hand, the volume and detail of new legislation means that transaction costs in the form of costs of compliance may threaten the survival of small and medium size investment firms in the European Union.¹³⁰ This would increase concentration within the European investment services industry. In light of the above, it is arguable that the implementation of MiFID and of other FSAP Directives will lead to a reduction of competition in an already oligopolistic market, restricting, instead of enhancing, consumer choice.

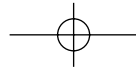
Furthermore, despite the efforts of the FSAP securities directives to establish a comprehensive framework for cross-border regulatory supervision and enforcement, the new regime will again suffer from regulatory fragmentation. Following MiFID's implementation, EU financial markets will present a very paradoxical view. These markets will be governed by single (harmonised) prudential regulation, public offer and admission of securities to trading, market integrity, disclosure of information to investors, and conduct of business regimes. Yet relevant regimes

will be supervised by at least 25 different national authorities. As a result, regulatory decisions concerning, essentially, uniform regimes, will be informed by the supervisory and enforcement cultures of the different national regulators and by the conflicting agendas these may pursue. The reasonable and cost-effective solution to this problem can only be the establishment of a central regulatory body for the supervision of EU securities markets. This body, which cannot and should not be another Commission outpost or the European Central Bank, should be granted not only law-making, but also enforcement powers which should be observed across the European Union.¹³¹ Due to the restrictions posed by the current EU legal framework, the establishment of such a body is not yet possible,¹³² putting at risk the fate of the FSAP project that intends to bring about market integration primarily through regulation rather than the operation of market forces.

131. See Ferran, above fn.67, pp.119–122.

132. See N. Moloney, *EC Securities Regulation* (Oxford University Press, 2002), pp.885–892.

130. Patrick Hosking, "New Rules from EU will Cost City £1bn—Just for Starters", *The Times*, November 25, 2006.



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