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Towards a Uniform European Capital Markets Law: Proposals of the Commission to Reform Market Abuse

I. Introduction

The European Union has had a uniform legal framework to combat market abuse since 2003. The legal instruments[1] require Member States to prohibit insider dealing and market manipulation. Member States must also ensure that inside information and directors' dealings are disclosed as soon as possible. These provisions are to be reformed and the European Commission presented its proposals[2] on 20 October 2011. The Commission argues that the global economic and financial crisis has highlighted the importance of market integrity and it is seeking to strengthen supervisory and sanctioning regimes in this regard. In this respect, the Commission takes into consideration a report published by the former Committee of European Securities Regulators (CESR)[3] and the *de Larosière* report[4], which drew attention to the dispari-

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[1] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), Official Journal L 096, 12 April 2003, p. 16 – 25 (the Market Abuse Directive). The European Union has enacted four legal instruments to implement the Directive, comprising three directives and a regulation. For an overview of the content of these legal instruments, see R.Veil, in R.Veil (Publ.) et al, *Europäisches Kapitalmarktrecht* (2011), Section 1, note 22 *et seqq.* and Section 2, note 82. To be published in 2012 under the title *European Capital Markets Law.*

[2] Proposal for a Regulation of the European Parliament and of the Council on Insider Dealing and Market Manipulation (Market Abuse) of 20 October 2011 COM(2011) 651 final (draft Market Abuse Regulation); available at: http://ec.europa.eu/internal_market/securities/docs/abuse/COM_2011_651_en.pdf. Proposal for a Directive of the European Parliament and of the Council on Criminal Sanctions for Insider Dealing and Market Manipulation of 20 October 2011 COM(2011) 654 final (draft Market Abuse Directive); available at: http://ec.europa.eu/internal_market/securities/docs/abuse/COM_2011_654_en.pdf.

[3] See CESR/08-099, *Report on administrative measures and sanctions as well as the criminal sanctions available in member states under the market abuse directive (MAD),* February 2008; available at: http://www.cesr-eu.org/data/document/08_099.pdf. Furthermore, the European Commission has published a Working Paper as an accompanying document to the proposals (Commission Staff Working Paper Impact Assessment, 20 October 2011, SEC(2011) 1217 final).

[4] See J. de Larosière et al., *Report by The High-Level Group on Financial Supervision in the EU*, 25 February 2009. Available at: http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf.

ties and lack of deterrence posed by administrative and criminal sanctions in Europe.[5]
This paper acknowledges the proposals and puts them in context, with a focus on the law on insider dealing and disclosure requirements.[6] It looks at the Commission's stated aim to strengthen the market abuse regime and give it a more European emphasis. The proposals could represent a further move towards codification of European capital markets law.[7]

II. Regulatory concept

1. Proposals

In the future, the main instrument for combating market abuse is to be a Regulation of the European Parliament and of the Council. The draft Market Abuse Regulation covers all regulatory areas of the Market Abuse Directive and is structured in a similar way. The first sections set out the application of the draft Regulation, define important terms and establish prohibitions and obligations. As the proposals are made in the form of a regulation, these rules would have direct effect in Member States (see Article 288 (2) TFEU[8]). National legal provisions on insider monitoring would then be superfluous. Other sections of the draft Regulation include extensive new provisions on supervision by national authorities and the European Securities and Markets Authority (ESMA), and administrative measures and sanctions.[9]
The Regulation is to be enacted under Level 1 of the *Lamfalussy* process.[10] It is therefore a framework instrument that still requires substantiating legal instruments, which are already addressed in the draft Regulation. In various provisions, the European Commission is required or authorised to adopt delegated legal instruments.[11] The European Parliament would have a power of co-decision in this respect.[12] ESMA is also charged with drawing up[13] regulatory technical standards[14] and implementing technical standards.[15] These two tools are of a technical nature and do not contain

[5] See Preamble para. 34 draft Market Abuse Regulation; for an analysis of the sanctioning regime taking into account civil remedies, see R.Veil and F.Walla, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 7, note 10 *et seqq*.
[6] The paper does not address proposals for market manipulation (see Art. 8 and 10 draft Market Abuse Regulation) or financial analyses (see Art. 15 draft Market Abuse Regulation).
[7] For codification approaches, see R.Veil, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Preface, p. V.
[8] Consolidated Version of the Treaty on the Functioning of the European Union, Official Journal C 115, 9 May 2008, p. 47 – 199 (TFEU).
[9] It is doubtful whether these provisions are to have direct effect in Member States or whether they are to be understood as provisions to be transposed by the national legislatures. See section VII.1 below for further details.
[10] For an overview of the structure of the Lamfalussy process since the creation of ESMA, see F.Walla, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 2, note 31 *et seqq.*
[11] See Art. 3 (3), Art. 8 (5), Art. 12 (3), Art. 13 (4), Art. 14 (5) and (6), Art. 29 (3) draft Market Abuse Regulation.
[12] See Arts. 31 and 32 draft Market Abuse Regulation.
[13] ESMA will present the Commission with proposals for implementing and regulatory technical standards. Once approved by the Commission, the legal instruments become effective pursuant to Art. 10 *et seqq.* of the Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (the ESMA Regulation). For more about these, see F.Walla, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 6, note 57 *et seqq.*
[14] See Art. 11 (3), Art. 15 (3) subparagraph 2 draft Market Abuse Regulation.
[15] See Art. 12 (9), Art. 13 (6), Art. 15 (3) subparagraph 1, Art. 18 (3), Art. 19 (9), Art. 30 (4) draft Market Abuse Regulation.

any 'strategic decisions or policy choices'.[16] The European Parliament only has the right to raise objections with regard to regulatory technical standards.[17]
The European Commission has also proposed a Directive on criminal sanctions for insider dealing and market manipulation. Until now, none of the four framework directives has required Member States to adopt criminal provisions. The Commission's proposal thus marks the start of a new era. The criminal sanctions are intended to demonstrate 'social disapproval of a qualitatively different nature compared to administrative sanctions or compensation mechanisms under civil law'.[18] The application of criminal sanctions for such contraventions would remain within the jurisdiction of Member States. However, implementation is clear and unambiguous. The draft Directive also uses the most important definitions from the provisions of the draft Market Abuse Regulation.[19] In this way, EU law is 'incorporated' into national criminal laws.

2. Level of harmonisation

The draft Directive establishes only 'minimum rules' for criminal sanctions.[20] It is expressly constituted as a minimum harmonisation legal instrument,[21] so that Member States would be allowed to impose or retain more stringent criminal sanctions.[22] It is more difficult to judge which concept is followed in the proposed Market Abuse Regulation.[23] This does not expressly address the issue of whether the intention is to have a minimum or full harmonisation of market abuse. Only the fifth chapter on administrative measures and sanctions allows for other sanctions or higher fines to be introduced.[24]
No final conclusions about the degree of harmonisation can be drawn from the fact that the issue is being regulated by way of a regulation.[25] Therefore, other aspects have to be considered. The full harmonisation concept is supported by the fact that, in the opinion of the Commission, the effectiveness of the Market Abuse Directive is undermined by 'numerous options and discretions'.[26] The Preamble to the new Market Abuse Regulation does not give a clear indication of a specified level of harmonisation, but it provides a further hint that the goal is to achieve full harmonisation of prohibitions of insider dealing and market manipulation.[27] Also, the aim of drawing up the Market Abuse Regulation, namely avoiding regulatory arbitrage,[28] is best achieved through full harmonisation.

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[16] See. Art. 10 (1) subparagraph 2 and Art. 15 (1) sentence 2 ESMA Regulation.
[17] See Art. 13 ESMA Regulation.
[18] See Explanatory Memorandum, p. 3.
[19] See Art. 2 no. 1 and no. 2 draft Market Abuse Directive with respect to the definitions for 'financial instrument' and 'inside information'.
[20] See Art. 1 (1) draft Market Abuse Directive.
[21] With respect to this concept, see F.Walla, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 2, note 48 *et seq.*
[22] See also Preamble para.15 draft Market Abuse Directive.
[23] The question is already the subject of intense debate with respect to the Market Abuse Directive. For full harmonisation, see Th.Möllers, 'Europäische Methoden- und Gesetzgebungslehre im Kapitalmarktrecht, Vollharmonisierung, Generalklauseln und soft law im Rahmen des Lamfalussy-Verfahrens als Mittel zur Etablierung von Standards' *ZEuP* 2008, 480, 499; for minimum harmonisation, see N.Moloney, *EC Securities Regulation*, 2nd edn., (2008), p. 35.
[24] See Art. 26 (2) draft Market Abuse Regulation.
[25] See F.Walla, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 2, note 49.
[26] See Explanatory Memorandum of the Commission to the adoption of a draft Market Abuse Regulation, p. 3.
[27] See Preamble para. 3 ('uniform rules'), para. 4 ('uniform framework'), and para. 5 ('uniform conditions' or 'the same rules') draft Market Abuse Regulation.
[28] See Preamble para. 4 draft Market Abuse Regulation.

In the end, there is no general degree of harmonisation but each area of regulation has to be examined separately.[29] The fact that full harmonisation only prevents stricter regulation must be taken into account. Whether or not a Member State's regulation is stricter can only be clarified by the European Court of Justice (ECJ) in interpreting the Market Abuse Regulation. Difficult questions are raised: Will the level of regulation in the European framework proposal remain unaffected by supplemental national provisions? The sorts of provisions that might be affected include the German prohibition on disclosure pursuant to section 15(2) sentence 1 of the Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG),[30] the special liability for damages pursuant to sections 37b and 37c WpHG in Germany, or under Section 90A in conjunction with schedule 10a of the Financial Services and Markets Act 2000 (FSMA) in the United Kingdom, or general liability in tort law.[31] To what extent may the national legislature make substantiating provisions? In areas where the European proposal delegates regulation of individual elements or aspects to the Commission or ESMA,[32] this will raise additional jurisdictional issues.[33]

3. Summary

The proposals submitted undoubtedly aim towards a far-reaching Europeanisation of capital markets law. The framework proposal is to be expanded by numerous substantiating legal instruments by the Commission and ESMA, probably also in the form of regulations.[34] Prohibitions on insider dealing and market manipulation and the disclosure requirements would have to be interpreted only on the basis of principles developed by the European Court of Justice (ECJ),[35] and would present new theoretical challenges. These are derived from the specific conception of European proposals to determine regulatory aims,[36] which will open the way up for a teleological interpretation. Besides, the terms in the proposals need to be interpreted at a purely European level – a new challenge for legal practice. There is also the question of the relevance of the guidelines and recommendations drawn up by ESMA[37] for interpretation purposes.[38] In the opinion of the German Federal Administrative Court (*Bundesverwaltungsgericht* – BVerwG), an earlier paper produced by the CESR reflected a joint interpretation by authorities. Further discussions will clarify whether the authorities' in-

[29] With respect to the Market Abuse Directive, see L.Klöhn, 'Die Regelung selektiver Informationsweitergabe gem. § 15 I 4 und 5 WpHG – eine Belastungsprobe' *WM* 2010, 1869, 1879 following the Opinion of the Advocate General Kokott in Case C-45/08, *Spector Photo Group* (2009), 0. This seems to be also the approach taken by the Commission; see Commission Staff Working Paper Impact Assessment, 20 October 2011, SEC(2011) 1217 final, p. 69.

[30] See section V.3 below.

[31] For more on this issue, see below, section VII.1.

[32] See section II.1.

[33] See also Commission Staff Working Paper Impact Assessment, 20 October 2011, SEC(2011) 1217 final, p. 68 *et seqq.*

[34] See Commission Staff Working Paper Impact Assessment, 20 October 2011, SEC(2011) 1217 final, p. 70.

[35] For these principles, see K.Langenbucher, in K.Langenbucher, *Europarechtliche Bezüge des Privatrechts*, 2nd edn. (2008), Section 1.

[36] See Art. 1 draft Market Abuse Regulation: Ensuring the integrity of financial markets and enhancing investor protection and confidence.

[37] These guidelines are published under Level 3 of the Lamfalussy process pursuant to Art. 16 ESMA Regulation. The CESR has already drawn up several other guidelines in the past. See F.Walla, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 2, note 40 *et seq.*

[38] See R.Veil, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 2, note 118.

terpretation can really claim the assumption of correctness as argued by the BVerwG.[39]

From the legal policy aspect, it makes sense for capital markets law to be further unified at European level by legislation made in the form of regulations. In the past, many Member States have transposed the provisions of the Market Abuse Directive one-to-one. Some have also retained some of their 'old' law. For example, insider dealing in the United Kingdom is covered by five different legislative provisions.[40] Other Member States, such as Germany, have adopted provisions with different wording; these provisions raise questions regarding the conformity of the transposed provisions with European law. The disparate legal landscape leads to legal uncertainty and results in unnecessary costs for legal advice. In this respect, the draft Regulation would be an improvement. The limits are exposed in the area of criminal law: pursuant to Article 83 (2) TFEU, minimum requirements for the determination of criminal offences and sanctions may only be implemented in the form of directives.[41]

III. Application of the proposed Market Abuse Regulation

1. Inclusion of alternative trading systems and over-the-counter derivatives transactions

The draft Regulation represents a massive extension of the application of market abuse rules.[42] It governs not just financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made[43]; it also includes financial instruments only traded on a multilateral trading facility (MTF) or on an organised trading facility (OTF).[44] In particular, this includes the unofficial trading not covered by the Market Abuse Directive,[45] including over-the-counter trading (OTC trading).[46] The Commission also wishes to prohibit insider dealing for exclusively over-the-counter transactions in derivatives[47], and extend the prohibition on market manipulation to other acts with respect to the specified financial instruments.[48]

This expansion is a central component of the new regime. It builds on the acknowledgement that the competition between the different trading platforms and systems intended by the Markets in Financial Instruments Directive (MiFID)[49] has come into

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[39] See BVerwG *ZIP* 2011, 1313, 1316 (with respect to 'Frequently asked questions regarding Prospectuses: Common positions agreed by CESR Members', 12th updated version - November 2010 - Ref. CESR/10-1337).

[40] For an extensive analysis, see R.Veil and M.Wundenberg, *Englisches Kapitalmarktrecht*, 2010, p. 43 *et seqq.*

[41] There is insufficient space in this paper to investigate whether the strict requirements of Art. 83 (2) TFEU have been met and whether the adoption of the Regulation and the Directive are even permissible pursuant to the principles of subsidiarity and proportionality (Art. 5 (3) and (4) TFEU).

[42] This paper cannot address the new rules governing the trading in greenhouse gas emission allowances and spot commodity contracts.

[43] See Art. 2 (1) (a) draft Market Abuse Regulation (until now Art. 9 subparagraph 1 Market Abuse Directive).

[44] See Art. 2 (1) (b) draft Market Abuse Regulation.

[45] Many Member States have already voluntarily extended the application of the Market Abuse Directive to certain MTFs. See Commission Staff Working Paper Impact Assessment, 20 October 2011, SEC(2011) 1217 final, p. 19.

[46] See Art. 2 (1) (c) draft Market Abuse Regulation (until now Art. 9 subparagraph 1 Market Abuse Directive).

[47] See Art. 2 (2) draft Market Abuse Regulation (until now derivatives were included only in exceptional circumstances under Art. 9 subparagraph 2 Market Abuse Directive).

[48] See Art. 2 (3) (a) draft Market Abuse Regulation.

[49] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive

being, and that in recent years, in conjunction with the new technologies such as high-frequency trading (HFT), this has led to a rapid increase in trading on alternative trading platforms and systems, especially for OTC transactions.[50] In these times of financial crisis, where investor confidence in market integrity is challenged, there are calls for a uniform level of protection for the various trading platforms. The joint application of the market abuse regime and MiFID[51] makes it abundantly clear that the different legal instruments are leading to an emerging uniformity in European capital markets law. The Commission sees the adoption of diverse other legal instruments (mostly regulations) as complementary to the new market abuse rules.[52]

2. Exceptions

The application exceptions seem familiar:[53] buy-back programmes, stabilisation measures and monetary and public debt management activities are also part of the Market Abuse Directive.[54] Yet, the new provisions of the proposals are more detailed and take account of more recent developments, such as the establishment of the European Financial Stability Facility (EFSF). It remains to be seen if or to what extent the Commission would use delegated legal instruments[55] to make changes to the current position. Contrary to the wording of Article 31 of the draft Market Abuse Regulation, the Commission would only be empowered to specify and not to change the requirements in Article 3 (1) and (2) of the draft Market Abuse Regulation, as expressly stated in Article 3 (3) of the draft Market Abuse Regulation.[56] Even if, in the light of the financial crisis, the desire to exercise freedom of policy[57] is understandable, it is questionable whether the blanket exceptions are justified. Market abuse by public bodies appears to be particularly suited to shake investor trust in market integrity.

IV. Prohibition of insider dealing

1. Definition of inside information as cornerstone of insider dealing law

The definition of inside information is the cornerstone of insider dealing law; it is used as a basis for prohibitions and ad hoc disclosure requirements. This explains why the Market Abuse Directive and its Implementing Directive 2003/124/EC define all relevant aspects of the term. The European Commission is taking this as a starting point

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93/22/EEC, Official Journal L 145, 30 April 2004, p. 1 – 44 (the Markets in Financial Instruments Directive – MiFID).

[50] See Explanatory Memorandum of the Commission on the Adoption of a Market Abuse Regulation, p. 7. According to the Commission Staff Working Paper Impact Assessment, 20 October 2011, SEC(2011) 1217 final, p. 12 *et seqq.,* in March 2011 around 48% of equity trading was already taking place on the new trading systems and via OTC transactions; for non-sovereign bonds the off-exchange figure was around 89%. The trading volume not covered by the Market Abuse Directive amounted to around €8.4 billion in 2009.

[51] Further evidence is provided by the extensive references to the new MiFID or the Markets in Financial Instruments Regulation (MiFIR) in the definitions under Art. 5 nos. 1-6, no. 13 and no. 14 draft Market Abuse Regulation. See also Preamble para. 48 draft Market Abuse Regulation with respect to intended identical schedule for applicability of the new regime with the new MiFID.

[52] See Commission Staff Working Paper Impact Assessment, 20 October 2011, SEC(2011) 1217 final, p. 32.

[53] Arts. 3 and 4 draft Market Abuse Regulation. The only new element is the exception for climate policy activities of the EU, Art. 4 (2) draft Market Abuse Regulation that takes into account greenhouse gas emissions allowances under the new market abuse regime.

[54] Arts. 7 and 8 Market Abuse Directive and Regulation 2273/2003/EC.

[55] Pursuant to Art. 3 (3) draft Market Abuse Regulation.

[56] Otherwise, it would make no sense to make detailed specifications at the level of the draft Market Abuse Regulation. Accordingly, Preamble para. 42 draft Market Abuse Regulation includes no indication of authorising changes to these specifications.

[57] See Preamble para.10 draft Market Abuse Regulation.

and seeks to extend the concept. For the first time, it presents five different categories of the definition of inside information, two of which are addressed here.[58]
The first is exactly the same[59] as the legal definition of the current applicable regime.[60] There is to be no change to information indicating a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so qualifying as inside information, provided that the information is sufficiently specific to permit assessment of the possible effects on the price of the financial instrument. In particular, the issue of when there is precise information during a protracted set of facts is an issue that is subject to intense and controversial debate. The high point to date has been the reference of the German Federal Court of Justice (*Bundesgerichtshof* – BGH) to the European Court of Justice (ECJ) in the *DaimlerChrysler/Schrempp* case.[61] The BGH is asking for clarification of two issues: Firstly, can intermediate steps also constitute precise information in this respect? Secondly, the European Court of Justice was asked to clarify whether the terminology of reasonable expectation was an isolated approach to the expectation of occurrence, i.e. requires a predominant expectation ('50 plus x%') or even a high expectation, or if the expectation of occurrence is to be determined in relation to the anticipated effects. Such a *probability/magnitude* approach[62] would mean that for far-reaching effects there would only have to be a very low expectation of occurrence.[63]
The draft Market Abuse Regulation does not address these interpretation issues directly. However, it seeks to extend the definition of inside information to include other information 'which is not generally available to the public' as inside information. The requirements are as follows: Firstly, this information refers to one or more issuers of financial instruments or to one or more financial instruments; and secondly, if it were available to a reasonable investor, the information would be regarded by that person as relevant when deciding the terms on which transactions in the financial instrument should be effected.[64] The last characteristic is based on the definition of price sensitivity.[65] The preamble uses the following as examples: The state of contract negotiations, terms provisionally agreed in contract negotiations, the possibility of the placement of financial instruments, conditions under which financial instruments will be marketed, or provisional terms for the placement of financial instruments.[66]
First of all, the new category would take into account the expansion of the application of the market abuse regime and include information about financial instruments for which there is no price listing, especially derivates only traded over the counter (OTC). Secondly, the Commission wants to waive the characteristic of 'precise' information with the new definition in order to intensify the prohibition of insider dealing. It should now rest only on price sensitivity. The issuer would have no duty to dis-

[58] There is no space in this paper to address the definitions for derivatives on commodities, emissions certificates and front running (see Art. 6 (1) (b), (c) and (d) draft Market Abuse Regulation).
[59] See Art. 6 (1) (a) in conjunction with (2) and (3) draft Market Abuse Regulation.
[60] See Art. 1 (1) Market Abuse Directive in conjunction with Art. 1 Implementation Directive 2003/124/EC.
[61] BGH *WM* 2011, 14 *et seqq.*
[62] See L.Klöhn, 'Der „gestreckte Geschehensablauf" vor dem EuGH – Zum DaimlerChrysler-Vorlagebeschluss des BGH' *NZG* 2011, 166, 168; R.Veil, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 9, note 35.
[63] This discussion will not be revisited here; please note that the application of the *probability/magnitude*-formula would likely cause substantial problems in practice.
[64] See Art. 6 (1) (e) draft Market Abuse Regulation.
[65] Art. 6 (3) draft Market Abuse Regulation.
[66] Preamble para. 14 draft Market Abuse Regulation.

close[67] as the relevant set of circumstances 'may not be sufficiently precise'.[68] This issue will be addressed later in this paper.[69] With respect to insider prohibitions, we will see that the intensification envisaged by the European Commission carries certain advantages. There has still been no effective progress in combating insider dealing. However, the lawful subsumption under the new definition will cause considerable difficulties, as the proposed definition is so loaded with evaluations that it seems doubtful if it can be adequately determined. This sort of vague definition of information is particularly troublesome as any infringement is to be subject to criminal law sanctions.[70]

2. Prohibited acts

The second chapter of the draft Regulation governs prohibited acts: Firstly, engaging or attempting to engage in insider dealing; secondly, recommending or inducing another person to engage in insider dealing; and thirdly, improperly disclosing inside information.[71] The draft Regulation contains substantiating provisions for each of these acts. It determines the definition of insider dealing in this respect, when there has been an attempt at insider dealing, the requirements for a recommendation and when information is properly disclosed.[72] Provisions also regulate the categories of persons for whom the prohibitions apply, such as primary and secondary insiders.[73] The regulatory mechanism is clumsy. Prohibited acts are partly outlined in an awkward and ambiguous manner. For example, Article 9 (c) of the draft Market Abuse Regulation defines to 'improperly disclose inside information' as a prohibited act. This wording raises the issue of whether this is supposed to constitute an extension of laws to protect inside information. The formulation 'engage in insider dealing' under Article 9 (a) and (b) sounds unfamiliar and permits different interpretations. The types of acts that are prohibited only become apparent upon reading of the previous substantiating provisions of the draft Regulation. Overall the prohibitions vary only slightly from the provisions of the Market Abuse Directive.[74] Therefore, the decisions of the European Court of Justice[75] in relation to the previous cases may still be relevant.

3. Summary

The most important change would be the move towards Europeanisation of insider law. The European legal provisions would have direct effect in the Member States. Stricter regulation by Member States would no longer be permitted for reasons already stated.[76] This positive summary is somewhat diminished, as some of the intended content changes are not convincing. The European Commission wants to increase legal certainty for market participants by a more precise definition of the

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[67] See Art. 12 (3) draft Market Abuse Regulation.
[68] Preamble para. 14 draft Market Abuse Regulation.
[69] See section V.1 below.
[70] Art. 2 no. 2 draft Market Abuse Directive makes reference with respect to inside information to 'information within the meaning of Article 6 of Regulation (EU) No…of the European Parliament and the Council on insider dealing and market manipulation.'
[71] Art. 9 draft Market Abuse Regulation.
[72] See Art. 7 (1) to (4) draft Market Abuse Regulation.
[73] See Art. 7 (5) to (7) draft Market Abuse Regulation.
[74] There is no indication that prohibitions are to be strengthened. For more detail on this, see R.Veil in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 9, note 135. This reflects the authors' point of view from a policy-making perspective that prohibitions should not be strengthened; this is not an interpretation of the draft.
[75] See ECJ case C-384/02, 2005, I-9939 (*Grøngaard/Bang)* on unauthorised transfer; ECJ case C-45/08, 2009, 0 (*Spector Photo Group*) on prohibition of use.
[76] See section II.2 above.

characteristics of inside information,[77] but fails to achieve this goal. In introducing a new category of inside information, the draft Regulation only creates greater legal uncertainty. It would have been a smart move to wait for the decision by the European Court of Justice in the *DaimlerChrysler/Schrempp* case. The law on insider dealing cannot be reliably reconstructed and formulated until a decision has been made in that case.

V. Disclosure of inside information

According to the Market Abuse Directive, an issuer must inform the public as soon as possible of inside information that directly concerns the said issuer. The issuer may under his own responsibility delay disclosure of that information if such disclosure would prejudice the issuer's legitimate interests.[78] The Commission wants to retain this basic system and promote the Europeanisation of the system by upgrading it to directly applicable Regulation law.[79] However, the proposal contains new elements that might contain some explosive challenges to current theory.

1. Duty to disclose

The Commission draft uses a uniform definition of inside information for insider prohibitions and the duty to disclose that was first outlined in the Market Abuse Directive. However, there is now an exception: the newly-created category under Article 6 (1) (e) of the draft Market Abuse Regulation shall not be subject to ad hoc disclosure rules.[80] This necessitates a specific differentiation of this category from the known definition of inside information in the Market Abuse Directive.[81] This is a difficult task, as interpretation of the previous definition already exposed many issues[82] and these may now have to be revisited.

The source of the differentiation is clear: As against the previous definition, the new category should be a mere catch-all provision, and there is an exclusive relationship, with the previous definition of inside information having priority.[83] If we only look at the information with respect to listed financial instruments, the question arises as to which area remains for application of the new definition. The relevance for the decision of a reasonable investor about the terms on which transactions are to be effected is always present if information is likely to have a significant effect on the price of the financial instrument. If so, then the new category varies from the previous definition only with respect to the eschewal of the characterisation of 'precise' information. This also appears to be the view of the Commission.[84]

But, is there any kind of price-sensitive information that is not precise? Should the European Court of Justice, as is widely expected,[85] decide that reasonable expectation is to be interpreted within the meaning of the *probability/magnitude* formula and that intermediate steps of a protracted set of facts may also constitute precise information where they are independently price sensitive, the question is to be answered in the negative. The new category would then be irrelevant which cannot be the

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[77] See Preamble para. 13 draft Market Abuse Regulation.
[78] Art. 6 (1) and (2) Market Abuse Directive.
[79] See Art. 12 (1) and (4) draft Market Abuse Regulation.
[80] Art. 12 (3) draft Market Abuse Regulation.
[81] Now Art. 6 (1) (a) in conjunction with (2) and (3) draft Market Abuse Regulation.
[82] See section IV.1 above.
[83] See Art. 6 (1) (e) draft Market Abuse Regulation: 'information not falling within paragraphs (a), (b), (c) or (d)' and (unnecessarily) Art. 12 (3) draft Market Abuse Regulation: 'information which is only inside information within the meaning of point (e) of paragraph 1 of Article 6.'
[84] See Preamble para. 14 draft Market Abuse Regulation.
[85] See L.Klöhn, 'Der „gestreckte Geschehensablauf" vor dem EuGH – Zum DaimlerChrysler-Vorlagebeschluss des BGH' *NZG* 2011, 166, 171; S.Widder, 'Ad-hoc-Publizität bei gestreckten Sachverhalten – BGH legt Auslegungsfragen dem EuGH vor' *GWR* 2011, 1 *et seqq*.

Commission's intention. So, the Commission seems to have a narrower interpretation of precise information. In its view, there must be room for price-sensitive information which is not precise.

This is where we find the true explosive power of the new proposal. In fact, there are many advantages of a narrower interpretation where this only limits disclosure obligations and no longer the applicability of insider prohibitions. Significantly, the dispute about the precision of information is argued with respect to regulation of insider prohibition: bringing forward disclosure is justified by avoiding the threat of insider dealing.[86] These grounds will have only very limited application under the proposed regime. Due to the new category of inside information, insider dealing would also be prohibited, and would even carry criminal sanctions, if the precise information characteristic were interpreted more narrowly. Only disclosure obligations would be limited. Of course, the disclosure of inside information is much more effective in combating insider dealing than the mere prohibition of insider dealing. Once the information has been disclosed, the insider is deprived not only of the authorisation but also the possibility of carrying out insider dealing. However, the predominant connection between ad hoc disclosure and insider dealing law has been criticised. As the Commission itself argues,[87] there is information which should trigger the insider prohibition but not the obligation to disclose the information. There are strong arguments that ad hoc disclosure should be understood primarily within the context of other transparency rules.[88] If ad hoc disclosure is not addressed in the Transparency Directive[89], which would be an issue worthy of consideration, the Commission's new concept still loosens the connection between the law on insider dealing and ad hoc disclosure. It may therefore be regarded as a step in the right direction and an opportunity for the future to give transparency considerations greater weight during interpretation. The proposal is also eloquent proof that it is not possible to maintain concurrent insider prohibitions and disclosure requirements.

The Commission appears not to be fully aware of the possible consequences of its new proposal for the ad hoc law;[90] it certainly does not intend that the disclosure requirement should be limited in scope. However, its proposal is marked by an implicit and comparatively narrow understanding of the characterisation of precise information. The more transparency-based approach to the interpretation of ad hoc disclosure rules would therefore fully meet the expectations of the Commission.

Another change is to affect the ad hoc disclosure in 'SME growth markets'.[91] The Market Abuse Directive does not contain any provisions in this respect; in many cases it is the relevant stock exchange regulations that contain the disclosure require-

[86] See BGH *WM* 2011, 14, 17 referring to ECJ case C-45/08, 2009, 0 (*Spector Photo Group*).

[87] See Preamble para. 14 draft Market Abuse Regulation.

[88] See P.Koch, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 15, note 6 and note 144 with respect to such regulatory concepts in France, Spain and Sweden; A.Kollmorgen and F.Steinhardt, 'Kommentar zu BGH, Beschluss vom 22.11.2010 – II ZB 7/09' *BB* 2011, 527; see also C.Gunßer, 'Ad-hoc-Veröffentlichungspflicht bei zukunftsbezogenen Sachverhalten' *NZG* 2008, 855, 858.

[89] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 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/EC; Official Journal L 390, 31 December 2004, p. 38 – 57 (the Transparency Directive).

[90] Only Preamble para. 14 draft Market Abuse Regulation addresses the new category with respect to definitions; the Preamble to disclosure requirements does not refer to the new proposal.

[91] According to Art. 5 no. 6 of the draft Market Abuse Regulation, these special multilateral trading facilities (MTFs) for small and medium-sized enterprises (SMEs) are to be defined in the new MiFID.

ments.[92] The Europeanisation of this area would be an enormous step. However, simplified requirements would apply so as not to overwhelm small and medium-sized companies.[93]

2. Delay in disclosure

The Commission draft would still allow issuers to delay disclosure of inside information where required so as not to prejudice their legitimate interests.[94] The definition of legitimate interests of the issuer is critically important in this respect. Until now, the legitimate interests of the issuer have been substantiated in two sets of circumstances and some application examples.[95] Apart from these examples, practice in the Member States diverges greatly and there are diverse issues of interpretation.[96] In this light, it seems strange that the undefined legal term 'legitimate interests' is neither substantiated in the draft Regulation nor is the Commission empowered to substantiate the provision.[97] This applies even more so if one defines the scope of disclosable information more narrowly than under the Market Abuse Directive;[98] this would possibly also involve a narrower interpretation of the meaning of legitimate interests of the issuer.[99] The suggestion implicit in the Commission's working paper that investor protection could suffer if the term were substantiated[100] is not self-evident.

The Commission justifiably seeks to get rid of the option for Member States to require issuers to inform competent authorities without delay about any delay of public disclosure.[101] This informative option was misguided and resulted in a heterogeneous practice across the different Member States.[102] Instead, in future issuers are to be required to inform competent authorities about the delay immediately after the public disclosure.[103]

In addition to the issuer's self-exemption option, there is also provision for a competent authority to permit a delay in public disclosure.[104] This is not a reversal from the

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[92] See P. Koch, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 15, note 25 *et seq.*

[93] See Art. 12 (7) draft Market Abuse Regulation.

[94] Art. 12 (4) draft Market Abuse Regulation.

[95] See Art. 3 (1) Directive 2003/124/EC and CESR, Market Abuse Directive Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market, CESR/06-562b, July 2007, p. 9 *et seq.*

[96] See P. Koch, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 15, note 72 *et seqq.*

[97] Empowerment of ESMA is not possible as it would require 'strategic decisions or policy choices' within the meaning of Art. 10 (1) subparagraph 2, and Art. 15 (1) sentence 2 EMSA Regulation to be made; in particular, this is not just a 'technical means for delaying the public disclosure' that EMSA is required to determine pursuant to Art. 12 (9) draft Market Abuse Regulation.

[98] See section V.1 above.

[99] Under the Market Abuse Directive, 'inside information' has become such a broad term that a great deal of information is disclosable. The German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin) acknowledges the resulting need for an effective tool to preserve issuers' confidentiality interests and interprets the term 'legitimate interests' in a not too restrictive way, Issuer Guidelines (*Emittentenleitfaden*), p. 67.

[100] See Commission Staff Working Paper Impact Assessment, 20 October 2011, SEC(2011) 1217 final, p. 58.

[101] See Art. 6 (2) sentence 2 Market Abuse Directive.

[102] For more on this point, see P. Koch, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 15 note 63 *et seq.*

[103] See Art. 12 (4) subparagraph 2 draft Market Abuse Regulation; also section 15 (3) sentence 4 Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG). It is a matter of debate whether a pre-notification to the competent authority before public disclosure, as demanded by section 15 (4) WpHG, would then be excluded.

[104] See Art. 12 (5) draft Market Abuse Regulation.

issuer's self-exemption system first set up by the Market Abuse Directive.[105] However, the financial crisis has demonstrated that there may be circumstances where it is in the public interest to keep inside information secret, but it may not be in the legitimate individual interests of the issuer. Such instances include authorisation of emergency liquidity support for financial institutions[106] or the results of bank stress tests. In future, the competent authorities may only permit a delay in disclosure of such information of 'systemic importance'. But when is information of 'systemic importance'? Which system is intended here, and where is the threshold for relevance of information? It may have been clarified that disclosure of such information may be delayed, but the Commission's declared intent for the proposals to increase legal certainty[107] is not achieved. It is also extremely questionable whether the relevant competent authorities of the Member States would interpret this politically charged definition in a uniform manner. This is even more awkward as the Commission has not been given further powers to substantiate.[108] One consolation for issuers is that the authorisation from public authorities should also be binding on other third parties.[109] But what if the issuer does not seek authorisation from the competent authority even though the conditions for such an authorisation are present? Could the issuer successfully defend against a claim for damages on the basis of a 'defence of legitimate alternative legal process'?[110] The relationship between the circumstances where the public authority may take action and the circumstances justifying issuer self-exemption is not defined. Where there is information of systemic importance, should a delay only be possible in the future by way of authorisation from public authorities, even if the legitimate interests of the issuer are also endangered?

3. Summary

The further Europeanisation of ad hoc laws makes sense in principle. However, the proposals throw up difficult questions about the extent of the disclosure obligation and about the possibilities of delaying such disclosures. The whole concept may also soon be challenged by the decision of the European Court of Justice in the *DaimlerChrysler/Schrempp* case. The issue of the desired level of harmonisation also applies to ad hoc laws.[111] It is disputed for the Market Abuse Directive.[112] Thus far, only

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[105] Previously, approval from the competent authority had been required in some Member States; see M.Pfüller, in A.Fuchs (Publ.), *Wertpapierhandelsgesetz (WpHG) Kommentar* (2009), Section 15 WpHG, note 342; P. Koch, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 15, note 64.

[106] See Preamble para. 25 draft Market Abuse Regulation.

[107] See Commission Staff Working Paper Impact Assessment, 20.10.2011, SEC(2011) 1217 final, p. 28.

[108] The fact that the new proposal remains in an unpolished editorial state is also demonstrated by Art. 12 (5) subparagraph 3 of the draft Market Abuse Regulation, which refers to the letters (a), (b) and (c) in subparagraph 1 instead of making reference to the indents actually used.

[109] With respect to the previous provisions of the applicable section 15 WpHG, see M.Pfüller, in A.Fuchs (Publ.), *Wertpapierhandelsgesetz (WpHG) Kommentar* (2009), Section 15 WpHG, note 342. As these cases do not concern the issuer's interests, there is a convincing argument for leaving the decision about the delay to the competent authorities. However, national authorities might vary a great deal in their interpretation of the provision and thereby thwart the Commission's standardisation intent; also see Commission Staff Working Paper Impact Assessment, 20.10.2011, SEC(2011) 1217 final, p. 59.

[110] The 'defence of legitimate alternative legal process' means that where there is a legitimate alternative legal process (securing authorisation from public authorities for the delay, e.g.), the issuer would not have disclosed the information any earlier than under its actual wrongful conduct and that the damage suffered by the investor is not based on the contravention; see OLG Stuttgart, *ZIP* 2009, 962 *et seqq.* for another example in the *DaimlerChrysler/Schrempp* case.

[111] See section II.2 above.

the Transparency Directive has promoted a minimum harmonisation approach.[113] However, as the ad hoc disclosure rules are very close to the transparency rules in the Transparency directive, there is a valid argument for minimum harmonisation of this area. Now that the proposal for a reformed Transparency Directive envisages full harmonisation for many regulatory areas[114] and the Commission is seeking to reduce options and discretion of Member States in the area of ad hoc disclosures, full harmonisation might also be anticipated in this area in the future. In particular, the prohibition on disclosure pursuant to section 15 (2) sentence 1 WpHG[115] already discussed, which is to be understood as a special circumstance of a general prohibition on misuse, is a permissible substantiation and not a prohibited stricter rule.

VI. Disclosure of directors' dealings

1. Tighter disclosure deadline and uniform threshold

Directors of issuers are required to disclose their dealings (directors' dealings) pursuant to the Market Abuse Directive. This disclosure requirement is also intended to prevent market abuse and promote transparency.[116] The Commission proposal foresees much more detailed provisions than the Market Abuse Directive;[117] but the changes are relatively moderate. The most important new provision would affect the disclosure itself: directors would not have to inform the relevant competent authorities within five working days,[118] but would themselves have to ensure disclosure of the information within two working days.[119]

As the extended application of the market abuse rules increasingly also affects small and medium-sized enterprises (SMEs) and these companies are hit particularly hard by the bureaucracy costs of disclosure requirements, the threshold is to be raised across Europe to €20,000 per calendar year. This would not only provide relief for small and medium-sized enterprises, but would also represent a significant standardisation of laws,[120] as it is currently left up to Member States to decide whether or not they wish to have a minimum threshold (of only up to €5,000).[121] The question is whether this standardisation is intended to replace the previous expressly minimum harmonisation approach[122] with full harmonisation. The question may only be answered with reference to concrete individual provisions;[123] for example, in future Member States would be denied the opportunity to determine a lower threshold.

2. Strengthening the regime and the need for substantiation

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[112] Full harmonisation is favoured by Th.Möllers, 'Zur „Unverzüglichkeit" einer Ad-hoc-Mitteilung im Kontext nationaler und europäischer Dogmatik' *FS Horn*, 2006, p. 473, 484 *et seqq.*; minimum harmonisation is favoured by L.Klöhn, 'Die Regelung selektiver Informationsweitergabe gem. § 15 I 4 und 5 WpHG – eine Belastungsprobe' *WM* 2010, 1869, 1879 *et seq*. See also P. Koch, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 15, note 15.

[113] See F.Prechtl, *Kapitalmarktrechtliche Beteiligungspublizität* (2010), p. 22; R.Veil, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 16, note 5.

[114] See Art. 3 (2) Transparency Directive in the version of the draft Amendment Directive dated 25 October 2011.

[115] Pursuant to this provision, other information that evidently fail to meet publication requirements, may not be published as an ad hoc disclosure; see also section II.2 above.

[116] See Preamble para. 26 Market Abuse Directive, and Preamble para. 28 draft Market Abuse Regulation; see also R.Veil, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 17, notes 2 and 4.

[117] Art. 14 draft Market Abuse Regulation.

[118] Art. 6 (1) Directive 2004/72/EC.

[119] See Art. 14 (1) draft Market Abuse Regulation.

[120] See Preamble para. 28 draft Market Abuse Regulation.

[121] Art. 6 (2) Directive 2004/72/EC.

[122] See Art. 6 (1) Directive 2004/72/EC; and R.Veil, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 17, note 6.

[123] See section II.2 above.

Legal standardisation is also supposed to be supported by the 'clarification'[124] that transactions undertaken by a portfolio manager exercising discretion and the pledging or lending of financial instruments are also subject to disclosure requirements.[125] From the German point of view, this represents not just a clarification but a real strengthening of the regime.[126] It also calls into question the previously restrictive interpretation with respect to acquisition of shares by way of gift, inheritance or as employment remuneration.[127] It is doubtful whether all these cases constitute a threat of market abuse that needs to be combated by disclosure requirements. On the other hand, it would be helpful to clarify that also other types of transactions may trigger the disclosure requirement and that in this respect the Commission would be authorised to produce a comprehensive specification of such instances by way of delegated legal instruments.[128] The attempt to authorise substantiation of the types of association 'considered to create a close personal association' has also failed.[129] This could be regarded as a refutable assumption; however, in the interests of legal certainty, the dispute about this should be excluded as before[130] in instances such as how close a married couple are in a particular individual case.
Most questions of interpretation, that are often highly technical,[131] are quite properly not clarified by the proposals. We must hope that the Commission will make extensive use of its powers to adopt delegated legislation. As is the intention of the Commission, not until then will the regime by truly Europeanised.[132]

VII. Supervision and sanctions

1. Overview

The declared aim of the European Commission is to ensure that supervision is more effective.[133] The proposal for a Market Abuse Regulation envisages a raft of provisions intended to strengthen the powers of national authorities.[134] Several of its provisions also seek to improve cooperation between the national supervisory instances and in relation to ESMA.[135] This paper cannot address the details of the regulatory areas but merely draws attention to the sanctions.

One of the main aims of the European Commission is to ensure a more deterrent sanctioning regime by way of uniform and stronger sanctions.[136] The draft Market Abuse Regulation is limited to administrative measures and sanctions. Chapter 5 covers administrative measures and sanctions for Member States,[137] who are to be re-

[124] See Preamble para. 28 draft Market Abuse Regulation.
[125] Art. 14 (2) draft Market Abuse Regulation.
[126] See M.Pfüller, in A.Fuchs (Publ.), *Wertpapierhandelsgesetz (WpHG) Kommentar* (2009), Section 15a WpHG, notes 124 and 129, who until now does not regard such transactions as subject to disclosure requirements.
[127] See BaFin, Issuer Guidelines, p. 89.
[128] The regulatory powers of the Commission in Art. 14 (6) draft Market Abuse Regulation refer only to 'the characteristics of a transaction referred to in paragraph 2' and not to paragraph 1.
[129] Art. 14 (6) draft Market Abuse Regulation.
[130] See Art. 1 (2) Directive 2004/72/EC.
[131] On this matter, see R.Veil, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 17, note 10.
[132] See Explanatory Memorandum of the Commission for Adoption of a Market Abuse Regulation, p. 3; and expressly with respect to directors' dealings, see Commission Staff Working Paper Impact Assessment, 20.10.2011, SEC(2011) 1217 final, p. 28.
[133] See for example Preamble para. 29 draft Market Abuse Regulation.
[134] See Art. 17 draft Market Abuse Regulation.
[135] See Arts. 18 and 19 draft Market Abuse Regulation.
[136] Preamble para. 34 draft Market Abuse Regulation: 'equal, strong and deterrent sanctions regimes'.
[137] See Art. 24 (1) draft Market Abuse Regulation: 'Member States shall lay down the rules on administrative measures and sanctions….'

quired to implement the provisions in Articles 25 to 29 in their national legal systems. Therefore, the Regulation would insofar not have direct effect in Member States and only requires Member States to implement the provisions.[138] The proposal for a Directive governing criminal sanctions would also require implementation under national laws.

Below we look at the central new provisions from the two proposals, but do not expand on private enforcement. Neither of the proposals addresses civil liability,[139] although this may have been considered.[140] In particular, the obligation to disclose inside information is an area of regulation suited to civil liability.[141] One explanation for the lack of civil law provisions or corresponding empowerments could be that the European Commission presumes 'social disapproval' of market abuse and does not regard 'compensation mechanisms under civil law'[142] as having dissuasive effect. However, there is no assumption that the Commission wishes thereby to exclude civil liability under national laws even if the draft Regulation is regarded as fully harmonising.[143]

2. Administrative sanctions

The proposal for a Market Abuse Regulation forces Member States into a corner, as it lists twenty-two cases where national competent authorities must be authorised to take action against alleged offenders.[144] The individual administrative measures and sanctions are also listed in detail.[145] These range from orders to prohibit actions, to fines and pecuniary sanctions on profits. It even prescribes the circumstances that authorities must take into account in determining the type of administrative measures and sanctions.[146] These provisions are due to the fact that, until now, the competent

[138] The wording of Art. 25 ('This Article shall apply in all the following circumstances: …') and Art. 26 ('competent authorities shall, in conformity with national law, have the power to…') of the draft Market Abuse Regulation seems to imply that the provisions should have direct effect like the other parts of the draft Market Abuse Regulation. According to Art. 24 (1) draft Market Abuse Regulation, however, it is more convincing to interpret the provisions as a obligation for national legislatures to introduce such rules.

[139] There are also no statements about the issue decisive under German tort law of whether certain provisions are designed to serve the protection of investors' interests. The issue of if, and on the basis of which criteria, the protective legal characteristics of European prescriptions and prohibitions may be determined is a theoretical and as yet fully uncertain issue.

[140] However, from a legal policy point of view, the reluctance to set up European regulation of private enforcement is to be welcomed. It would be preferable if this level could be left to competition between legal systems. See R.Veil and F.Walla, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 7, note 24.

[141] For this reason, special liability provisions have been in force in Germany since 2002 and in the United Kingdom since 2010 to deal with failure to disclose inside information; see section II.2 above. Also see P.Koch, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 15, notes 107 *et seqq,* note 123.

[142] See Explanatory Memorandum of the Commission to draft Market Abuse Directive, p. 3 *et seq.*

[143] Firstly, it is questionable whether civil law liability represents a stronger regulation of the same regulatory area or is not even included in the proposal. On the other hand, the fact that the proposal expressly permits stronger administrative and criminal sanctions under national laws indicates that civil law liability is to be retained. See section II.2 above.

[144] See Art. 25 draft Market Abuse Regulation.

[145] See Art. 26 draft Market Abuse Regulation; the proposal contains an editorial error, as it refers to 'a breach referred to in paragraph 1', whereas it should have referred to 'pursuant to Article 25'.

[146] See Art. 27 (1) draft Market Abuse Regulation.

authorities have varied greatly in their use of sanction powers. The European legal provisions and the ESMA Guidelines to be drawn up[147] aim to unify law and practice.

In many countries, sanctions under administrative law will need to be made much stronger in certain areas. Two examples illustrate this point. German administrative law does not allow pecuniary sanctions of up to twice the amount of profits gained or, in respect of a legal person, administrative pecuniary sanctions of up to 10% of its total annual turnover.[148] Furthermore, competent authorities must publish all administrative measures and sanctions.[149] They are only excused from this requirement if such publication would seriously jeopardise the stability of financial markets. Such a 'naming and shaming' is already standard in Italy, France, Sweden and the United Kingdom,[150] but not yet in Germany. If the Regulation becomes law, this situation will change and a possible disproportionate damage for the responsible party may only lead to anonymisation.[151]

3. Criminal sanctions

If one considers that none of the four capital markets framework directives contains provisions to cover the introduction of criminal penalties, the draft Directive on criminal sanctions is in itself quite noteworthy. The European Commission explained in clear language that it is concerned with the 'social disapproval' of actions and that it hopes that use of the criminal law will improve deterrence.[152] Member States are requested to introduce criminal sanctions with respect to the 'most serious market abuse offences'.[153] Only intentional conduct is to be subject to criminal sanctions.[154]

The greatest shock is the demand that Member States should make sure that legal persons may also be held liable for offences.[155] This regulatory power of Member States is not new to European legislation proposals.[156] However, in some Member States, particularly Germany, the criminalisation of legal persons does not form part of traditional criminal legal theory. These countries traditionally reject or are sceptical towards such criminalisation. Legal persons only acquire legal capacity through their executive bodies and cannot therefore commit a criminal offence.[157]

Recently, there has been increasing criticism and calls for the introduction of criminal responsibility of companies.[158] The proposals for criminal responsibility for transactions of representatives of a company and organisational deficiencies developed dur-

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[147] See Art. 27 (2) draft Market Abuse Regulation: Guidelines Addressed to Competent Authorities on Types of Administrative Measures and Sanctions and Level of Fines.
[148] See Art. 26 (1) (m) draft Market Abuse Regulation.
[149] See Art. 26 (3) draft Market Abuse Regulation.
[150] See practices in Italy, France, Sweden and the United Kingdom; R.Veil and F.Walla, in R.Veil (Publ.) et al., *Europäisches Kapitalmarktrecht* (2011), Section 7, note 10 *et seqq.*
[151] Member States must also ensure that the affected parties have legal protection against possible measures by the competent authority. See Art. 28 draft Market Abuse Regulation.
[152] See Explanatory Memorandum of the Commission to the draft Market Abuse Directive, p. 4.
[153] See Art. 1 (1) draft Market Abuse Directive.
[154] See Arts. 3 and 4 draft Market Abuse Directive.
[155] See Art. 7 draft Market Abuse Directive.
[156] For comparable regulatory powers, see C.Kirch-Heim, *Sanktionen gegen Unternehmen* (2007), p. 106 *et seqq.*
[157] H.Jeschek, *Lehrbuch des Strafrechts, A.T.,* 4th edn. (1988), Section 23 V.1.; also H.Otto, *Die Strafbarkeit von Unternehmen und Verbänden* (1993), p. 22; Lewisch and Parker argue that the Austrian legal system rejects such criminalization, see P.Lewisch and J.Parker, *Strafbarkeit der juristischen Person (*2001), *passim*.
[158] See C.Kirch-Heim, *Sanktionen gegen Unternehmen (*2007), p. 236 *et seqq.;* S.Kindler, *Das Unternehmen als haftender Täter* (2007), p. 274 *et seqq.;* C.Kohlhoff, *Kartellstrafrecht und Kollektivstrafe (*2003), p. 289 *et seqq.*

ing the discussion[159] are reflected in the draft Directive on criminal sanctions for insider dealing and market manipulation.[160] But is it really necessary to declare legal persons criminally responsible in all Member States in order to prevent market abuse? The European Commission fails to address this issue in the Explanatory Memorandum to the draft Directive. The preamble contains only stereotyped statements.[161] The vehement expansion of administrative sanctions gives rise to further scepticism. Academics and practitioners of criminal law might also examine the draft proposals in order to share their specific know how and competences.

VIII. Summary

The proposals to reform market abuse are working towards Europeanisation of the regime. The Commission's declared aim is make European financial markets much more attractive for cross-border issuers and investors, including from countries outside the European Union.[162] At its greatest, the objective requirements of the prohibitions and duties would be harmonised at a European level. The prohibitions of insider dealing and obligations to disclose inside information and directors' dealings considered in this paper would apply for the first time with direct effect in all Member States of the European Union. There would be a uniform regulatory regime. The supervision and sanctions would also be applied uniformly throughout the EU, although the legal basis would still be found in national laws. Supervision of the markets would still be entrusted to national competent authorities. However, the proposed European provisions are so detailed that the legal instruments would be largely identical.

This Europeanisation would signal a new era for capital markets regulation. If one considers that other areas are also covered by regulations, then a large part of capital markets law – estimated at 70% – would be directly applicable European law.[163] The areas of regulation divided between four different framework acts would be more closely integrated with one another and would represent the first steps towards codification. For the first time, it would be possible to have systematic approach to European capital markets law.

Another aim is the strengthening of regulation, supervision and sanctions. The proposals contain some clever new provisions. It seems that one of the most important is the extension of applicability to alternative trading platforms and systems. It also makes sense to strengthen administrative sanctions as a method of deterrence. Other proposals are not so convincing. The redefinition of inside information, which throws up difficult and unnecessary boundary issues, seems questionable. The Commission should explain why criminal sanctions against companies are really necessary to prevent market abuse and these matters should be debated by the European Parliament.

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[159] See C.Kirch-Heim, *Sanktionen gegen Unternehmen* (2007), p. 237 *et seq.*

[160] See Art. 7 (1) draft Market Abuse Directive with respect to responsibility of legal persons for representational acts and Art. 7 (2) draft Market Abuse Directive with respect to responsibility of legal persons for organisational deficiencies.

[161] See Preamble para. 14 draft Market Abuse Directive.

[162] See Commission Staff Working Paper Impact Assessment, 20.10.2011, SEC(2011) 1217 final, p. 72.

[163] Prospectus law is found partly in one Regulation. Ratings agencies are regulated by a Regulation. Short selling will also be included in a Regulation from 2012. And finally: the legal basis for ESMA is also included in a regulation.