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Spector Photo Group NV: Towards a common view on insider dealing?

On 10 September 2009, Advocate General Kokott issued her opinion in the case of *Spector Photo Group NV v Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA)* (case C-45/08). Having considered the interpretation of the insider dealing restriction in Article 2 of the Market Abuse Directive (2003/6/EC) ("MAD"), she concluded that, as a general rule, possessing inside information which a person knows or ought to know is inside information and acquiring or disposing of financial instruments to which the information relates is sufficient to constitute insider dealing – there is no requirement of intent to use the information. However, at the same time, the Advocate General acknowledged that certain exceptions exist to this general rule.

If the European Court of Justice ("ECJ") follows the Advocate General's opinion, the Member States and the European regulatory authorities may be forced to find a common view on insider dealing. Belgium may find that its current insider dealing legislation is too stringent, while the regulatory authorities of other Member States may find it significantly easier to take enforcement action for insider dealing.

Key Issues

European Court of Justice may decide that there is no requirement to show intent for insider dealing and that the Market Abuse Directive is a maximum harmonisation directive

The Member States and the European regulatory authorities may be forced to find a common view on insider dealing

Background

Spector Photo Group NV ("**Spector**") is publicly traded on Euronext Brussels. On 21 May 2003 Spector announced that it would purchase shares to fulfil its obligations under a stock option plan and, from 28 May 2003 to 30 August 2003 it purchased 27,773 shares in six separate contracts. In particular, on 13 August 2003, Spector purchased approximately 18,000 shares. The orders were placed by Mr Van Raemdonck on behalf of Spector. On 21 August 2003, Spector announced that a subsidiary had signed a letter of intent to acquire the business of a competitor and, on 11 September 2003, Spector announced its results for the first half of 2003.

The Commissie voor het Bank-, Financie- en Assurantiewezen / Commission Bancaire, Financière et des Assurances ("**CBFA**", the Belgian Banking, Finance and Insurance Commission) subsequently investigated the trading and decided that Spector and Mr Van Raemdonck had engaged in insider trading contrary to Belgian law. Spector and Mr Van Raemdonck appealed the decision before the Appeal Court in Brussels ("the **Appeal Court**"), which, *inter alia*, referred to the ECJ the question of interpretation of Article 2 of MAD and whether Article 2 of MAD provided for maximum harmonisation.

The Advocate General has issued her opinion in the case. The opinion sets out the Advocate General's understanding of the applicable law and recommends to the Court how the case ought to be decided. The opinion does not bind the Court, but is seen as being very influential.

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The meaning of 'use'

The predecessor to MAD was directive 89/592/EEC (the "**Insider Dealing Directive**"). This provided that each Member State should prohibit persons who possess insider information by virtue of specified positions from:

> "*taking advantage of that information with full knowledge of the facts by acquiring or disposing of for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which that information relates*".

The use of term "*taking advantage of*" implied a requirement that the inside information influenced the decision to acquire or dispose of securities.

The insider dealing directive was replaced by MAD. MAD provides that each Member State should prohibit persons who possess inside information by virtue of specified circumstances from:

> "*using that information by acquiring or disposing of, or by trying to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates*".

The Appeal Court asked the ECJ to decide whether the mere fact that a person in possession of inside information as set out in MAD, acquires or disposes of, or tries to acquire or dispose of, financial instruments to which that information relates, is sufficient to say that he has used the inside information, or whether it is necessary to show that a deliberate decision was made to trade on the basis of the inside information.

In the opinion of the Advocate General, it is not necessary to show a causal link between possession of the inside information and any decision to acquire or dispose of securities. Accordingly, it is not necessary to show that the person would not have made the acquisition or disposal if he did not have the inside information.

The Advocate General's opinion is that the change in wording from "*taking advantage of*" to "*using*" between the insider dealing directive and MAD supports this conclusion. In particular, she noted that the original proposal for MAD presented by the Commission retained the words "*taking advantage of*" from the insider dealing directive. However, the draft text was amended by replacing the words with "*using*" following a report by Robert Goebbels as rapporteur for the European Parliament Committee on Economic and Monetary Affairs. The report provided the following justification for the change:

> "*The mere use of inside information should be sanctioned in the administrative context, therefore any final or intentional element should be deleted*".

According to the Advocate General, this reasoning supports a broad interpretation of Article 2 of MAD.

Nevertheless, the opinion also acknowledges that certain exceptions exist to this general rule. According to the Advocate General there is no "*use*" of inside information in situations where it is clear from the outset that the inside information cannot have had any influence on the acquisition or disposal. This could be the case if a person acts against the effect that the inside information would be likely to have on the price of the financial instruments (for example, by selling the financial instruments, although their price is expected to go up, because the investor is in immediate need of the proceeds).

Recital 18 to MAD also provides exceptions to the general rule for market-makers and bodies authorised to act as counterparties pursuing their legitimate business and persons authorised to execute orders on behalf of third parties dutifully carrying out those orders.

Additionally, recital 24 acknowledges the possibility that the establishment of Chinese walls within financial institutions can be effective to maintain market integrity. A firm which has such measures in place will be better able to argue that it was not "*using*" the information by acquiring or disposing of securities.

However, for issuers and their employees, if the ECJ adopts the Advocate General's opinion, it would appear to be generally sufficient for a finding of insider dealing if a person: (1) has inside information; (2) knows, or ought to know that he has the inside information; and (3) acquires or disposes of financial instruments to which that information relates.

Maximum harmonisation

The Appeal Court also asked the ECJ to rule on whether the provisions of MAD, and, in particular, Article 2 of MAD, provide for full harmonisation (with the exception of those provisions which explicitly permit Member States some scope in interpreting measures).

The Advocate General's opinion is that Article 2 of MAD is a maximum harmonisation provision. In support of this approach, she again highlights the changes between the insider dealing directive and MAD. Article 6 of the insider dealing directive provided that each Member State may adopt provisions more stringent than those laid down by the directive. MAD contains no equivalent provision. Recital 11 of MAD states that prior to MAD legal requirements varied from one Member State to another, "*leaving economic actors often uncertain over concepts, definitions and enforcement*". In her view this suggests that Article 2 of MAD should be interpreted as providing legal certainty to market participants across Member States. She notes that, on the basis of her interpretation of the term "*using*", Article 2 of MAD provides a far-reaching and effective prohibition against insider dealing, as a result of which, it will only be in exceptional cases that it will be possible to acquire or dispose of financial instruments whilst in possession of inside information relating to them. Therefore, there is no need for a more stringent approach to be taken by Member States.

Comment

Following the implementation of the EU Financial Services Action Plan there are many provisions in financial services law in Member States that reflect the wording in EU directives and regulations. This case starkly highlights the increasing importance that the decisions of the ECJ will have on the interpretation of domestic financial services law.

The case also brings to light the diverging interpretations that the Member States have adopted with regard to the definition of insider dealing. For example, in Belgium, the provision implementing Article 2 of MAD does not require "*use*" of inside information for the administrative sanctions regime to apply. In Germany, the provision implementing Article 2 of MAD does require "*use*" (*Verwendung*) of inside information, which pursuant to the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, "**BaFin**") in its Issuer's Guidelines (*Emittentenleitfaden*), newly published on 4 June 2009, implies that an offender must employ such information for the purposes of buying or selling insider securities. Furthermore, in the UK, the legislation implementing MAD refers to the term "*on the basis of*" rather than "*using*" and the FSA takes the view that it is indicative that a person's behaviour is "*on the basis of*" inside information if the inside information is the reason for, or "*a material influence*" on, the decision to deal.

Interestingly, if the ECJ follows the opinion of the Advocate General in this case, the decision would not reflect any of those interpretations. Belgian insider dealing legislation, which does not allow a general exception to the insider dealing prohibition in situations where it is clear from the outset that the inside information cannot have had any influence on the acquisition or disposal, may prove to be too stringent and may require to be amended. In Germany, where BaFIN currently considers that an offender must employ inside information for the purposes of buying or selling insider securities, the Advocate General's opinion would appear to negate the need for such a purposive test and, if the ECJ's decision is consistent with the opinion, the BaFin may be required to change its interpretation. Furthermore, legislation which implemented MAD in the UK may also have to be amended, with the consequence that the evidential burden on the FSA for proving insider dealing would be reduced.