Insider Trading and Market Abuse: a New Community Legal Framework

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Prior to the adoption of the first Directive on insider dealing (Directive 89/592/EEC) Member States were free to regulate insider trading by any means they considered adequate. Some Member States treated insider trading as a criminal offence, while others had voluntary codes of conduct, or no specific regulations at all. After the adoption of the 1989 Directive, the Member States were obligated to modify or to introduce new elements into their national securities laws so as to make them consistent with the Directive. Since 1989, financial markets have undergone major changes: new technologies and new products have been developed, cross-border trading activities have flourished and the number of participants has increased significantly. A new Directive addressing not only insider trading but also price manipulation and the dissemination of misleading information was considered necessary: the Market Abuse Directive 2003/6/EC (MAD) was born.

The Directive is part of the Financial Services Action Plan (FSAP), aimed at removing all outstanding barriers to cross-border financial services in the EU in order to create a single integrated European capital market. The progress made under the FSAP and the role of the Committee of European Securities Regulators (CESR) were outlined by Mr. F. Bolkestein, former Member of the European Commission, responsible for the Internal Market, and Mr. A.W.H. Docters van Leeuwen, chairman of CESR and of the Autoriteit Financiële Markten in the Netherlands, in their speeches at a seminar organised by NautaDutilh in November 2004. These contributions, which open this issue of ECL, give a clear view of the context, what CESR is and how CESR works within the four-level approach of the Lamfalussy Process as described in my article in ECL 2004/1. Interesting is the publication last autumn by CESR of the "Himalaya" report: "Which supervisory tools for the EU securities markets?". In this report, CESR states its intention to give priority to deepening the co-operation arrangements under the FSAP in order to enhance the supervisory relationship between authorities and improve the convergence of approaches and decisions within the network of securities regulators. Although the report is not, as stressed by Docters van Leeuwen, a proposal to transform CESR into a single supervisory authority for all the 25 Member States, the "co-operative" model can, in my opinion, lead in the long run to a single European Supervisory Authority.

If one compares the contribution of Professor Stephen Bainbridge about the US approach on insider trading with the contribution of Dr. Francois Kristen on the European approach, a feasible conclusion is that there are fundamental differences between the US and the EU. Whereas in the US the modern prohibition is a creature of SEC administrative actions and judicial opinions, in the EU it is based preponderantly on legislation and not on case law at EU level. As pointed out by Dr. Kristen, the MAD strives for full harmonisation and, although the prohibition is formulated in such a way that it can be taken over without many adjustments in the national legal order of the Member States, the Country Status Reports show that it is apparently still not easy to implement the MAD within the set time framework. A half year after the Directive's implementation date "12 October 2004" it is interesting to see whether and how this Directive has been implemented in some Member States. The Country Status Reports in this issue give a broad outline of the situation at the beginning of this year. Although not every Member State has already implemented the MAD, the Country Status Reports show that there are some differences among those that have.

Which information will be deemed in practice to constitute inside information will, I suppose, not always be clear, but having the privilege of reading the contributions for this ECL issue before they were published was certainly not inside information in the sense of the MAD.