Market abuse regulation and market abuse directive: happy markets without happy investors?*

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European market abuse legislation (Regulation No 596/2014 and Directive 2014/57/EU) focuses on administrative sanctions, and since 2016 has made criminal sanctions mandatory for at least the most serious offences. Although the legislation aims to improve investor confidence, it is silent on investor protection, and unclear on the reparation of investor losses. In the present paper, civilist and criminologist arguments are presented on this issue.

We identify the different functions of compensation, and we consider the feasibility of attributing a punitive character to compensation itself or to an additional civil penalty, to prevent multiple court proceedings. Similarly, investors should be able to pursue their interests in market abuse criminal proceedings, and therefore an institution within the criminal procedure is needed regarding the return of confiscated property to injured investors.

We highlight the difficulties arising from calculating investor losses and evaluate proposed methods for calculating loss on either the difference in the share price at various time stages or on the effect exerted on the decision taken by the investor. Comparative observations are made in relation to United States law, from the perspective of both civil and criminal law. Regarding the latter, conditions for the application of the European Directive are compared with the American doctrine about the crime of securities fraud, which is in no way similar to the continental notion about fraud offences. We further examine whether the general pre-existing legal framework is sufficient to deal with market abuse.

I. Introduction

In this paper, we are interested in the legal framework for market abuse. We address the issue of whether the existing statutes should be considered sufficient or if further measures should be taken in order to achieve the objectives set up by both national and European Union legislators. We aim to prove that even if the current legislative provisions seem to be more complete than the preceding ones, there is still place for improvement. A critical approach is adopted relating to investor protection, as it seems to be currently insufficient.

This study is divided into two parts: the first part (under II.) focuses on the civil claims of investors, while the second part (under III.) examines investor protection issues from the point of view of criminal law. As a chosen methodology, we independently present the issues of each branch of law that we are dealing with. This methodology for developing legal reasoning was deemed appropriate to better highlight the divergent approaches advocated between civilists and criminologists, as well as between different national legal orders. For example, the differences seen between the German and French legal systems as to whether investors are protected by capital market legislation are characteristic of the contrasting solutions observed in various legal systems.

First, we present the legal framework surrounding market abuse. In the European Union, the first directive, Council Directive 89/592/EEC, only regulated insider trading, but was succeeded by Directive 2002/3/EC, which additionally was concerned with the manipulation of information. Both directives provided for administrative sanctions, where the national legislators could choose whether to impose criminal sanctions. In contrast, even if the current Market Abuse Regulation (MAR), Regulation (EU) No 596/2014, is restricted to an administrative sanction, Directive 2014/57/EU (Market Abuse Directive – MAD)[1] imposes member states to establish criminal sanctions against aggravated forms of market abuse. The act of concern is insider trading, or the unlawful disclosure of inside information and market manipulation.[2] Insider trading arises where a person possesses and uses inside information by directly or indirectly acquiring or disposing of financial instruments to which that information relates, either for their own benefit or for the benefit of a third party. Of note, insider dealing can also occur when an order for a financial instrument is placed before the person concerned possessed the inside information, where the inside information is used to cancel or amend an order to which the information relates.[3] Public disclosure of inside information by an issuer of securities is imposed by Art. 17 of the MAR. Alternatively, market manipulation relates to activities and behaviours that are

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[1] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive).

[2] Preamble to Regulation (EU) No. 596/2014 of the European Parliament and the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, recital 7. Art. 8, 10 and 12.

[3] Art. 8 MAR.

likely to lead to false or misleading signals as to the supply, demand, or price of a financial instrument, such as entering into a transaction or placing an order to trade. Market manipulation also occurs when a person undertakes an activity or behaviour which affects or is likely to affect the price of one or several financial instruments. Providing and transmitting false or misleading information or inputs in relation to a benchmark, and disseminating information through the media are also included in the definition of market manipulation provided by Art. 12 of the MAR.

While it was intended that the member states would uniformly apply this legal framework, the required legal certainty of investor protection has not been achieved. Before examining the conditions under which investor protection is provided, we first consider the differences that exist between behaviours that fall within the scope of EU law, and behaviours that can lead to civil damages. Subsequently, we will analyse comparative law issues, in particular focusing on US law.

II. Civil law claims and market abuse regulation

1. Recognising a right to investor compensation: is there any place for a punitive function?

Under civil laws, such as French and Greek Law, the victim should demonstrate the commission of a fault at the origin of his damage and the existence of a causality that makes it possible to link the damage to this fault. For example, in French Law Art. 1240 of Civil Code establishes a principle of liability for fault without making any distinction based on the interests protected.[4] The simple violation of duties imposed by mandatory provisions constitutes a civil fault which any person can avail himself of without it being necessary to analyse the objective of the text concerned. In Greek Law, when the rule does not confer explicitly a right to a person, the legal interest of the injured party should be envisaged in the scope of the prohibition provided by the applicable legal rule. That means that the fact that an act is unlawful is not enough per se if the protection of the person that sustained damage was not intended by the legislator. Despite these provisions, Greek case law suffices to detect illegality in the violation of the provisions on market abuse.[5]

The idea that norms ensure specific protection of certain interests, and that the violation of a norm only allows for the reparation of the interests protected, is borrowed from Acquilian relativity (lex acquilia). This theory has been developed particularly in Germany, under the name “Schutzzweck der Norm”.[6] Additionally, Acquilian relativity is also somewhat reflected in French law. For example, Art. 2 of the Code of Criminal Procedure only allows victims that the law intended to protect to pursue action in criminal court. Specifically, an offence that concerns only the general interest cannot serve as the basis for a civil action by a victim. The requirement of a direct causal link between the offence and the damage suffered by a person in order to bring civil action to a criminal court could be viewed as a minor intrusion of Acquilian relativity.[7] The same idea is taken up by the Draft Common Frame of Reference (DCFR) which refers to the notion of “legally relevant damage”.[8] However, we could remark that Aquilian relativity should only apply in legal systems based on special liability cases, such as that of Germany or Anglo-American law. Because in legal systems like that of Greece, when a special provision does not seek to protect a particular interest, the protection of this interest can still be achieved by general liability clauses. The fault also lies in the breach of the general duty of prudence or diligence.[9] Alternatively, France does not draw on Aquilian relativity as it does not have norms protecting particular interests. In terms of market abuse, both French[10] and Greek[11] doctrines have remarked that prohibited behaviour constitutes a derogation of a diligent and reasonable person’s behaviour.[12] We remark that insider trading and market manipulation do not correspond to standard behaviour, but it is unclear if the failure to disclose information (Art. 17 MAR) corre-

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[4] *G. Viney*, in: Le droit privé français à la fin du XXe siècle, Études offertes à Pierre Catala, 2001, p. 555.

[5] Greek Supreme Court no. 1093/2008 = Commercial Law Review (ΕΕμπΔ) 2009, 375, commented by *Alexandropoulou/Vervessos*; Greek Supreme Court no. 1491/2005 = Commercial Law Review (ΕΕμπΔ) 2006, 394; Court of First Instance of Athens no. 3904/2015 (db. Isocrates); Court of First Instance of Athens no. 2231/2015 = Armenopoulos 2005, 416, commented by *Plagakos*. Cf. *Sotiropoulos*, Journal of Business and Corporate Law (ΔΕΕ) 2018, 744. Cf. Greek Supreme Court no. 976/2018 = Journal of Business and Corporate Law (ΔΕΕ) 6/2018, 730: “The (culpable) failure of the liable person to submit a public offer to all minority shareholders for the acquisition of their common shares, in case of acquisition of control or strengthening of control in the company, in violation of Article 7 of the Law 3461/2006, constitutes an unlawful omission, since his relevant obligation is provided for, directly and explicitly, in the above-mentioned mandatory law provision”.

[6] Cf. *Sonnenberger*, RLDC 2007/40, suppl. no. 2640; *Quézel-Ambrunaz*, Essai sur la causalité en droit de la responsabilité civile, 2010, p. 141.

[7] *Ch. Quézel-Ambrunaz* (fn. 6), p. 145.

[8] Book VI. - 2: 101: Meaning of legally relevant damage (1) “Loss, whether economic or non-economic, or injury is legally relevant damage if:
(a) one of the following rules of this Chapter so provides;
(b) the loss or injury results from a violation of a right otherwise conferred by the law; or
(c) the loss or injury results from a violation of an interest worthy of legal protection”.

[9] Cf. *Quézel-Ambrunaz* (fn. 6), p. 149.

[10] See, e.g., *Spitz*, La réparation des préjudices boursiers, 2010, para. 193, p. 123 and para. 194, p. 125; *Martin/Dezeuze/Bouaziz/Françon*, Les abus de marché, 2013, para. 396, p. 288.

[11] *Liappis*, Apozimiosi ton ependiton kai dikaio tis kefalaiagoras (Investors’ Indemnity and Capital Market Law), 2012, p. 117. Cf. *Kornilakis*, Eidiko Enochiko Dikaio (Obligation Law, Special Part), 2002, p. 485.

[12] Recitals 14 and 26 of the preamble to MAR; Art. 7 § 4 MAR.

sponds to a common behaviour or not. Consequently, should investor protection not fall within the regulation's safeguards, reparation for losses deriving from Art. 17 MAR may not be possible. However, a specific legislation (Transparency Directive 2013/50/EU) exists in EU law for liability in cases where periodic information is not provided and violations of the above obligation for information should be considered as falling within the general liability clause.

There is no uniform answer to whether an investor should be protected under national legislatures. While French and Greek doctrine and jurisprudence are supportive of this protection, this is not the case under German Law. Specifically, German case law excludes investor protection from market abuse legislation and rejects application of the general rule regarding extra-contractual responsibility to investor protection (§ 823 BGB). A residual protection could be provided by § 826 BGB and Art. 919 of the Greek Civil Code when it can be demonstrated that the behaviour was opposed to morality.[13] Therefore, use of inside information or market manipulation could be qualified on these grounds, however under these provisions, it is necessary that the behaviour of the person accused of market abuse is intentional. We consider that this person, in most cases, knows or should have known that this conduct causes damage to other persons acting in the marketplace.

Regarding the interests protected by MAR, the objective is "to protect the integrity of the financial market and to enhance investor confidence, which is based, in turn, on the assurance that investors will be placed on an equal footing and protected from the misuse of inside information".[14] Even if the integrity of the financial markets is the primary purpose of such regulation, it is not the only purpose. For example, the second recital of the preamble to MAR indicates that maintaining public confidence is a parallel pursuit that is cited no less than twelve times in the whole text. Investor confidence is a prerequisite for economic growth and wealth, and therefore investors should be motivated to conduct market transactions and should be assured of the integrity of transactions. Public share offerings have proven beneficial for companies, as they can avoid bank lending and the resulting high fixed interest,[15] however market abuse deprives companies of the possibility to finance their activities via public investors. Still, it is challenging to understand how this confidence in market integrity can be attained if unlawful behaviour is not sufficiently sanctioned.

Insider trading offers an information advantage to the person who possesses the information, and this information asymmetry between traders in a stock market undermines the equal access of investors. Specifically, third parties unaware of such inside information are disadvantaged unfairly.[16] *Bénabent* states: "The random contract is like a fight, since a gain for one party necessarily leads to a loss for another. So, we must start on equal footing, which means that contractors must have the same scope and intensity of uncertainty, and therefore possess the same elements of evaluation".[17] Even if the process of buying or selling shares in a stock market, which differs from the conclusion of a classical contract, is out of the scope of the present paper, it is important to note that everyone involved in this process shares the same level of uncertainty. Similarly, manipulation of information should be criticized, as it not only disrupts the smooth functioning of the law of supply and demand,[18] but also injures the investors who buy or sell a stock during the dissemination of the misleading information.

Financial market law primarily aims at protecting market integrity. However, the institutional orientation of a branch of law should not exclude private interests from its protective field. Greek doctrine has remarked that institutions do not exist in an environment cut off from social and economic reality for the sake of an abstract system, but rather they necessarily exist to promote and protect specific private interests. In other words, the protection of institutions is not an end in itself, but instead a means of preserving the interests that institutions protect.[19] Therefore, it must be recognized individual claims have a right to be protected in order to achieve the effectiveness of the protection provided.[20] In the same sense, it has been observed that stock market rules create a system of rules in good faith, in accordance with principles such as stock market transparency, and access to

[13] See infra II. 4.
[14] Recital 24 MAR.
[15] See e.g. *Michalopoulos*, Katachristiki ekmetalleusi pronomiakon pliroforion sto chrimatisthrio (Abuse of confidential information in the stock market), 1991, p. 22. Cf. *Schotland*, Virginia Law Review 53 (1967), 1425 (1440).
[16] Recital 23 MAR.
[17] *Bénabent*, La chance et le droit, Paris, 1973, p. 42 (translation).
[18] *Avgitidis*, Dikaio tis kefalaiagoras (Capital Market Law), 2014, p. 327.
[19] *Sotiropoulos*, Journal of Business and Corporate Law (ΔΕΕ) 2018, 744 (concerning mandatory public offer by a controlling shareholder of a listed company – directive 2004/25/EC, transferred into Greek Legal System by Law No. 3461/2006). – The Greek Supreme Court no. 976/2018 held that: "It is more correct to accept that methods that disrupt the functioning of the market, provided that they of course meet the requirements of the rules of Articles 914 and 919 of the Civil Code, activate the mechanisms of personal protection for the investor, regardless of any other administrative measures that may be imposed by the supervisory authority pursuant to Article 29 of Law 3461/2006. This is also supported by the need to provide substantial and effective protection, the completeness of which cannot be ensured even by the threat of the above administrative sanctions […]".
[20] The Court of Appeal of Athens observes that in capital markets, ensuring the full effectiveness of the provisions of European Union law can only be achieved by ensuring that individuals are able to bring an action to court (Court of Appeal of Athens no. 5894/2018). See also Greek Supreme Court no. 1093/2008 = Commercial Law Review (ΕΕμπΔ) 2009, 375.

truthful and equitable information.[21] These not only aim to protect the public interest, but also aim to protect the private interest of investors, on which the proper functioning of the stock market ultimately depends.[22] A parallel can also be made with competition law which also primarily aims at protecting the market. However, civil claims by individuals were first accepted by the case law[23] and then explicitly provided for by the European Directive 2014/10/EU.

We consider that damage to investors should be repaired so that both compensation and prevention can be ensured. Prevention cannot be ignored as a justification of repairing damage as a complementary measure to administrative or criminal sanctions since substantive damages could potentially avert future prohibited practices efficiently. The economic analysis of law puts emphasis on this preventive effect, namely that a person inclined to cause damage will change his behaviour depending on whether or not they are held responsible and the victim is compensated. Further, the principal rule establishing responsibility in French and Greek Law limits the obligation to pay damages to situations in which the perpetrator is at fault. In other words, the victim is not entitled to compensation in all cases but only when the perpetrator has committed a fault. The main purpose of this rule was to control and direct the behaviour of the person causing damage but not to guarantee compensation for the victim. Indeed, for an economist, the main goal of civil liability is not the compensation of accident victims, but rather the prevention of the accidents themselves. In the economic analysis of civil liability, the rules of law have an important ex ante function for the reduction of damage. Specifically, economic analysis explains that legal rules encourage the parties that could potentially be involved in an accident, to take precautions to prevent accidents.[24] In the case of abusing privileged information, the effective enforcement of insider trader liability has the effect to discourage him from engaging in such unlawful conduct. Similarly, criminal law aims at this result.[25]

We believe that in addition to the restorative and deterrent functions of tort liability, the award of damages can also have a punitive function. We consider that the notion of penalty is not excluded from the notion of reparation.[26] For example, it can be considered punitive when a decision condemning a company to pay compensation to investors is published. The punitive function is mainly attributed to criminal law, but this does not exclude the pronunciation of a penalty outside of this legal branch.[27] Private sentencing has an incentive effect, since it motivates the victim to act, and to play the role of private prosecutor,[28] and a victim with no personal interest in the action will not act. If the victim doesn't act, the misconduct may go undetected, which in turn means the damaging behaviour will not be sanctioned, and therefore the normative function of the law is not ensured.[29]

Further, we consider that the defence of the general interest does not necessarily or exclusively involve the implementation of criminal law, and that a civil action could reconcile the economic public order with the protection of private interests. French law gives us an example concerning restrictive competition practices where an administrative authority can bring an action before a civil court or intervene in an existing legal process between individuals. Moreover, such authorities can provide the victim and the court with information they collected during preliminary investigations.[30] We can compare this possibility to that of the Securities and Exchange Commission (SEC) in the United States to bring a civil action to the federal courts, facilitating the task of shareholders who intend to defend their interests.[31] This feature would also be of great help to investors in cases of market abuse.

French doctrine also highlights the distinction between the civil penalty, which does not benefit the victim (e.g. a civil fine), and the private penalty, which does benefit the victim (e.g., l' "astreinte" or a penalty clause).[32] We believe

[21] Cf. *Michalopoulos* (fn. 15), p. 34; Cf. *Anderson*, Hofstra Law Review 10 (1982), 341 (375): "In enacting the securities laws, Congress was concerned about investor protection, about full disclosure, about the efficient and fair operation of the securities markets, and about the improvement of ethical standards among professional market participants".

[22] *Mentis*, in: Anonimi etairia kai kefalaiagora, Prostasia tou ependiti [Public limited company and capital market, Investor protection], 2002, p. 103 (111). Cf. *Avgitidis* (fn. 18), p. 372; *Georgakopoulos*, Chrimatistiriako kai trapeziko dikaio [Stock Market and Banking Law], 1999, p. 85.

[23] ECJ, Judgment of 20.9.2001 – C-453/99 (Courage); ECJ, Judgment of 13.7.2006 – C-295/04 (Manfredi).

[24] *Faure*, in: Duffains (ed.), L'analyse économique du droit dans les pays de droit civil, 2002, p. 113 (114).

[25] *Mackaay/Rousseau/Larouche/Parent*, Analyse économique du droit, 3rd ed. 2021, p. 361.

[26] See in that sense, *Ripert*, La règle morale dans les obligations civiles, 1949, p. 344. Contra Cour de cassation – Chambre criminelle, Judgment of 8.2.1977 – 76-91.772 = Bulletin criminel 1977, no. 52.

[27] *Grare*, Recherches sur la cohérence de la responsabilité délictuelle, 2005, p. 87. See also Vocabulaire juridique CORNU, 2011, "Peine", para. 2, p. 745.

[28] *Jauffret-Spinosi*, Petites Affiches 2002 (20.11.2002), p. 8.

[29] *Grare* (fn. 27), p. 105; *Posner*, Economic Analysis of Law, 4th ed. 1992, p. 191.

[30] A civil fine can be imposed. The administrative authority may also request that the defendant be ordered to cease the unlawful activity. This request is useless as far as we are concerned, since the actions in question will be corrected after the rectification of the fraudulent information (Art. L. 442-4 of the French Commercial Code). See *Carval*, La responsabilité civile dans sa fonction de peine privée, 1995, p. 150 et seq.

[31] *François*, in: Reygrobellet/Huet (eds.), La réforme du contentieux boursier, 2016, p. 145 (149); *Carval* (fn. 30), p. 153.

[32] When the debtor fails to fulfil his obligation or is in arrears, this private penalty could be either an "astreinte" which is independent of damages and should be liquidated by a judge (Art. L.131-2, § 1 of French Code of Civil Execution Procedures), or a penalty clause stipulated in a contract by which the parties assess damage on a flat-rate basis in advance,

that while the imposition of additional civil penalties can have a punitive effect, and in this respect they increase deterrence, EU legislators seem to prefer criminal sanctions to prevent market abuse. We propose that in cases where no proceedings have been initiated in criminal or administrative courts, it would be appropriate for civil courts to be able to impose a civil or private penalty, as defined above, to thus achieve the punitive purpose that EU legislators seek to achieve with Directive 2014/57/EU.

However, it is important to avoid the double imposition of punitive penalties, both during criminal and civil proceedings, as this would be in violation of the principle non bis in idem.[33] The European Court of Human Rights (ECHR) holds that this principle applies to two proceedings, one administrative and the other criminal, based on the same behaviour.[34] It is also accepted that the sanctions imposed by independent administrative authorities fall within the criminal law as laid out in Art. 6 § 1 of the European Convention on Human Rights.[35] In fact, in regards to both the perpetrator and the reproached behaviour, the criminal and administrative offences show a proximity resulting in non-admissible duplications in imposed sanctions. In the case of Spector Photo Group, the European Court of Justice (ECJ) drew the States' attention to the fact that "in the light of the nature of the infringements at issue and the degree of severity of the sanctions which may be imposed, such sanctions may, for the purposes of the application of the ECHR, be qualified as criminal sanctions".[36] Nevertheless, in the Åkerberg Fransson case the same Court (ECJ) considered that a Member State can impose, for the same acts of non-compliance, a combination of administrative penalties and criminal penalties.[37] However, the two forms of penalties should not be combined if the administrative penalty is both criminal in nature[38] and has become final.[39] The Court added that the cumulation of penalties is not permitted when the remaining penalties are effective, proportionate and dissuasive.[40] In other words, the principle of effectiveness of EU law could justify the double punishment. As a result, if a Member State chooses to comply with EU law rather than the European Convention on Human Rights, it is possible for the ECHR to issue a condemnation.

In terms of the economic analysis of law, every lawsuit has a social and individual cost and restarting proceedings against an individual previously tried for the same behaviour increases this cost significantly. The general economics of the principle of non bis in idem therefore also makes it possible to save time and resources.[41] However, we recognize that each procedure has its own significant advantages: the ad-

before the compensation to which the non-performance of the contracted obligation will arise (Art. 1229 of French Civil Code).

[33] ECHR, Judgment of 18.3.2015 – 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (Grande Stevens et al. v. Italy), regarding fines imposed by Italian National Companies and Stock Exchange Commission (Consob) and criminal proceedings brought against the applicants, although proceedings were still pending before the Court of Cassation); *Pernazza*, in: Reygrobellet/Huet (eds.), La réforme du contentieux boursier, 2016, p. 101 et seq. Cf. ECHR, Judgment of 8.6.1976 – 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (Engel and others v. the Nederlands).

[34] ECHR, Judgment of 23.10.1995 – 15963/90 (Grandinger v. Austria). Under Art. 4 of Protocol No. 7 of the European Convention on Human Rights: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence of which he or has already been finally acquitted or convicted in accordance with the law and penal procedure of that State".

[35] ECHR, Judgment of 27.8.2002 – 58188/00 (Didier v. France).

[36] ECJ, Judgment of 23.12.2009 – C-45/08 (Spector Photo Group NV v. Commissie voor het Bank-, Financie- en Assurantiewezen – Spector), § 42 = Revue de droit bancaire et financier 3/2010, 80, commented by *Bonneau*. See also Recital (77) MAR: "This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union (Charter)". See further recital 77 MAD: "This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union (the Charter) as recognised in the TEU. Specifically, it should be applied with due respect for […] the right not to be tried or punished twice in criminal proceedings for the same offence (Article 50)".

[37] ECJ, Judgment of 26.2.2013 – C-617/10 (Aklagaren v. Hans Åkerberg Fransson), § 34; *Aubert/Broussy/Cassagnabère*, L'Actualité juridique: Droit administratif (AJDA) 2013, 1154; *Copain*, L'Actualité juridique: Pénal (AJ penal) 2013, 270; *Mayeur-Carpentier/Clément-Wilz/F. Martucci*, Revue française de droit administratif (RFDA) 2013, 1231; *Usunier*, Revue trimestrielle de droit civil (RTDCiv.) 2014, 312; *Ritleng*, Revue trimestrielle de droit européen (RTDEur.) 2013, 267. Art. 50 of the Charter of Fundamental Rights of the European Union provides that: "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law".

[38] According to ECJ, Judgment of 26.2.2013 – C-617/10 (Aklagaren v. Hans Åkerberg Fransson), § 37, the national court should determine the nature of the offence.

[39] ECJ, Judgment of 26.2.2013 – C-617/10 (Aklagaren v. Hans Åkerberg Fransson), § 34. When considering whether a penalty is of a criminal nature, the court cites the previous Bonda Judgment (ECR, Judgment of 5.6.2012 – C-489/10, § 37), which refers to the criteria of the Engel Judgment of the ECHR: i) the legal classification of the act by the national legislator, ii) the nature of the offence, and iii) the nature and the severity of the provided penalty (ECJ, Judgment of 26.2.2013 – C-617/10 [Aklagaren v. Hans Åkerberg Fransson], § 34).

[40] ECJ, Judgment of 26.2.2013 – C-617/10 (Aklagaren v. Hans Åkerberg Fransson), § 36.

[41] *Stasiak*, in: Duffains (ed.), L'analyse économique du droit dans les pays de droit civil, p. 333 (336).

ministrative authority provides significant expertise in administrative proceedings, while criminal proceedings allow for the injured parties to file civil actions before the criminal courts if we accept that their protection falls within the objectives of capital market law.[42] The complementarity of the two systems could be achieved by allowing for choice between the systems, or by redistributing the competence of the administrative authorities and the criminal judge. Moreover, the degree of seriousness of the impugned conduct has also been proposed as a criterion.[43] However, we note that it is not always easy to distinguish between serious and non-serious actions.[44] In this context, we propose an effective solution in terms of economic analysis of the law, where the possibility of bringing an action for damages before civil courts in a process in which the administrative authority also participates (in order to contribute its specialized knowledge) and in which civil penalties can be imposed that will be attributed to investors in addition to restitution of their damages. Under this approach, effective investor protection would be achieved without the need for criminal proceedings owing to the deterrent effect of similar future acts and the punishment of illegal behaviour. Further, a key difference between criminal and private investigations and prosecution, is that the state operates within a fixed budget. In other words, the state pursues offences as long as its budget allows, which may limit it to pursuing only a portion of the cases that deserve to be pursued.[45]

2. Civil law claims and prohibited conduct under MAR

Regarding insider trading in administrative proceedings, the required mental element depends on the behaviour concerned. For example, in case of possessing and using inside information, the persons enumerated in Art. 8 § 4 of MAR are presumed to have used inside information. Specifically, the persons presumed as insiders are the following: (a) being a member of the administrative, management, or supervisory bodies of the issuer or emission allowance market participant; (b) having a holding in the capital of the issuer or emission allowance market participant; (c) having access to the information in question through the exercise of employment, profession, or duties; or (d) being involved in criminal activities. Insider dealing also exists under circumstances other than those referred to above, when any person who possesses inside information knows or ought to know that this is inside information.[46] As a result, the mental element still has to be proved and is not presumed in this latter case of potential insider dealing.

Unlawful conduct is also the act, while in possession of inside information, of recommending or inducting another person to engage in insider dealing.[47] The person in question commits insider dealing when he knows or ought to know that the recommendation or inducement is based on inside information.[48] A distinction must therefore be made between primary holders of inside information and secondary holders induced or recommended to act on insider information. Primary holders are presumed to know that they have used inside information, which has been confirmed by the ECJ in the case Spector.[49] Specifically, the Court clarified that it is a simple presumption that could be overturned, which is now provided for in recital 24 of the preamble to MAR. Therefore, it appears that persons having a relationship with the company as mentioned above are the most significant cases of persons who use inside information. We can thus conclude that in these cases the existence of the mental element is presumed.

The same remarks can be formulated regarding market manipulation. That is to say, in the case of transactions or orders that give, or are likely to give, false or misleading signals (a), or which affects or is likely to affect the price of one or several financial instruments (b), the person is presumed to know that the information was false or misleading. On the other hand, disseminating information through the media (c) or transmitting false or misleading information in relation to a benchmark (d) is not automatically sufficient to affirm the existence of market manipulation.[50] In the latter cases, it needs to be proved that the person who disseminated or transmitted the information had or ought to have the knowledge that this information was false. We also conclude that the principal behaviour of giving misleading signals or affecting the price of financial instruments does not require further examining the existence of any mental element.

As a first conclusion, the presence of the material element, and not of the mental element, should be examined to qualify the most important behaviours sanctioned as insider dealing or market manipulation in an administrative procedure. In a criminal procedure, the person accused should have acted intentionally, which can be confirmed in most cases by analysing the material elements,[51] such as the specific behaviour and other related facts. Consequently, searching for a mental element that can be deduced by objective facts could be considered equivalent to a presumption of the presence of

[42] See infra III. for the opposing view.
[43] *Frichon-Roche*, in: Les enjeux de la pénalisation de la vie économique, 1997, p. 195.
[44] *Stasiak* (fn. 41), p. 346.
[45] *Mackaay/Rousseau/Larouche/Parent* (fn. 25), p. 359; *Carval* (fn. 30), p. 241. See, however, *Landes/Posner*, The Journal of Legal Studies 4 (1975), 36–38. For a discussion see *Black*, North Carolina Law Review (1984), 435 (459, 460).
[46] Art. 8 § 4 MAR.
[47] Art. 8 § 2 MAR.
[48] Art. 8 § 3 MAR.
[49] ECJ, Judgment of 23.12.2009 – C-45/08 (Spector), § 36.
[50] See, e.g., *Feron/Fink*, in: De Meuleneere/Pijcke/Rosiers (eds.), Market abuse – Les abus de marché, p. 32 et seq.
[51] See e.g. Greek Supreme Court no. 1185/2013 (criminal section): "The fact that the appellant entered the stock market suddenly during the critical period of time for no apparent reason or other reason, and made such a large volume of trades leads to the easy conclusion that the conditions were met, objectively and subjectively, for the commission of the offense for which he is accused". Cf. *Prorok*, La responsabilité civile sur les marchés financiers, 2019, p. 39.

this mental element. Moreover, regarding criminal law, the ECJ has clarified that the principle of the presumption of innocence does not preclude presuming an intention on the part of the person who commits insider trading. The Court considers that "the intention of the author of insider dealing can be inferred implicitly from the constituent material elements of that infringement, since that presumption is open to rebuttal and the rights of the defence are guaranteed".[52]

However, slight negligence can still give rise to responsibility of the persons committing market abuse as civil law claims are admitted in cases of an intentional behaviour or negligence. In the case of negligence, the insider dealer did not make any effort to establish the confidentiality of the information, which would be required by the average prudent person, or he did not intend to damage investor property.[53] On the other hand, negligent behaviours cannot, in principle, be sanctioned under criminal law. Therefore, certain conduct that can lead to compensation does not constitute conduct punishable by a criminal penalty. This point is a fundamental difference from US law, which, as we shall see below, requires proof of fraudulent intent to award damages.

Nevertheless, it seems that insider trading and market manipulation cannot be committed without being conscience that inside information is used or that false information is disseminated.[54] In addition to that, investors that have been victims of market abuse will mainly be informed of the unlawful behaviour when a criminal or administrative procedure has taken place. Under current European legal systems, such a procedure seems to be a necessary condition so that an investor would provide sufficient evidential proof to the courts regarding the facts. The French Competition Council (later the Competition Authority) has observed the same: "civil processing only turns out to be effective when the case has been dealt with by the Competition Council beforehand" (transl.).[55]

It should be noted that under Regulation (EU) No 596/2014, attempting to engage in insider trading or market manipulation is also a prohibited behaviour.[56] In other words, this regulation describes a behaviour that can be administratively punished but cannot give rise to a civil claim since there is no damage. Regarding the criminal prosecution of these acts, the Directive 2014/57/EU provides that member states shall take the necessary measures to ensure that the attempt to commit any of the offences referred to as insider dealing or market manipulation is punishable as a criminal offence.[57] As a result, a distinction must be established between acts that concern civil claims and acts that are criminally punishable. Therefore, attempting to commit prohibited acts can only constitute a criminal offence and not a civil offence.

Of further note, there are other conditions that should be fulfilled for a civil claim to be admitted. The MAR and the MAD refer to inside information as information of a precise nature,[58] which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments. On the other hand, every piece of abused information, even if imprecise and of a general nature, could be considered as sufficient since this information influenced the transactions concluded and the prices designated. We admit that an investor[59] will consider price-sensitive information in order to decide his investment strategy, but such information could not be sufficiently precise. The regulation poses a condition that needs to be construed, while it could have opted for a clearer term such as the existence of price-sensitive information.[60] Indeed, all information that can have an influence on the price should be considered as inside information under the regulation since the influenced investor should be a reasonable investor, as US law refers to material information.[61] However, the scope of the regulation is restricted by requiring precise information and, in practice, there could be an effect from this difference existing between engaging in civil liability and commencing an administrative or criminal process.

3. Calculating damages due to investors: a right to full compensation or an amount corresponding to the variation of the market price?

The existence of a causal link between the damaging event and the loss suffered by an investor is significant in determining the amount of compensation. However, establishing such a causal link for insider trading or market manipulation is particularly difficult, as proving that a specific behaviour has caused the purchase or sale of shares is not obvious when a large number of marketplace events can also have influenced these decisions. French case law, as we will see below, often

52 ECJ, Judgment of 23.12.2009 – C-45/08 (Spector), § 44.

53 *Plagakos*, Katachristiki ekmetalleusi empisteutikon pliroforion sto chrimatistirio kai agogi apozimioseos tou zimiothentos ependiti (Abuse of confidential information on the stock market and claim for damages from the injured investor), 2005, p. 682.

54 In that sense, ECJ, Judgment of 23.12.2009 – C-45/08 (Spector), § 36.

55 Decision of 19.9.2000 – 00-D-28; Decision of 30.11.2005 – 05-D-65.

56 Art. 14 and Art. 15 MAR.

57 Art. 6 MAR. See recital 13 MAR: "Due to the adverse effects of attempted insider dealing and attempted market manipulation on the integrity of the financial markets and on investor confidence in those markets, those forms of behaviour should also be punishable as a criminal offence".

58 Art. 7 § 1 MAR; Art. 2 (4) MAD. Cf. *Prorok*, (fn. 51), p. 36 et seq.; *Loyrette*, Le contentieux des abus de marché, 2007, p. 119 et seq.

59 Recitals 14 and 26 MAR; Art. 7 § 4 MAR.

60 Cf. *Hansen*, Nordic and European Company Law Working Paper No. 10-35, LSN Research Paper Series 2012, p. 5.

61 *Black*, North Carolina Law Review (1984), 435 (436): "A fact is material if there is a substantial likelihood that the reasonable investor would consider it important in making an investment decision". See infra II. 4 for US law.

refers to a lost chance, and by this way conceals the problem of causality. Regarding this requirement, Greek case law surprisingly has responded positively in two cases. For example, in one of them the Greek Supreme Court accepted that there is a causal link (adequate causation) when the act or omission of the responsible person – according to the lessons of common experience – was likely, and this could objectively cause the detrimental effect in the normal course of events.[62] The Court of Appeals of Athens considered the stock price that the investor (plaintiff) paid each time was due to the non-disclosure of its "correct" price by the defendant. The important factors were the following: the interval time between false publication and acquisition of shares by the investors, and the share acquisition at the same time or immediately after the misrepresentation.[63] The existence of a causal link was rejected in another affair when an experienced investor had in-depth knowledge in the field of equity transactions.[64] In addition, the Court has considered that verifying a causal link was not possible since the reasons provided by the examined Court of Appeal's decision were not sufficiently precise.[65]

To establish tort liability, the injured party bears the burden of proof. It has been suggested that the difficulties of establishing liability can be overcome by requiring the perpetrator to prove the facts from which arise the causal link between his conduct and the injury, as well as his fault. In other words, this reversal of the burden of proof towards the perpetrator has been supported in terms of meeting the conditions for establishing liability.[66] This view is based on the fact that the injured party is often unable to prove the conditions of the tort, especially when proving the fault of the perpetrator of the act. Proof of fault depends on facts or circumstances that are solely within the sphere of influence of the perpetrator and are often not accessible to the injured party. In these cases, in order for this evidentiary difficulty to avoid the irresponsibility of the party who manifested unlawful conduct, the reversal of the burden of proof allows each of the parties to prove the facts available to him.[67]

The Court of Appeal of Athens has rejected the doctrine of reversal of the burden of proof.[68] Greek jurisprudence has shown flexibility in locating the link between the injurious event and the injury without having to accept the reversal of the burden of proof. Specifically, it considers the damage caused as a result of the market abuse as predictable and decides to repair it. Given the rare cases that have dealt with investor compensation to date,[69] we can generally conclude that Greek case law is positive in accepting the existence of a causal link. Still, this solution does not provide legal certainty as the answer of case law is not always predictable, meaning it is unclear why an experienced investor would not be entitled to compensation.

Once a causal link has been established between the unlawful conduct and the injury suffered by the investor, we are asked to determine the amount of the injury. In general, the damage to be repaired is the difference between the actual situation of the victim and what the situation would be, had the unlawful behaviour not intervened.[70] An investor is harmed only if he has done something different than what he would have done in the absence of the illegality (insider trading/market manipulation). The calculation of the loss does not take into account the price at which the investor would buy or sell, if he also knew the confidential information, as this information is not publicly available.[71] In the case of market manipulation, had the information not been disseminated to the public, the victim would either not have bought the shares at all or would not have bought the shares at that price.[72]

If the misleading information is positive, an investor can be motivated to buy a specific asset or to offer a higher price for acquiring it.[73] If the misleading information is negative, the investor can be motivated to sell his own shares at a reduced price compared to the acquisition price. The damage of the investor in the first example can be calculated by subtracting the price of the asset had the false information not been disseminated from the higher actual price paid.[74] The price of the asset without the misleading information could be thought of as the price before the manifestation of the prohibited behaviour. However, this is only a hypothesis as the price of the asset could change at different moments because

[62] Greek Supreme Court nos. 1491/2005 and 1093/2008.
[63] Court of Appeal of Athens no. 5894/2018.
[64] Court of Appeal of Piraeus no. 555/2005.
[65] Greek Supreme Court no. 1491/2005.
[66] *Mentis* (fn. 22), p. 112; *Liappis* (fn. 11), p. 119.
[67] *Georgiades*, Enochiko dikaio, Geniko meros (Law of Obligations, General Part), 2nd ed. 2015, p. 653 et seq., 587 et seq. In regards to the liability of the producer of defective products, the case law accepted the reversal of the burden of proof in 1977, so that the essential events taking place in the field of production could be proven by the defendant producer: Court of Appeal of Thessaloniki no. 1259/1977 = Armenopoulos 1978, 121.
[68] Court of Appeal of Athens no. 5894/2018.
[69] See in fn. 62–65.
[70] E.g. see the decision of the French Supreme Court: Cour de cassation – Chambre civil (Deuxième chambre), Judgment of 1.4.1963 = Bulletin civil II, no. 309, D. 1963, p. 453, commented by *Moliner*: "the essence of civil liability is to restore as exactly as possible the balance destroyed by the damage and to put the victim back in the situation he would have been in if the harmful act had not occurred". See also Cour de cassation – Chambre civil (Deuxième chambre), Judgment of 28.10.1954 = Semaine Juridique (JCP) 1955 II, 8765, commented by *Savatier*; Cour de cassation – Chambre civil (Deuxième chambre), Judgment of 8.4.1970 = Bulletin civil I, no. 111 = Revue trimestrielle de droit civil (RTDCiv.) 1971, 660, commented by *Gurry*.
[71] *Mentis* (fn. 22), p. 121.
[72] Cf. regarding insider trading *Wang*, Southern California Law Review 54 (1981), 1217 (1240).
[73] See, e.g., *Spitz* (fn. 10), p. 212 et seq.
[74] Cf. *Martin*, La Semaine Juridique – Entreprise et Affaires (JCP E) 2010, 1977.

of other information related to it.[75] Fixing the true value of the asset to the price before the market manipulation occurred excludes the effect that subsequent events may have had on the price. Similarly for negative misleading information, the damage should be the difference between the real value of the asset and the reduced price that this asset had been sold for. However, the real value of the asset is a hypothetical one, since the price known prior to the unlawful behaviour does not correspond to a fixed price that takes into consideration subsequent events.[76] We conclude that calculating the damage in cases of market manipulation is not an easy affair.

French case law draws the same conclusion, namely that "the calculation based on the difference between the price paid and the current value of the investment, which is constantly subject to variations, does not appear to be possible".[77] As for the damage to be repaired, French jurisprudence refers constantly to the loss of chance. The first ruling that "only the damage resulting from the difference in price is certain and results directly from the infringement" in the case Société Générale de fonderie,[78] has only been repeated in one decision.[79] In the case of Gaudriot in 2010,[80] the Supreme Court held that "whoever acquires or keeps securities […] because of inaccurate, imprecise or misleading information […] loses only a chance to invest his capital in another investment or to give up one already made". This solution had already been adopted by the trial judges (in the first and second instance)[81] and was confirmed by the Supreme Court in 2014.[82] In the case of Sidel,[83] the Court of Appeal stated that the damage does not coincide with the amount of loss suffered by the civil parties during the resale of the securities "because of the risk and the hazard inherent in any stock market investment". In the Vivendi Universal Affair,[84] the damage consisted of a loss of opportunity to make more judicious arbitrations than purchasing or retaining the Vivendi Universal share. In general, loss of chance is defined in French case law as "the current and certain disappearance of a favourable eventuality".[85] The case law also refers to this concept when there is a problem proving the causal link between the harmful act and the subsequent damage produced.[86]

Still, what is most surprising is the calculation of investor compensation made by the judges in the first and second instance, which cannot be controlled by the Supreme Court. In some cases,[87] the lost chance is calculated according to the

[75] Cf. *Martin/Dezeuze/Bouaziz/Françon*, Les abus de marché, 2013, p. 283; *Wang*, Southern California Law Review 54 (1981), 1217 (1237).

[76] Cf. *Casper*, in: Schulze (ed.), Compensation of Private Losses, The Evolution of Torts in European Business Law, 2011, p. 91 (102).

[77] Court of Appeal of Paris, Judgment of 14.9.2007 – 2007/01477 (Régina Rubens); *Lenhof*, Lexbase Hebdo Edition Privée Générale 2007, no. 276; *Rontchevsky*, Revue trimestrielle de droit financier (RTDF), 145.

[78] Cour de cassation – Chambre criminelle, Judgment of 15.3.1993 – 92-82.223 (Société générale de fonderie) = Bulletin criminel No. 112 = Revue trimestrielle de droit commercial et de droit économique (RTDCom.) 1994, 148, commented by *Bouzat* = Droit des sociétés, Nov. 1993, p. 15, commented by *Hovasse*; *Bouloc*, Revue des Sociétés 1993, 847; *Jeantin*, Bulletin Joly Bourse 1993, 365.

[79] Cour de cassation – Chambre commerciale et financière, Judgment of 22.11.2005 – 03-20.600 (Pfeiffer v Société Eurodirect Marketing) = Revue trimestrielle de droit commercial et de droit économique (RTDCom.) 2006, 445, commented by *Storck*; *de Vauplane*, Banque & Droit 2006, 25.

[80] Cour de cassation – Chambre commerciale et financière, Judgment of 9.3.2010 – 08-21.547, 08-21.793 (Gaudriot) = Recueil Dalloz 2010, 791, commented by *Lienhard*; *Martin*, La Semaine Juridique – Entreprise et Affaires (JCP E) 2010, 1777; *Schiller*, La Semaine Juridique – Entreprise et Affaires (JCP E) 2010, 1483; *Rontchevsky*, Bulletin Joly Bourse, 2010, 16; *Schmidt*, Bulletin Joly Sociétés, 2010, 537; *Spitz*, Revue trimestrielle de droit financier (RTDF) 2010, 60.

[81] Court of Appeal of Paris, Judgment of 26.9.2003 – 2001/21885 (Flammarion) = Revue trimestrielle de droit commercial et de droit économique (RTDCom.) 2004, 132, commented by *Rontchevsky*; *Dezeuze*, Bulletin Joly Bourse 2004, 43; *id.*, Bulletin Joly Sociétés, 2004, 85. Court of Appeal of Paris, Judgment of 14.9.2007 – 2007/01477 (Régina Rubens); Tribunal correctionnel de Paris, Judgment of 12.9.2006 – 0018992026 (Sidel); *Barbièri*, Bulletin Joly Sociétés 2007, 119; *Dezeuze*, Bulletin Joly Bourse 2007, 37; *Daigre*, Revue des Sociétés 2007, 102. Court of Appeal of Paris, Judgment of 31.10.2008 – 06/009036, (Sidel) = Revue des Sociétés 2009, 121, commented by *Daigre*; *Barbiéri*, Bulletin Joly Bourse 2009, 143; *Dezeuze*, Bulletin Joly Bourse 2009, 28; *Dezeuze*, Revue trimestrielle de droit financier (RTDF) 2008, 137.

[82] Cour de cassation – Chambre commerciale et financière, Judgment of 6.5.2014 – 13-17.632, 13-18.473 (Marrionnaud) = Revue trimestrielle de droit commercial et de droit économique (RTDCom.) 2014, 829, commented by *Rontchevsky*; *Pailler*, Revue de droit bancaire et financier 2014, 156; *Gaudemet*, Bulletin Joly Bourse 2014, 340; *Dezeuze/Trèves*, Revue des sociétés 2014, 579.

[83] Court of Appeal of Paris, Judgment of 31.10.2008 – 06/009036, (Sidel).

[84] Tribunal correctionnel de Paris, Judgment of 21.1.2011 = Bulletin Joly Sociétés 2011, 210, commented by *Barbièri*. In the same sense, Tribunal correctionnel de Paris, Judgment of 12.9.2006 – 0018992026 (Sidel); Court of Appeal of Paris, Judgment of 14.9.2007 – 2007/01477 (Régina Rubens).

[85] Cour de cassation – Chambre civil (Première chambre), Judgment of 21.11.2006 – 05-15.674 = Bulletin civil I, no. 498; Cour de cassation – Chambre criminelle, Judgment of 4.12.1996 – 96-81.163 = Bulletin criminel, no. 445; Cour de cassation – Chambre criminelle, Judgment of 18.3.1975 – 74-92.118 = Bulletin criminel, no. 79.

[86] *Terré/Simler/Lequette/Chénedé*, Droit civil – Les obligations, 12.ed. 2018, § 924, p. 1007.

[87] Court of Appeal of Paris, Judgment of 26.9.2003 – 2001/21885 (Flammarion); Court of Appeal of Paris, Judgment of 19.3.2013 – 2011/06831 (Marrionnaud) = La Semaine Jurid-

change in price when also taking into account the importance of the risk. In other cases, the loss of chance serves to find a flat-rate assessment for the damage. For example, in the Sidel case the judges awarded the plaintiffs a lump-sum for all causes of damage in the amount of 10 euros per action.[88] In all cases, the loss of chance does not result in complete repair of the damage but only the part that has been compensated. In that way, the risk of an investment is not compensated and is therefore assumed by the person deciding to operate in the stock market.

We remark that we could reach the same conclusion for compensation if we accepted that investors are only entitled to compensation for damage caused by unlawful conduct. The loss due to the risk borne by each investor should not be repaired as such a compensation system would make investors irresponsible as they could always make legal claims whenever their stock return predictions failed. In addition, French case law had initially taken into account the risk inherent in the speculative nature of transactions carried out on securities listed on the stock exchange in order to reject the very principle of investor compensation rights.[89] However, we note that the damage caused by unlawful conduct must be wholly compensated. The illegal conduct consists either in spreading false information or in using privileged information; the realization of the risk to which an investor is exposed to has, as a counterpart, the hope of a higher return and not the risk of defective information.

Reimbursement of full loss requires that the investor gain what he would have had if the illegal behaviour had not occurred. This loss can be objectively expressed on the basis of the fluctuation observed in the share price, where the calculation takes into account the purchase price of the share and either the selling price of the share or the price after the information is disclosed. An expert must determine whether the change in the share price is due to the conduct in question or to other factors.[90] If damage is found to be exclusively due to the illegal behaviour, it should be repaired in its entirety. Therefore, the method used by French case law to compensate investors for a missed opportunity must be criticized as it only corresponds to a part of the damage. This method also takes into account the risk inherent in each investment as part of the damage is considered to be due to the dangerous nature of investing. For our part, we consider that buying and selling shares involves risks. However, investor loss in the cases we are considering is not due to the inherent risk of transacting on a stock exchange, but rather is the result of incorrectly published information or unequal use of unpublished information, which may have caused the total value loss of the share. The assessment of any other factors that occurred between the illegal behaviour and the disclosure should be taken into account by experts. However, the price change due to the illegal behaviour in question needs to be fully restored. French case law, which is in favour of restoring only one missed opportunity, arbitrarily determines the amount of the damage. The result is unsatisfactory to the extent that the amount of compensation is not foreseeable, meaning that transaction security is not ensured and a deviation from the principle of full compensation arises.

The fact that we do not know what a particular investor would have done if he had known the information does not justify the solution used in French case law. The market abuse regulation urges us to take into account the behaviour of a reasonable investor.[91] The investor's own behaviour is required in order for the loss to occur, as he himself decides to buy or sell the shares.[92] We can, however, observe that the existence of a causal link between the unlawful conduct and the damage has been accepted even when the will of a third party exists. For example, in the case of lost customers, the will of the customers intervenes and it cannot be determined with certainty why they decided to switch stores at that specific point in time. In fact, regarding acts of unfair competition, it is sufficient that reprehensible conduct increases the risk of damage.[93] It is not necessary to establish that without the conduct, the damage would not have occurred. In this way, correlation is accepted between the receipts of the two companies concerned, or between the fall in the victim's turnover and the act of unfair competition.

We accept that in the case of market abuse, the decision to buy or sell is based on the data available on the market and that it has been influenced by the illegal conduct in question.[94] It is the only method of calculating the damage that allows us to achieve an objective calculation of the damage. If the investor can claim a loss due to the cancellation of another transaction, it is up to him to provide the necessary proof. The same should be accepted if the defendant claims that the investor would have behaved in the same way if he had the same information at his disposal, possibly citing earlier or later investment decisions by the investor. In addition, an investor could ask for what he would have had, if he had not bought the stock. In this case, the compensation should repair not only the inflated price of the stock due to the non-disclosure of the inside information, but also additional losses due to other events, e.g., harm caused to company's reputation, loss of investor confidence in the company, or subsequent events regarding company's activities.[95]

In conclusion, the rule for compensation uses subjective calculation of the damage, or in other words compensation

ique – Entreprise et Affaires (JCP E) 2013, 1315, commented by *Martin*.

[88] Court of Appeal of Paris, Judgment of 31.10.2008 – 06/009036, (Sidel); see for a discussion on this question, e.g., *Charconac*, in: Reygrobellet/Huet (eds.), La réforme du contentieux boursier, 2016, p. 71 et seq., and p. 249 et seq.

[89] *Rontchevsky*, Journal des sociétés 2011, 19.

[90] Cf. for US law: Tucker v. Arthur Anderson & Co, 67 F.R.D. 468 (S.D.N.Y. 1975); *Reder*, The Business Lawyer 31 (1976), 1839 (1847).

[91] See fn. 12.

[92] Cf. *Charconac* (fn. 88), p. 254.

[93] Cour de cassation – Chambre commerciale et financière, Judgment of 29.11.1976 – 75-12.431 = Bulletin civil IV, no. 300.

[94] Cf. US law.

[95] See also *Spitz* (fn. 10), § 377 et seq. (p. 233).

for what the injured party actually suffered. An objective way of the damage can be provided when the perpetrator is a professional, in order to facilitate the method of calculating the damage and its predictability.[96] In the absence of specific regulation as to the liability arising from the examined behaviours, we consider that the objective way of calculating the loss corresponds to the nature of the relations formed during the stock exchange transactions such as impersonal relationships, anonymity, and mass transactions. However, the subjective means of calculating the loss should not be ruled out when it is sufficiently proven by the investor that there is a causal link between the injurious event and the total loss.

Therefore, in regards to the distinction made by the French doctrine between a loss consisting of a change in the share price and a loss suffered by the investor because he was influenced in his decision on a particular investment, we consider, as stated above, that he will be entitled to compensation first on the basis of a change in the share price. However, it is not ruled out that the investor may seek compensation for the damage suffered as a result of his decision to make the loss-making investment, if he can prove another loss. Our position in favour of full compensation is also adopted by competition law, where for example Directive 2014/104/EU provides for a right to full compensation,[97] including the actual loss, the loss of profit, and the payment of interest.

From the point of view of an economic analysis of the law, we observe that it has been argued in economic theory that we must consider the behaviour of a rational person[98] that has all relevant information at his disposal. This model of the investor as a rational agent actually motivates us to calculate the loss suffered based not only on the difference in the share price (e.g., the difference between the price at the time of purchase and at the time of sale), but also on other loss suffered that he can prove, because of his reliance on the share price for taking an investment decision. However, it has been observed that usually the average person will not be able to access all of the relevant information.[99] This view reinforces that calculating an investor's loss due to the influence of inaccurate information should not be the primary way of calculating a loss. In other words, our decisions are not based on all relevant data, as the average person cannot reasonably access them, and the cost of processing this information is disproportionate to its benefit. Investor decisions are not the result of processing all the financial data of the market and therefore the objective approach to calculating the damage suffered by a person due to the fact that he does not have all relevant information at his disposal seems to be more in line with the views expressed in economic theory. We note that Regulation (EU) No 596/2014 chooses the model of a reasonable investor, which we consider corresponds to a rational person as seen above.[100]

The same difficulties are met when damages from inside information must be fixed. As it has been remarked, "there is a loser for each winner, since informed traders' abnormal profits reduce the opposing traders' realized returns dollar for dollar".[101] The ECJ has ruled under Directive 2003/6/EC that "the purpose of the prohibition […] is to ensure equality between the contracting parties in stock-market transactions by preventing one of them who possesses inside information and who is, therefore, in an advantageous position vis-à-vis other investors, from profiting from that information to the detriment of those who are unaware of it".[102]

A person using positive inside information would offer a slightly higher price in order to acquire the targeted asset. Other investors observing both this signal and the resultant increase in stock purchases could be influenced and act in the same way.[103] In that case, the damage sustained is not obvious, since the investors will have conducted a profitable transaction if they bought the asset before the whole true value is reflected in the acquisition price. Even following the divulgence of the information, damage cannot be found because the share price corresponds with the real price. In other words, the insider acted in a way that demonstrates the true value of the market. That is why it has been argued that insider trading is a victimless crime.[104] What is still unfair[105] in this case is that the perpetrator took advantage of non-public information, and therefore his illegal behaviour consists of violating the principle of equality between persons in the same condition.

Should the insider not have acted in that way, another investor could have bought these assets before the rise in the price.[106] So the investor that was obstructed by this behaviour

[96] See, e.g., carrier liability: Convention on the Contract for the International Carriage of Goods by Road (CMR), Geneva, 19 May 1956.

[97] Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Art. 3.

[98] In favour of this model, see *Mackaay/Rousseau/Larouche/Parent* (fn. 25), § 143 (p. 44).

[99] See for a discussion *Duffains/Ferey*, Agir et juger, Comment les économistes pensent le droit, 2010, p. 12 and p. 34.

[100] Recital 14 MAR.

[101] *Seyhum*, Journal of financial economics 16 (1989), 190.

[102] ECJ, Judgment of 23.12.2009 – C-45/08 (Spector), § 48.

[103] See, however, *Schotland*, Virginia Law Review 53 (1967), 1425 (1443). The author states that empirical research suggests the absence of any substantial impact.

[104] *Manne*, Harvard Business Review 44 (1966), 113 et seq.; *Tountopoulos*, European Company and Financial Law Review (ECFR) 2014, 297 (325). See also infra III. 1.

[105] See *Schotland*, Virginia Law Review 53 (1967), 1425 (1439): "Even if we found that unfettered insider trading would bring an economic gain, we might still forgo that gain in order to secure a stock market and intracorporate relationships that satisfy such noneconomic goals as fairness, just rewards and integrity."; *Brudney*, Harvard Law Review 93 (1979), 322 (343–346); *Levmore*, Virginia Law Review 68 (1982), 117 (124 et seq.).

[106] *Wang*, Southern California Law Review 54 (1981), 1217 (1223, 1236).

still sustained damage consisting of the difference of the price prior the disclosure of the privileged information and after dissemination of this information. If the investor bought after the insider trading, he paid more.[107] The objection to this is that an investor may not have bought this asset should the insider trader not acted in this way, which means that only investors who can prove that they have passed orders at the same time as the insider trader can prove they suffered damage when their orders were not executed.[108]

The same reasoning can be followed regarding negative inside information as far as the insider in that case will try to sell the unwanted stocks, which can therefore induce others to sell. The problem is that if the unlawful behaviour was not present in the market, other investors may simply have done nothing. As a result, when the negative information would have become known, shareholders of the concerned asset would suffer all of the damage and selling these shares earlier therefore seems to be profitable for them. It can also be argued that a shareholder could have sold the stock at the available market price before the full price decrease has been produced by the insider. Therefore, this investor can sustain damage because he could not get the whole profit that he would have gained had the insider dealing not taken place. However, proving that the investor intended to sell the stocks at the same time as the illegal behaviour will not be easy, unless an unexecuted order is apparent at that time, or if a sale in the immediate period after the insider dealing can be taken into account.

Concerning the parties influenced by the insider dealing, it can be argued that their damage can be limited when they conclude other transactions with innocent traders in the opposite direction.[109] In other words, a shareholder who bought the stock that was sold due to negative insider information without knowing this fact may further pass his damage to another investor when the stock is sold to another trader. In this sense, the loss becomes diffused and highly diversified in the marketplace.[110] Nevertheless, shareholders who sold a stock impacted by positive insider information, were induced into acting in that way by the increased purchase orders on the market and the slight increase of the stock price. These investors do not have the opportunity to get the full profit from the increase of the price attained after communication of the positive information. In other words, the investors have not fully benefited from a sudden rise of the stock price. However, it is possible that the assets acquired by selling the impacted stocks could lead to another profitable investment, and so the overall damage was limited.[111]

Looking at how this damage has been estimated by different national jurisprudences, France does not have a single case in which damage from insider trading has been admitted. It is worth noting that the principle of repairing damage has been clearly formulated in a case on 11 December 2002,[112] where the Supreme Court admitted that shareholders can suffer personal damage due to insider behaviour. This admission has been approached as inducing an increased morality in marketplaces. It was the first time that repairing investor damage has been considered as included in the scope of the applied legislation, as until that time relevant behaviours were treated as only those regarding general interests. However, the above decision seems to restrict the protection offered to shareholders, as there is no ground for a company to claim damages for a loss in reputation or the increased cost of raising funds following insider trading with negative information.[113]

The acceptance of the possibility of repairing damages to investors should be applauded since it allows for claims, although this development has not been confirmed in practice. In the cases of Sidel and Vivendi, claims for damages based on insider trading were rejected as an influence on the share price was not detected due to the small quantities of shares exchanged. Indeed, the insiders behaved in a way to not provoke the attention of the market, as exchanging small quantities of stock can be unremarkable and therefore permit the insider to conclude a profitable transaction without influencing the rest of the market.

Even regarding market manipulation, the French jurisprudence seems quite conservative and resists admitting claims for damage. In the affair Les Beaux Sites[114], an institutional investor acquired 2 % of the capital of the company, and other investors claimed they were influenced by this behaviour and decided to also buy shares of this company. Then, the company went bankrupt, meaning that this investment caused damages to these influenced shareholders. The Court said that this company was present in a speculative market and that the investment risk was obvious, and therefore there was no possibility to repair the damages.

Greek case law emphasises the fact that investors should be in the financial situation they would be in if the misleading and false information had not been disseminated (Court of Appeal of Athens, no. 5894/2018). The damage to be repaired corresponds to the difference between the total amount

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[107] *Wang*, Southern California Law Review 54 (1981), 1217 (1239); *Schotland*, Virginia Law Review 53 (1967), 1425 (1434).

[108] Cf. *Spitz* (fn. 10), p. 286.

[109] *Fisch*, Iowa Law Review 94 (2009), 811 (844).

[110] See, e.g., *Spitz* (fn. 10), p. 290.

[111] In addition, a diversified portfolio protects investors. See, e.g., *Booth*, Journal of Corporation Law 46 (2021), 319 (333).

[112] Cour de cassation – Chambre criminelle, Judgment of 11.12.2002 – 01-85.176 = Bulletin criminel, no. 224 = Revue des sociétés 2003, 145, commented by *Bouloc*; *Bouloc*, Revue trimestrielle de droit commercial et de droit économique (RTDCom.) 2003, 390; *Rontchevsky*, Revue trimestrielle de droit commercial et de droit économique (RTDCom.) 2003, 336; *Maron/Robert/Veron*, La Semaine Juridique – Édition Générale (JCP G) 2003, 162; *Ducouloux-Favard*, Gazette du Palais 22 (2/2003), 25; *Stasiak*, Bulletin Joly Bourse 3/2003, 149; *Vauplane/Daigre*, Banque & Droit 3-4/2003, 36.

[113] *Cf. Ducouloux-Favard* (fn. 112), 25.

[114] Court of Appeal of Paris, Judgment of 18.2.2002 – 2001/02489 = Bulletin Joly Bourse 9/2002, 451, commented by *Ruet*; Tribunal de Grande Instance, Judgment of 18.9.2000 – 1997/18603.

paid for the purchase of shares and the total amount received from the subsequent sale of all or part of the same shares. In cases where the shares have not been further sold, the calculation of the damage can be based on the difference between the total amount paid and the market price reached when the truth became known. This solution has the disadvantage that the difference in stock price at the time of purchase and at the time of sale may be due in part or full to other factors rather than just the misleading information. The same can be said for the difference in price between the time of acquisition and the time of disclosure of the information, as subsequent events or other information may have contributed significantly to the pricing at the time the corrective information was disclosed.

A supplementary question arises as to whether an investor who does nothing during the period of non-disclosure of the inside or misleading information, and simply conserves his stock in a company, could allege that he suffered damage. Indeed, had the investor known the missing information, he could have decided to act in another way. For example, the investor could have sold the stock in order to avoid a sudden drop in market price and then could have invested in another more rentable stock. However, the recognition of this loss could be contested as hypothetical since it did not actually occur, and we cannot affirm that the investor would have acted in any other way. In fact, this was the first reaction of French case law when the above question arose in 1993.[115] Since then, some progress has been made, for example in the cases of Sidel[116] and Gaudriot,[117] as the French courts ruled in favour of repairing damage sustained by every investor who acquired or retained securities in view of inaccurate, imprecise, or misleading company information. This approach has been rejected in US case law as discussed below. For our part, we consider that this loss should give right to damage recuperation so far as the market-available information has shaped the behaviour of the investor, as investor's active (e.g., to sell securities) or passive (e.g., to retain securities) attitude can be the result of insider trading or misleading information.

We conclude that legal uncertainty exists as to the civil liability deriving from acts of market abuse and the amount of compensation when the causation is not presumed. Greek jurisprudence appears to be positive in admitting the existence of a link between the loss-making behaviour and the damage. French jurisprudence opts for the reparation of a lost chance, and German jurisprudence rejects that the legal framework regarding market abuse aims at investor protection. Consequently, a uniform solution cannot be attained without establishing a presumption of causation. Further, we consider that damage should be wholly compensated to the extent that loss is proven.

[115] Cour de cassation – Chambre criminelle, Judgment of 15.3.1993 – 92-82.223 (Société générale de fonderie).

[116] Court of Appeal of Paris, Judgment of 31.10.2008 – 06/009036, (Sidel).

[117] Cour de cassation – Chambre commerciale et financière, Judgment of 9.3.2010 – 08-21.547, 08-21.793 (Gaudriot).

4. Compared against US Law, and specific European regimes: do we need to facilitate the proof of causality?

US investor compensation lawsuits are known on the one hand for the frequency of compromises and on the other for the significant amounts awarded. The Enron case, in which $ 7.2 million USD in damages were awarded in 2008, and the World Com case, in which $ 6.2 million USD were awarded in 2005,[118] are typically cited as examples of such cases. A special regime for private enforcement has even been established in US law for cases of insider dealing. Specifically, Section 10 (b) of the Securities Exchange Act of 1934 specifies that unlawful behaviour is any manipulative or deceptive device or contrivance in contravention of rules and regulations that Security Exchange Commission (SEC) may prescribe.

In 1942, the SEC enacted Rule 10b-5 which prohibits any untrue statement of a material fact or omission to state a material fact,[119] where material information is only that which is important to a reasonable investor.[120] It suffices that a material fact would "affect a reasonable investor's deliberations without necessarily changing her ultimate investment decision".[121] Six conditions were examined: 1) a "material representation or omission"; 2) the defendant acted with a "wrongful state of mind" or "scienter" (a mental state involving intent to deceive, manipulate, or defraud);[122] 3) a representation or omission "in connection with the purchase or sale of a security"; 4) the plaintiff relied upon the misrepresentation or omission (reliance); 5) an economic loss; and

[118] *Bouchoux*, Business Organizations for Paralegal, 8th ed. 2019, p. 330; *Coughlin/Isaacson/Daley*, Loyola University Chicago Law Journal 37 (2005), 1 (22, 23, 25, 26 et seq).

[119] Title 17 Code of Federal Regulations (C.F.R.), § 240.10b-5 (1981). Rule 10b-5: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security."

[120] Basic, Inc. v. Levinson, 485 U.S. 224 (1988); *Affiliated* Ute Citizens v. United States, 406 U.S. 128 (1972). Cf., e.g., *Erdlen*, Fordham Law Review 80 (2011), 877 (893 et seq.).

[121] Folger Adam Co. v. PMI Industries, Inc. 938 F.2d 1529 (2d Cir. 1991).

[122] Aaron v. SEC, 446 U.S. 680, 694-95 (1980, SEC civil enforcement action); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976, private action for damages); *Anderson*, Hofstra Law Review 10 (1982), 341 (342); *Brooks*, Hastings Law Journal 32 (1980), 403 (408).

6) the causal link between the purchase or sale of the security and the loss suffered (loss causation).[123]

The defendant can be an "insider" (e.g., an employee), a "tippee" (e.g., a tipped-off third party), or a "misappropriator" (e.g., a third party uninvolved with the insider). The insider uses non-public information in breach of his fiduciary duty towards his company employer.[124] When the insider (tipper) gives insider information to a third party (tippee) that has knowledge of the insider's breach of duty, the tippee then has a derivative liability if he uses this insider information.[125] In this instance, the tipper should benefit by violating his fiduciary obligation or intend to make the inside information a gift.[126] A misappropriator uses information that he gets from a party other than the issuer in breach of a promise of confidentiality.[127] Rule 10b-5 also requires the defendant's scienter, or in other words that he knows or recklessly ignores misleading information.[128] We remark that a breach of a fiduciary duty or a confidentially obligation[129] is required, which is contrary to the EU legal framework as discussed above.

The plaintiff must be a purchaser or seller of a company's stock during the period when the information was not public, as neither shareholders who maintained their stock in the company nor potential investors who did not purchase the stock can bring a civil suit for damages under Rule 10b-5,[130] contrary to what we have argued for above. The plaintiff may either be a private person or the SEC, as the courts have admitted that Rule 10b-5 strives for investor protection, so the SEC can file suit for damages on this basis.[131] In case Cady, Roberts & Co,[132] the SEC held that Rule 10b-5 applies to insider trading, even when there is no affirmative misrepresentation.[133]

Firstly, Rule 10b-5-1 established by the SEC requires that the trading occurred "on the basis of" material non-public information. This requirement is fulfilled if the defendant "was aware of" the information.[134] Secondly, the same rule renders it possible to prove that the confidential information was not used. Rule 10b-5-2 has extended the prohibition of using privileged information to all persons who have a duty of confidentiality towards the company or those in family relationship with insiders. We remark that the possibility to reverse the presumption of use of the information is very close to what is admitted in European Law.

An implied private right of action under section 10 (b) was admitted quite early in case law,[135] and later, in 1988, the

[123] Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341 (2005). Cf. *François* (fn. 31), p. 170; Lentell v. Merrill Lynch & Co., Inc., 396 F.3d 161, 172 (2d Cir. 2005). Cf. *Gregory/Johnson*, Southern Illinois University Law Journal 34 (2010), 251 (253); *Grundfest*, Stanford Law School and The Rock Center for Corporate Governance, Working Paper Series No. 150, August 28, 2013; *Olazábal*, Berkeley Business Law Journal 3 (2006), 337 (343). Cf. Caremark, Inc. v. Coram Healthcare Corp., 113 F.3d 645, 649 (7th Cir. 1997): § 10 (b) "loss causation" is "nothing more than the 'standard common law fraud rule'"; *Coughlin/Isaacson/Daley*, Loyola University Chicago Law Journal 37 (2005), 1 (3).

[124] A "constructive" insider is an outside professional (e.g., lawyer or accountant) to the company entrusted with confidential information.

[125] In Dirks v. Securities & Exchange Commission, 463 U.S. 646 (1983), a securities analyst had non-public information about a Funding and investigated its correctness. Dirk's customers sold the stock they detained in this Funding.

[126] Dirks v. Securities & Exchange Commission, 463 U.S. 646 (1983).

[127] U.S. v. O' Hagan. It should be noted that the solution held in Shiarella v. U.S., 445 U.S. 222 (1980), is not anymore pertinent. In the latter, it was held that a printer who deduced information from the documents given to him and used this information had no fiduciary duty towards the concerned company and did not violate 10b-5, since he did not personally "benefit, directly or indirectly, from his disclosure". After O'Hagan, a deception of those who entrusted him with confidential information could probably have been admitted. *Bunch*, San Diego Law Review 17 (1980), 725; *Cann*, Dickinson Law Review 85 (1981), 249; *Coulom*, St. John's Law Review 55 (1980), 93.

[128] Ernst & Ernst v. Hochfelder, Supreme Court of the United States, 1976, 425 U.S. 185; SEC v. Obus, 693 F.3d 276, 289 (2d Cir. 2012). Cf. *Choi*, Vanderbilt Law Review 57 (2004), 1465 (1470); *Palk*, Berkeley Business Law Journal 13 (2016), 101 (118).

[129] *Wang*, Southern California Law Review 54 (1981), 1217 (1285); *Anderson*, Hofstra Law Review 10 (1982), 341 (346); *Palk*, Berkeley Business Law Journal 13 (2016), 101 (111 et seq.).

[130] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975); *Wang*, Southern California Law Review 54 (1981), 1217 (1313); *Anderson*, Hofstra Law Review 10 (1982), 341 (349); *Brooks*, Hastings Law Journal 32 (1980), 403 (417); *Rapp*, Washington and Lee Law Review 39 (1982), 861 (874). The condition does not apply to the defendant; it is enough that the latter has published a misleading press release.

[131] *Fischel/Carlton*, Stanford Law Review 35 (1982), 857 (889).

[132] 40 SEC 907 (1961).

[133] The first case where silent trading was admitted was the following: SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968).

[134] *A. Horwich*, The Business Lawyer 62 (2007), 913 (919). See also infra III. 2. b) and c).

[135] Kardon v. National Gypsum Co., 69 F. Supp. 512, 513-14 (E.D. Pa. 1946). The US Supreme Court approved the private right of action in Superintendent of Insurance of New York v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971), including a citation to J. I. Case Co. v. Borak, 377 U.S. 426 (1964). The latter decision implied a private right of action under section 14 of the Securities Exchange Act of 1934. In the case of Stoneridge Investment Partners LLC v. Scientific Atlanta, 552 U.S. 148 (2008), the United States Supreme

amended Section 20A of the Securities Exchange Act 1934 (15 U.S. Code § 78t–1), provided for an express private right of action that can be exercised by contemporaneous traders with the insider who act in the opposite sense. In other words, contemporaneous traders are those who conclude a transaction with the insider. The damages to be repaired correspond to the profits made or losses avoided by the insider; any amounts disgorged pursuant to a court order obtained by the SEC in Section 21A (a) (1) should be taken into account (SEC 20A (b).[136] All other persons that are not contemporaneous traders may have an implied private right of action (Section 20A (d).[137]

A first difficulty is that the contemporaneous traders are not defined, as for example a transaction should have been concluded only within one hour[138] following the insider's operation or in a few days after.[139] We can also remark that this regulation provides for punitive damages[140] since the calculation is not based on the damage suffered by the investors.[141] These punitive damages give the judge the possibility of ordering the perpetrator to pay an amount greater than the amount of the damage caused. This is in contrast to Civil Law legal systems, and specifically to the basic principle in French, Greek, and German law of full redress for the damage suffered by the injured party[142] and the award of non-punitive compensation. However, French and German case law recognises that punitive compensation is not contrary to international public policy.[143] We observe that private punishment presupposes the existence of a particularly grievous fault, while in cases of compensatory damages the existence of damage delimits the restoration of the damage. In the case of compensation, but not in cases of punitive damages, the amount of compensation is determined by the extent of the loss.[144]

From an economic approach, punitive damages can be considered as an efficient solution where the intentional behaviour of the perpetrator renders the damage more probable.[145] However, it has also been proposed that punitive damages should only be awarded if the injurer has a significant chance of escaping liability for the harm caused.[146] *Polinsky* and *Shavell* remark that when injurers are made to pay more than the harm they caused, wasteful precautions may arise and the product price may become inappropriately high.[147] In the cases of market abuse that we are concerned with, punitive damages serve the purpose of preventing reprehensible behaviour.

State common law only provides limited protection to investors who have been harmed by insider trading except for cases where there is misrepresentation in a face-to-face trans-

Court confirmed that "[i]t is now established that a private right of action is implied under [10b-5]".

[136] See also Section 20A (c): "Any person who violates any provision of this title or the rules or regulations there under by communicating material, nonpublic information shall be jointly and severally liable under subsection (a) with, and to the same extent as, any person or persons liable under subsection (a) to whom the communication was directed". See *H.M. Friedman*, The North Carolina Law Review 68 (1990), 465 (486).

[137] See, e.g., *Block/Epstein*, The Corporate Counsellor's Deskbook, 5th ed. 2020-3 Supp., § 3.04 [C], 3-66.

[138] Cf. *Wang*, Hastings Law Journal 38 (1987) 1175 (1191).

[139] Cf. O'Connor & Assoc. v. Dean Witter Reynolds, Inc., 559 F. Supp. 800 (S.D.N.Y.1983); Shapiro v. Merrill Lynch Pierce Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1981).

[140] Even if a distinction could be drawn between punitive damages and restitutionary damages, the illicit profit is not only taken into account, but also the intentional fault of the insider is considered. Cf. *Saint-Pau*, in: Wicker/Schulze/Mäsch (eds.), La réforme du droit de la responsabilité civile en France, 8e journées franco-allemandes, 2021, p. 11 (34); *Prorok* (fn. 51), p. 275.

[141] This will only be the case when the profit gained by the insider will be more than the investor's loss and not when the gains will be less than the investor's losses.

[142] E.g., Cour de cassation – Chambre civil (Première chambre), Judgment of 9.11.2004 – 02-12.506 = Bulletin civil I, no. 264: "Compensation for damage, which must be integral, cannot exceed the amount of the damage"; Court of Appeal of Paris, Judgment of 30.6.2006 – 04/06308 (Sté Morgan Stanley & Co. & Sté Morgan Stanley DW. Inc. c/ Sté LVMH) = Revue trimestrielle de droit commercial et de droit économique (RTDCom.) 2006, 875, commented by *Rontchevsky*; *Delpech*, D. 2006AJ, 2241: "any fault, even slight, gives rise to the right to full compensation for the damage caused, but only to this specific, current damage, arising from the fault"; Cour de cassation – Chambre civil, Judgment of 21.10.1946 = Semaine Juridique (JCP) 1946 II, 3348, *P. L.-P.* notes: "the compensation for the damage that the law imposes on the author of a tort or a quasi-delict must include the entirety of the damage suffered, regardless of the gravity of the fault committed by the person responsible".

[143] The French and the German Supreme Court have refused the *exequatur* of a decision awarding damages when the foreign judges did not respect the principle of proportionality in relation to the damage suffered by the injured party. Cour de cassation – Chambre civil (Première chambre), Judgment of 1.12.2010 = Recueil Dalloz 2011, 24, commented by *Gallmeister/Licari* (ibid., 423); *Fages*, Revue trimestrielle de droit civil (RTDCiv.) 2011, 122; *P. Remy-Corlay*, Revue trimestrielle de droit civil (RTDCiv.) 2011, 317; *Juvénal*, La Semaine Juridique – Édition Générale (JCP G) 2011, 140; *Stoffel-Munck*, La Semaine Juridique – Édition Générale (JCP G) 2011, 415. BGH, Judgment of 4.6.1992 – IX ZR 149/91 = Revue trimestrielle de droit civil (RTDCiv.) 1994, 457, commented by *Witz*.

[144] Cf. *Jault*, La notion de peine privée, 2005, p. 67; *Roujou de Boubée*, Essai sur la notion de réparation, 1974, p. 59.

[145] *Cooter*, Southern California Law Review 56 (1982), 79.

[146] *Polinsky/Shavell*, Harvard Law Review 111 (1998), 869; *Posner* (fn. 29), para. 6.10, p. 192.

[147] *Polinsky/Shavell*, Harvard Law Review 111 (1998), 869 (873).

action.[148] In all other cases an action brought by a shareholder against the insider trader seems to be insufficient. The insider does not have a duty to disclose facts known to him, unless he has a fiduciary obligation, which is only towards the corporation and not to the other shareholders.[149] However, many states recognize a "special facts" exception (majority rule) when the insider's conduct is especially unfair: for example, when the insider conceals his identity or material facts about the company.[150] A minority of states impose an obligation to the insider to disclose material facts known to himself (minority rule).[151] In cases of impersonal transactions on the stock exchange, when majority rule applies and the insider remains silent, there is no remedy against this silence. Companies are due compensation when the insider's (e.g. employee's) purchases have increased the shares price and the company intends to buy large quantities of its shares from public shareholders.[152] Otherwise, when the company has not suffered a direct damage, no corporate harm has been admitted except in one case.[153]

The most efficient protection is provided under US law according to the fraud-on-the-market theory. In the case of Basic v Levinson in 1988,[154] the transaction causation was admitted, and the investor's reliance on the integrity of the market price was presumed. This presumption is justified by the admission that the market is efficient and that public information is integrated into the price of stocks (namely, the Efficient Capital Market Hypothesis).[155] On the other hand, the causation of loss has to be proved, or in other words causality between the fraud and the damage is required.[156] The damage repaired is based on the effect of the fraud on the price of the stock, as a calculation based on how the investor's decision was influenced is not practical since it would not be possible to examine the subjective intent of each investor in a class action.[157] This theory has been applied in cases of omission, market manipulation, and dissemination of false information. Therefore, an investor can have confidence in the integrity of the price set by a market.

We must remark here, that in this system we do not examine the investor's reliance on the fraudulent information, as the investor's confidence in the integrity of the market is sufficient. It has been argued that the investor may not consider that the market price at any given moment corresponds to the exact value of the share, as he could just look forward to a profitable share purchase with expectations of a value rise in the near future.[158] However, we could counter this argument as even if the price is expected to change, the investor considers that the price has been fixed fairly at the time of purchase or sale.[159]

The Private Securities Litigation Reform Act of 1995 (PSLRA)[160] has laid down stricter conditions as to the facts to be relied on by the plaintiff: "The complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed" (section 21D (b) (1) (B).[161] We underline the requirement that facts should be stated "with particularity", and in the same sense of tightening the conditions required, Section 21D (b) (2) provides that the complaint shall state "with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind".[162] In the case of Tellabs Inc. v. Makor Issues & Rights, Ltd.[163] the Court explained that "the inference of scienter must be more than merely 'reasonable' or 'permissible'– it must be cogent and compelling". In addition, the plaintiff should prove the loss causation by arguing that there is a causal link between the act or omission and the damage suffered by the plaintiff.[164] The case law has clarified that the

[148] *Anderson*, Hofstra Law Review 10 (1982), 341 (366). Four conditions have to be fulfilled in a deceit action: (a) misrepresentation of a material fact, (b) reliance, (c) causation, (d) scienter. *Black*, North Carolina Law Review (1984), 435.

[149] *Fischel/Carlton*, Stanford Law Review 35 (1982), 857 (883).

[150] *Fischel/Carlton*, Stanford Law Review 35 (1982), 857 (883).

[151] *Brooks*, Hastings Law Journal 32 (1980), 403 (407).

[152] *Fischel/Carlton*, Stanford Law Review 35 (1982), 857 (883). Cf. *Booth*, Journal of Corporation Law 46 (2021), 319 (331).

[153] New York Court of Appeal, Diamond v. Oreamuno, 248 N.E.2d 910 (N.Y 1969).

[154] Basic Inc. v. Levinson, 485 U.S. 224 (1988). See, e.g., *Keegan*, Journal of Law & Commerce 31 (2012-2013), 163 (167).

[155] *Black*, North Carolina Law Review (1984), 435 (439 et seq.).

[156] *Rapp*, Washington and Lee Law Review 39 (1982), 861 (894). Cf. Schlick v. Penn Dixie Cement Corp., 507 F.2d 374 (2d Cir. 1974); *Gillespie III*, Journal of Business & Technology Law 3 (2008), 161 (165); *Olazábal*, Berkeley Business Law Journal 3 (2006), 337 (343); *Erdlen*, Fordham Law Review 80 (2011), 877 (885).

[157] *Rapp*, Washington and Lee Law Review 39 (1982), 861 (868); *Black*, North Carolina Law Review (1984), 435 (459).

[158] *Black*, North Carolina Law Review (1984), 435 (455); *Prorok*, (fn. 51), p. 103. See this author for a discussion on US law.

[159] *Booth*, Journal of Corporation Law 46 (2021), 319 (338).

[160] Public Law 104-67, 104th Congress.

[161] 15 USC § 78u-4 (b) (1).

[162] *Coughlin/Isaacson/Daley*, Loyola University Chicago Law Journal 37 (2005), 1 (8, 9); *Gillespie III*, Journal of Business & Technology Law 3 (2008), 161 (167, 176).

[163] 551 U.S. 308 (2007).

[164] According to the Act, "the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this title caused the loss for which the plaintiff seeks to recover damages" (Securities Exchange Act of 1934, section 21D (b) (4). *Booth*, Journal of Corporation Law 46 (2021), 319 (324); *Coffee*, Business Lawyer 60 (2005), 533 (545); *Coughlin/Isaacson/Daley*, Loyola University Chicago Law Journal 37 (2005), 1 (9); *Olazábal*, Berkeley Business

loss causation must be proven while the dispute at issue is judged on the merits, and not while being examined for certification.[165] As a result, since a transaction is usually reached after certification, the extent of the damage caused by the illegal act will not have to be proven.

It has also been admitted that the defendants must have the opportunity to rebut the presumption of reliance even before the certification stage by proving the price was not impacted.[166] In regards to this latter issue, the Supreme Court did not make it more difficult to demonstrate the causal link. Therefore, it did not rarefy the actions for damages, since a writ of certiorari can still be granted based on the presumption of reliance, even if it is a rebuttable presumption.

As for calculating the damages, the method out-of-pocket has been preferred by the case law, as it consists of calculating the increased amount that the investor paid at purchase due to the price alteration arising from the false information. The damage can also be found in the reduced price at which the investor sold the stock.[167] Different theories of damage calculation can be found in American case law and theory. The main difference between these theories is whether they take into account the real value of the share at the time of the transaction or the value of the share as it was formed after the disclosure of the correct information.[168] Still, both approaches seem lacking. The first, which is based on the real value of the stock at the time of the transaction, takes into account a hypothetical value that has no presence in the real world. That is, it uses the estimates of financial analysts rather than financial figures that are actually from the stock market.[169] For example, the stock may show no downside when the misleading information is corrected, and therefore this approach has been accused of accepting "phantom loss" restoration[170] and has been rejected by the jurisprudence. In the case of Dura v. Broudo, the Supreme Court has held that buying a share at an overvalued price is offset by holding a share at the same overvalued price.[171] In the absence of a subsequent drop in the market price, the investor can always resell at the same overvalued price. The Court ruled in favour of an ex post perspective, holding that loss exists when the price of the purchased securities declines.[172] On the other hand, an ex ante perspective asks what the securities would have been worth at the time of the purchase absent the fraud, and pre-Dura this damage was the typical methodology.[173]

Still, the ex post calculation of the loss being based on the present market price after the restoration of the truth, carries the risk of including parameters that are not related to the misleading information.[174] In the above case, the damage which is not reflected in the share price on the market must be repaired according to the Court, since the stock price can be calculated without the appearance of these additional parameters (proof of loss causation). The Court therefore deviates from the calculation of the loss on the basis of the market price of the share and favours the restoration of damage that the claimant proves, even if a drop in the share price was avoided due to other events.[175]

Law Journal 3 (2006), 337 (348); *Erdlen*, Fordham Law Review 80 (2011), 877 (897).

[165] Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179 (2011); *François* (fn. 31), p. 171; *Erdlen*, Fordham Law Review 80 (2011), 877 (902).

[166] Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014 – Halliburton II).

[167] As the Supreme Court held in 1900, out-of-pocket loss is "the difference between the real value of the stock at the time of the sale, and the fictitious value at which the buyer was induced to purchase": Sigafus v. Porter, 179 U.S. 116, 124 (1900, quoting High v. Berret, 23 A. 1004, 1004 (Pa. 1892); Green v. Occidental Petroleum, 541 F.2d 1335, 1341 (9th Cir. 1976): "[T]he so called out-of-pocket measure […] fixes recovery at the difference between the purchase price and the value of the stock at the date of purchase. This difference is proximately caused by the misrepresentations of the defendant. It measures precisely the extent to which the purchaser has been required to invest a greater amount than otherwise would have been necessary. It furthers the purpose of rule 10b-5 without subjecting the wrongdoer to damages the incidence of which resembles that of natural disasters". Cf., e.g., *Gillespie III*, Journal of Business & Technology Law 3 (2008), 161 (178); *Olazábal*, Berkeley Business Law Journal 3 (2006), 337 (346, 360); *Mullaney*, Fordham Law Review 46 (1977), 277 (281).

[168] *Kantrow*, Louisiana Law Review 67 (2006), 257 (264), 268. Cf. *Gillespie III*, Journal of Business & Technology Law 3 (2008), 161 (166).

[169] Cf. *Kantrow*, Louisiana Law Review 67 (2006), 257 (284 et seq.). See against this argument, *Coughlin/Isaacson/Daley*, Loyola University Chicago Law Journal 37 (2005), 1 (41).

[170] *Coffee*, Business Lawyer 60 (2005), 533 (538): "the loss here is […] simply too speculative and indefinite in the absence of any evidence that the market considered the stock to have been overvalued because of the alleged patent problem". See also *Prorok* (fn. 51), p. 122 et seq.

[171] Dura Pharms., Inc. v. Broudo, 125 S. Ct. 1627, 1629, 2005; 544 U.S. 336, 338 (2005); *Coughlin/Isaacson/Daley*, Loyola University Chicago Law Journal 37 (2005), 1; *Booth*, Journal of Corporation Law 46 (2021), 319; *Gillespie III*, Journal of Business & Technology Law 3 (2008), 161 (169); *Olazábal*, Berkeley Business Law Journal 3 (2006), 337 (354).

[172] *Fisch*, Iowa Law Review 94 (2009), 811 (843).

[173] *Fisch*, Iowa Law Review 94 (2009), 811 (845); *Tabak/Okongwu*, Inflation Methodologies in Securities Fraud Cases: Theory and Practice (July 2002, unpublished manuscript), p. 1 (8), available at http://ssrn.com/abstract=315919 (2.6.2022); *Tabak*, Inflation and Damages in a Post-Dura World 3 (Sept. 25, 2007, unpublished manuscript), p. 1 (4), available at http://ssrn.com/abstract=1017334 (2.6.2022).

[174] Cf. *Kantrow*, Louisiana Law Review 67 (2006), 257 (275, 278, 280).

[175] See, e.g., *Coughlin/Isaacson/Daley*, Loyola University Chicago Law Journal 37 (2005), 1 (22, 23, 25); *Olazábal*, Berkeley Business Law Journal 3 (2006), 337 (363); *Prorok* (fn. 51), p. 131.

Special regimes in England and in Germany related to defective public information have not provided sufficient protection to investors. As mentioned above, in German Law there is no general rule in tort law prohibiting behaviours that is in contrast with common behaviour. The responsibility under § 823 BGB supposes a violation of an interest protected by a law or the violation of a protected right.[176] It is admitted that the "Wertpapierhandelsgesetz" (Securities Trading Act, Art. 15) protects the market interests but not private interests. Consequently, invoking liability on the grounds of § 823 BGB has been rejected.[177] Moreover, § 826 BGB can only be invoked as far as an intentional breach of morality can be proven, such as providing erroneous information.[178] In these instances, what remains to be proven is the causality existing between the behaviour and the damage, since no presumption is admitted. As for the damage, both damage due to alteration of the decision and due to the alteration of the price have been repaired by German courts.[179]

A special provision in § 37b and § 37c of Wertpapierhandelsgesetz (which became § 97 and § 98 in 2018) established a private right of action in the case of violations of Art. 17 of the MAR by an issuer of financial instruments.[180] Failure to publish inside information or publication of untrue inside information is behaviour considered by this provision, however intention or gross negligence is presumed in regards to mental elements. This presumption could be rebutted. In contrast, there is no presumption of causality, as this element has to be proven. This strict condition to be fulfilled means that the above specific regime is difficult to be implemented in practice.[181]

The same fate befalls the special regulation in English law regarding civil liability in secondary markets in the case of no publication of periodic and ad hoc information, as well as in the case of omission to make inside information public. Firstly, it should be noted that the Financial Conduct Authority (FCA) is the independent administrative authority vested with the power to sanction market abuse, while the Regulatory Decisions Committee is an independent FCA Enforcement Department committee that makes decisions on behalf of the FCA. When a market abuse is observed, the accused person can appeal to the Upper Tribunal, however people who have suffered damage as a result of market abuse cannot file a claim directly with the court. At the request of the FCA, the Upper Tribunal may order the person who committed the market abuse to pay the FCA an amount equivalent to the amount of the profits made or the loss suffered by the victim. Subsequently, the FCA is responsible for repaying this amount to the victim according to the court's instructions.[182] Section 9OA and Schedule 10A of the Financial Services and Markets Act (FSMA) established in 2006, and revised in 2010, provides for a private right of action when the issuer of securities violated his obligations regarding published information. Either intention or recklessness of the issuer is required by the issuer, along with proof that the investor relied on this incorrect information.[183] However, these conditions are difficult to meet and for this reason even until today this special legislation has rarely been implemented. The first decision under FSMA that admitted the claims of the plaintiff is currently being attended to, while a draft is already available.[184]

We conclude that when a causal link is not presumed, it is extremely difficult to prove its existence. The special arrangements in England and Germany that do not provide this proof facility have not achieved their purpose, while in America, the existence of the presumption of transaction causation (reliance) favours reparations, which are usually agreed to out of court. It therefore appears that when the causal link is not presumed, investor protection is of limited effectiveness.

5. Mass damage and collective litigation: is this a solution to the problem?

A further question should be posed regarding the effectiveness of private enforcement. Collective litigation is widespread in the US and Canada but not in most European countries. The economic analysis of the law highlights the advantages of this system, as it allows for class actions at a limited cost for numerous parties who have suffered minor damages.[185] As a result, when the amounts requested with

[176] *Fromont/Knetsch*, Droit privé allemand, 2017, p. 205.

[177] *Casper* (fn. 76), p. 91; *Mülbert*, in: Assman/Schneider/Mülbert (eds.), Wertpapierhandelsrecht, Kommentar 7th ed. 2019, Art. 15 VO Nr. 596/2014 para 47 et seq. (p. 1837).

[178] See *Mülbert* (fn. 177), Art. 15 VO Nr. 596/2014 para 49 (p. 1837 et seq.); *Mollers*, North Carolina Journal of International Law 30 (2004) 279 (303, 320).

[179] *Mollers*, North Carolina Journal of International Law 30 (2004) 279 (309). Cf. *Winter*, Der nach den §§ 97 und 98 WpHG zu ersetzende Schaden, 2019, p. 65 et seq.; *Sethe*, in: Assmann/Schneider (eds.), Wertpapierhandelsgesetz, Kommentar, 6th ed. 2012, § 37c para. 83 et seq.; *Mülbert* (fn. 177), Art. 15 VO Nr. 596/2014 para 51 (p. 1838).

[180] *Mülbert* (fn. 177), Art. 15 VO Nr. 596/2014 para 50 (p. 1838)Securities Trading Act, available at https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG_en.html (2.6.2022).

[181] *Thomale*, in: Kalss/Oppitz/Torggler/Winner (eds.), EU Market Abuse Regulation: A Commentary on Regulation (EU) No 596/2014, 2021, p. 377.

[182] *Serres/Helleringer*, in: Reygrobollet/Huet (eds.), La réforme du contentieux boursier, 2016, p. 131 (138).

[183] *Nikituk*, Columbia Journal of Transnational Law, Apr. 1, 2021, available at https://www.jtl.columbia.edu/bulletin-blog/englands-first-section-90a-fsma-opinion-serves-as-guide-for-us-circuit-split (2.6.2022).

[184] Available at https://www.judiciary.uk/wp-content/uploads/2022/01/Autonomy-v-Lynch-summary-280122.pdf (2.6.2022). On the contrary, claims based on 90A FSMA have been dropped upon agreement in the case Morgan Lewis & Bockius LLP v Tesco PLC.

[185] See *Duffains/Donat-Duban/Langlais*, Economie des actions collectives, 2008, p. 15 et seq. Cf. in favour of collec-

individual claims are low, the litigation cost will not exceed the expected profits. Additional benefit derived from collective litigation is that the courts can avoid the volume of cases increasing unnecessarily, which saves judicial resources. Furthermore, the creators of the damage are encouraged to change their behaviour and avoid conduct that might lead them into the position of a defendant in a class action.[186]

However, it should be noted that while lawyers in traditional litigation are subject to control by the client, lawyers in class actions are subject to minimal monitoring by the dispersed and disorganised clients.[187] So, the attorney assumes a role of an entrepreneur who bears a significant portion of the risk of litigation and also controls the litigation while serving his own interests.[188] In addition to this disadvantage of class actions, the significant cost makes the net amount attributed to investors extremely low and insufficient to compensate the real loss they suffered. This lack of full compensation has led to criticism of the Fraud-on-the-Market cause of action. The principal objective of facilitating private enforcement therefore seems to have failed, as the victim-compensation objective is not served by class actions that involve significant transaction costs, attorney fees, and assurance premiums.[189] Furthermore, enterprise liability, rather than the individual perpetrator's liability,[190] results in the compensation being paid by the company itself, i.e., by its shareholders. As a result, innocent investors who happen to be shareholders at the time of the lawsuit compensate the injured investors,[191] while those actually responsible for the fraudulent transactions are covered by the corporation's responsibility.[192] As a response to this criticism, it has been proposed that the Fraud-on-the-Market approach could be considered to be a corporate-governance device that controls company executives.[193] We could cite as an additional factor for the failure of class actions, that the majority of institutional investors do not submit claims in settled securities class actions.[194]

The most important risk arising from bringing a class action to court is the pressure exerted on a company to enter into a settlement regardless of the likelihood that the claims against it could have been dismissed in a substantive judgment.[195] Indeed, a company will be motivated to a compromise in order to avoid further reductions in its share price. As a remedy to the abuse of collective actions, the PSLRA was adopted.[196] According to this Act, the Court shall appoint as "lead plaintiff" the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members" (Section 21D (a) (3) (B) (i).[197] Pursuant to this Act, the previous "first-to-file rule" is no longer applicable in order to avoid previous abuses that have occurred between law firms.[198] This Act of 1995 was followed by the Securities Litigation Uniform Standards Act of 1998, which prohibits class actions based upon statutory or common law, a practice that applied to avoid the stricter requirements of the PSLRA of 1995.

In French Law, associations of investors can act before all jurisdictions, both civil and criminal, to defend the interests of their members, when they are regularly declared and made public by an insertion in the BALO[199] and when their statutes so allow.[200] These associations are approved associations or associations whose grouped members hold a minimum of voting rights (5 %) and have communicated their status to the Financial Market Authority.[201] Investors' associations defended the collective interest of 122 shareholders in the Gaudriot Affair, and the interests of 700 victims in the Sidel Affair. However, these were not class actions as it was not

tive actions, *Guégan-Lécuyer*, Dommage de masse et responsabilité civile, 2006, p. 416.

[186] *Duffains/Donat-Duban/Langlais* (fn. 185), p. 29.

[187] *Macey/Miller*, University of Chicago Law Review 58 (1991), 1 (3, 8).

[188] *Coffee*, Indiana Law Journal 62 (1987), 625; *id.*, University of Chicago Law Review 54 (1987), 877; *id.*, Columbia Law Review 86 (1986), 669 (676). Cf. *Choi*, Vanderbilt Law Review 57 (2004), 1465 (1474).

[189] *Fox*, Columbia Law Review 109 (2009), 237 (252).

[190] *Coffee*, Columbia Law Review 106 (2006), 1534.

[191] *Coffee*, Business Lawyer 60 (2005), 533 (534 et seq., spec. 541); *Kantrow*, Louisiana Law Review 67 (2006), 257 (284).

[192] *Bratton/Wachter*, University of Pennsylvania Law Review 160 (2011), 69 (73).

[193] *Fox*, Columbia Law Review 109 (2009), 237 (252).

[194] *Cox/Thomas*, Stanford Law Review 58 (2005), 411 (449 et seq.). The authors found that that less than 30 % of institutional investors with provable losses present their claims in these settlements. Cf. *Cox/Thomas*, Washington University Law Quarterly 80 (2002), 855 et seq.: "This survey showed that about one-third of the thirty-three respondent institutions had made no recovery of any asset losses in the prior five years, a time period in which more than 700 securities class action cases were settled". See *Prorok* (fn. 51), p. 135. Cf. *Choi*, Vanderbilt Law Review 57 (2004), 1465 (1475, 1476, 1503).

[195] *Gillespie III*, Journal of Business & Technology Law 3 (2008), 161 (175); *LaCroix*, D&O DIARY from 5.2.2019, available at https://perma.cc/PD4E-7TQG (2.6.2022); Cf. *Olazábal*, Berkeley Business Law Journal 3 (2006), 337 (356).

[196] See supra 4. The House Conference Report, the PSLRA was designed to prevent "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action […]". H.R. Rep. No. 104–369, at 31 (1995) (Conf. Rep.), reprinted in 1995 U.S.C.C.A.N. 730; St. J. *Choi*, Vanderbilt Law Review 57 (2004), 1465 (1469); *Erdlen*, Fordham Law Review 80 (2011), 877 (893).

[197] Cf. *Choi*, Vanderbilt Law Review 57 (2004), 1465 (1475).

[198] According to this rule, the first who brought an action represented the other members of the class.

[199] Bulletin of compulsory legal announcements (Bulletin des announces légales obligatoires).

[200] Monetary and Financial Code, Art. L452-1 al. 1.

[201] Monetary and Financial Code, Art. L452-1 al. 3, 4.

possible to act on behalf of all victims, including those who have not manifested an interest.[202]

In Germany, a specific procedure applies in particular to claims for damages due to false, misleading, or insufficient financial information. The plaintiff or the defendant can address a request for *model procedure* to the judge who suspends the procedure. Publicity is carried out in the section reserved for the Bulletin of official announcements, and if within four months, nine other similar claims have been formulated and accompanied by model procedure requests, the court of appeal must render a model decision that will bind the judges seized of similar first instance requests, even if a request for a model procedure has not been submitted.[203] The court of appeal chooses, at its discretion from among all the applicants, the one who will support the request for a model decision, taking into account the possibility of an agreement between the plaintiffs to designate one applicant. On the points dealt with, the decision rendered is binding on the courts of first instance, but the particular amount of damages to be awarded for each claimant is still needed. For example, the action brought against Deutsche Telekom in 2005 concerned 1.800 victims.[204]

In Great Britain, the procedure provided for collective actions was not favourable for the exercise of this type of action until 2015. Actions had to be brought separately, and when a Group Litigation Order was pronounced, they would continue to be the subject in part of an individual treatment entailing significant costs.[205] On the other hand, only consumers could pursue action under this special procedure for damage suffered in connection with a good or service outside their professional activity. Since October 1, 2015, professionals can initiate collective actions. Moreover, treble damages[206] are prohibited and lawyers cannot agree on remuneration as a percentage of the compensation.[207]

We conclude that although collective actions significantly facilitate investor compensation, they are not a panacea. They have been accused of significant disadvantages in terms of the results they present, and in particular for the pressure they exert on a company to choose to reach a settlement and the high transaction costs. In this context, their introduction into legal order is not indisputable. At the same time, we note that the collective representation of the subjects of a right is being promoted at the European level. We mention the possibility of representing personal data subjects[208] or consumers from an association, and this tendency of collective representation seems very likely to extend to the stock market.

III. A comparative approach of United States and European Criminal Law through case studies and with special consideration to victimological aspects

1. The protected legal good

It is customary in continental criminal law essays to develop the interpretation of criminal provisions belonging to the special part of criminal law upon the notion of the protected legal good ("Rechtsgut").[209] The idea of a protected (by the relevant provision) legal good (or value), except "summarizing what the legislature had in mind in a succinct catchword and [being useful] for categorizing offenses into groups",[210] provides further the legal scholar with a useful perspective on a teleological interpretation, thus an interpretation emancipated from the will of a certain legislator at the time of the provision's coming into effect and pursuing the purpose it aims to achieve within the social and economic context at any given time of its duration.[211]

Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 "on criminal sanctions for market abuse (market abuse directive)" sets minimum rules to secure by means of criminal law the flank of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 "on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC". MAD states its purpose in Art. 1 § 1 ("to ensure the integrity of financial markets in the Union and to enhance investor protection and confidence in those markets"). This goal is further elaborated

[202] Cf. Sénat, Les actions de groupe, May 2010, No. LC 206, p. 16. *Martin/Dezeuze/Bouaziz/Françon* (fn. 75), p. 280 et seq.
[203] *Martin/Dezeuze/Bouaziz/Françon* (fn. 75), p. 281.
[204] Ibid.
[205] *Serres/Helleringer* (fn. 182), p. 143.
[206] Some statutes provide that once the amount of compensation has been determined on the basis of the damage suffered by the injured party, compensation of three times the amount is awarded. See, e.g., Cohen v. De La Cruz, 523 U.S. 213 (1998).
[207] *Serres/Helleringer* (fn. 182), p. 143 et seq.
[208] Art. 80 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
[209] See especially *Roxin/Greco*, Strafrecht, Allgemeiner Teil, Vol. 1, 5th ed. 2020, § 2 paras 1 et seq.; *Hörnle*, in: Dubber/Hörnle (eds.), The Oxford Handbook of Criminal Law, 2014, p. 685 et seq.
[210] *Hörnle* (fn. 209), p. 686 et seq. From the French literature cf. *Pin*, Droit Pénal Général, 10th ed. 2018, p. 31 et seq.; *Kolb/Leturmy*, Cours de Droit Pénal Général, 5th ed. 2019/2020, p. 31 et seq.; *André*, Droit Pénal Spécial, 6th ed. 2021, p. 35. From the German literature cf. *Maurach/Schroeder/Maiwald/Hoyer/Momsen*, Strafrecht, Besonderer Teil, Bd. 1, 11th ed. 2019, p. 2 et seq.; *Jescheck/Weigend*, Lehrbuch des Deutschen Strafrechts, Allgemeiner Teil, 5th ed. 1996, p. 7 et seq. From the Greek literature cf. *Androulakis*, Poinikon Dikaion, Eidikon Meros (Criminal Law, Special Part), 1974, p. 7 et seq.; *Charalampakis*, Poiniko Dikaio, Geniko Meros I (Criminal Law, General Part I), 2021, p. 52 et seq.; *Mylonopoulos*, Poiniko Dikaio, Geniko Meros (Criminal Law, General Part), 2nd ed. 2020, p. 48.
[211] *Charalampakis* (fn. 210), p. 56 et seq.; *Mylonopoulos* (fn. 210), p. 48; cf. further *Roxin/Greco* (fn. 209), § 2 paras 7 et seq., 63 et seq.

in recital (1): "An integrated and efficient financial market and stronger investor confidence requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities, derivatives and benchmarks".[212]

MAD aims to ensure the unification of national criminal laws in the EU and creates the premises for a higher level of legal certainty considering market abuse offences in the common European Market.[213] It was the first Directive promulgated under Art. 83 § 2 of TFEU., thus initiating an interaction between European and national criminal provisions never experienced in the past.[214]

Reading Art. 1, recital (1) and considering the wording and structure of the market abuse offences laid out especially in Art. 3 to 5 of MAD, the conclusion regarding the protected legal good seems rather evident for the European legal scholar. MAD does not protect the investor or the company, that registers and sells securities, and/or its shareholders etc. MAD's objective refers only to protecting the integrity of financial markets (i.e., their "smooth functioning" ability) and public confidence in securities, derivatives and benchmarks.[215] In other words, MAD aims to protect the (smooth functioning of the) capitalistic economic system. Thus, in terms of European criminal doctrine MAD safeguards only a "collective" or "universal" legal good, namely the integrity of financial markets and public confidence in securities, derivatives and benchmarks, and not an individual legal good, i.e., the investors' property.[216] In Europe market abuse is by definition a "victimless crime".[217]

However, a question may be raised: What about people losing money due to acts or omissions classified as market abuse offences pursuant to MAD? For the European legislator this seems as a far and indirect consequence of a criminal act against the capitalistic economy. The relevant recital (7) of MAD reads as follows: "In the light of the financial crisis, it is evident that market manipulation has a potential for widespread damage on the lives of millions of people. The Libor scandal, which concerned a serious case of benchmark manipulation, demonstrated that relevant problems and loopholes impact gravely on market confidence and may result in significant losses to investors and distortions of the real economy. The absence of common criminal sanction regimes across the Union creates opportunities for perpetrators of market abuse to take advantage of lighter regimes in some Member States. The imposition of criminal sanctions for market abuse will have an increased deterrent effect on potential offenders".

However, this awareness did not lead to the enactment of a special framework for individual investor (property) protection within MAD or otherwise. Enhancing investor protection from property loss remains, in conclusion, a declared, yet only far and indirect goal of MAD.[218] In some jurisdictions, e.g., in the German jurisdiction, the collective or universal nature of the protected legal good even excludes market abuse provisions from their use as legal grounds for bringing a civil reimbursement claim against the market offender.[219]

[212] Same in recital (2) of MAR.

[213] *Theile*, in: Esser/Rübenstahl/Saliger/Tsambikakis (eds.), Wirtschaftsstrafrecht, 2017, Vor §§ 38, 39 paras 1 et seqq. (p. 2034 et seq.); *Nestler*, Bank- und Kapitalmarktstrafrecht, 2017, p. 48, 249.

[214] *Nestler* (fn. 213), p. 48, 249.

[215] *Theile* (fn. 213), ch. 7 para. 38 WpHG para 4 (p. 2041); *Saliger*, in: Park (ed.), Kapitalmarktstrafrecht, 5th ed. 2019, WpHG § 119 para. 23; *Nestler* (fn. 213), p. 250; *Assmann*, in: Assmann/ Schneider/Mülbert (eds.), Wertpapierhandelsrecht, Kommentar, 7th ed. 2019, Vor Art. 7 VO Nr. 596/2014 para 29 (p. 1566); *Mülbert* (fn. 177), Ar. 12 VO Nr. 596/2014 paras 21 et seqq. (p. 1729 et seq.); Explanatory Report to [Greek] Law 4443/2016, p. 6 et seq., available at https://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/e-odew-eis.pdf (2.6.2022). This conception reflects previous case law of the Court of Justice (ECJ, Decision of 23.12.2009 – C-45/08, ECLI:EU:C:2009: 806 = Die Aktiengesellschaft 2010, 74 [76, para. 37]). The French "Code Monétaire et Financier" refers to market abuse crimes as "Violations of the transparency of the Markets" ("Atteintes à la transparence des marches (Articles L465-1 à L465-3-6)"), but it also includes this section in a chapter with the overall title "Crimes related to the protection of the investors" ("Infractions relatives à la protection des investisseurs (Articles L465-1 à L465-4)").

[216] *Saliger* (fn. 215), WpHG § 119 para. 23; *Nestler* (fn. 213), p. 250; *Assmann* (fn. 215), Vor Art. 7 VO Nr. 596/2014 para. 29 (p. 1566); *Mülbert* (fn. 177), Art. 12 VO Nr. 596/2014 paras 21 et seqq. (p. 1729 et seqq.); *Pananis*, in: Joecks/ Miebach (eds.), Münchener Kommentar zum Strafgesetzbuch, Vol. 7, 3rd ed. 2019, WpHG § 119 paras. 5 et seq.; Explanatory Report to [Greek] Law 4443/ 2016, p. 6. About the distinction between individual and collective or universal legal goods see again *Hörnle* (fn. 209), p. 686.

[217] *Pananis* (fn. 216), WpHG § 119 para. 9; *Tountopoulos*, European Company and Financial Law Review (ECFR) 2014, 325. See also supra II. 3.

[218] *Saliger* (fn. 215), WpHG § 119 para. 23; *Mülbert* (fn. 177), Art. 12 VO Nr. 596/2014 paras 21 et seqq. (p. 1729 et seqq.); cf. Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), COM (2020) 99 (final), p. 1 et seq.

[219] *Saliger* (fn. 215), WpHG § 119 para. 23; *Theile* (fn. 213), ch. 7 § 38 para. 4 (p. 2041); *Assmann* (fn. 215), Vor Art. 7 VO Nr. 596/2014 para. 29 (p. 1566); *Mülbert* (fn. 177), Art. 12 VO Nr. 596/2014 paras 25 et seq., Art. 15 VO Nr. 596/2014 paras 45 et seqq. (p. 1731, 1836 et seq.). The Greek civil doctrine and jurisprudence deal with the same problem, by accepting a "reflective" protection of private investor interests: *Tountopoulos*, in: Zitimata euthinis stin anonimi etairia,

According to the leading opinion in German doctrine, the European legal framework does not allow the assumption that the investor and his individual property are protected, not even alongside the collective interest in a smooth functioning capital market.[220] As mentioned above in the civilist part[221], the French Code of Criminal Procedure (Art. 2) only allows victims that the law intended to protect to pursue a civil action in a criminal court, thus an offence that concerns only the general interest (and not a personal interest) cannot serve as relevant legal ground.[222] Against the protection of the individual investor and his property weights particularly that the competence to regulate a civil claim for damages in case of market abuse was at the European legislator's disposal; however, it did not make use of it, but rather chose to involve civilians at the effective private enforcement of market abuse provisions through evolving whistleblower-systems and consequently left the matter of civil claims open to a variety of solutions according to national civil laws across EU Member States.[223] Yet on the other side of the Atlantic, the (scrutinized in the following) relevant provisions of US law constitute sufficient and common legal grounds for civil, civil regulatory, or criminal actions.[224]

For more than two decades, two kinds of market abuse criminal offences have been classified in European law and doctrine: Insider dealing and unlawful disclosure of insider information on the one hand, market manipulation on the other hand.[225] Both categories of market abuse offences, as described concerning their minimum requirements in MAD (Art. 3, 4 and 5), seem to originate from US law, especially the case law evolved regarding the antifraud provisions of the Securities Exchange Act of 1934. Nonetheless, "market abuse" as a generic term for insider trading and market manipulation remains unknown to US law and doctrine. Both terms, insider trading and market manipulation, serve there rather as criminological distinctions in the context of a special fraud offence, called "securities fraud", than as a doctrinal classification of special (other than fraud) offences, hence aiming to protect something else, above and beyond the individual property of participants in capital markets (investors, issuers of securities, holders of valuable information etc.). In the modern American doctrine scholars do recognize this ratio legis by attesting, for example, that "Public confidence in the fairness and integrity of the stock market is necessary for the market to properly function".[226] However, given that "federal securities law does not expressly forbid insider trading […] insider trading liability is based upon several federal antifraud provisions that generally prohibit securities fraud".[227]

Nevertheless, in the context of European law "market abuse" consolidates, as a generic term, all acts or omissions undermining the smooth functioning of the capital market. Recital (7) of MAR summarizes this European notion of market abuse to the point: "Market abuse is a concept that encompasses unlawful behaviour in the financial markets and, for the purposes of this Regulation, it should be understood to consist of insider dealing, unlawful disclosure of inside information and market manipulation. Such behaviour prevents full and proper market transparency, which is a prerequisite for trading for all economic actors in integrated financial markets".

The pertinent differences between European and US criminal law and doctrine-hence the comprehension of potential flaws of the European criminal legal framework within a global capital market-can therefore be best enlightened with the help of two comparative case studies, both with international features, but having in common the involvement of Greek nationals as defendants.

2019, p. 247 et seq.; *Avgitidis* (fn. 18), p. 381 et seq. See supra II. 1.

[220] *Theile* (fn. 213), ch. 7 § 38 WPHG para. 4 (p. 2041); *Mülbert* (fn. 177), Art. 12 VO Nr. 596/2014 paras 25 et seq., Art. 15 VO Nr. 596/2014 para. 48 (p. 1731, 1837); *Pananis* (fn. 216), WpHG § 119 para. 8 et seq.

[221] See supra. II. 1. about the reflections of the "Acquilian relativity".

[222] *Bouloc/Matsopoulou*, Droit pénal général et procédure pénale, 21th ed. 2018, p. 239 et seq. ("L'action civile est l'action en dommages-intérêts introduite par 'tous ceux qui ont personnellement souffert du dommage directement causé par l'infraction' (art. 2 C. pr. pén.)").

[223] *Saliger* (fn. 215), WpHG § 119 para. 23; *Mülbert* (fn. 177), Art. 15 VO Nr. 596/2014 para. 48 (p. 1837). Cf. the civilist approach, supra II.

[224] *Buell*, Duke Law Journal 61 (2011), 540 et seq.; *Adams/Runklett*, University of Pennsylvania Law Review 145 (1997), 1098 (1100 et seq.). However, see a substantiated criticism on securities-fraud class actions in Congress, the Supreme Court, and the rise of securities-fraud class actions, Harvard Law Review 132 (2019), 1066, asking for what the German doctrine fully supports in the context of MAR and MAD (supra fn. 219, 220), namely that civil enforcement power should be centralized in the regulatory authority.

[225] *Mülbert* (fn. 177), Vor Art. 12 VO Nr. 596/2014 paras 8 et seqq. (p. 1696 et seq.); *Theile* (fn. 213), ch. 7 Vor §§ 38, 39 WpHG a.F. paras 1 et seqq., Vor §§ 38, 39 WpHG paras 1 et seqq. (p. 1958 et seq., 2034 et seq.); cf. Report from the Commission (fn. 218), p. 4 et seq.

[226] *Byrne*, Villanova Law Review 66 (2021), 187; *Finigan*, Marquette Law Review 70 (1987), 692 (723); *Adams/Runklett* University of Pennsylvania Law Review 145 (1997), 1098 et seq.; *Buell*, Duke Law Journal 61 (2011), 540 (569 et seq.); Harvard Law Review 132 (2019), 1066.

[227] *Byrne*, Villanova Law Review 66 (2021), 187 (188); *Adams/Runklett* University of Pennsylvania Law Review 145 (1997), 1098 (1100 et seq.).

2. Insider dealing and unlawful disclosure of insider information: USA vs. G.N. & T.L.

a) The allegations[228]

On October 2019 the US Attorney's Office, Southern District of New York, announced the unsealing of four indictments and the arrests of three members of an alleged wide-ranging international insider trading ring, among them two Greek nationals G.N. and T.L. According to the indictment, which led several months later to T.L.'s conviction by the US District Court, Southern District of New York, G.N. and T.L. together engaged in a scheme, beginning in 2013, to steal confidential inside information from Company A., a biotechnology company headquartered in Boston, that was marketing a drug for treatment of leukemia, for their personal use. T.L. used his connection to his father, to obtain material nonpublic information (hereinafter, MNPI) about Company A and then provided that information to G.N., who reaped millions of dollars in profits by trading based on that MNPI. Specifically, on four separate occasions from 2013 through 2015, the father of T.N., in his capacity as member of the Board of Directors, became aware of MNPI relating to Company A, and was alleged to disclose that information to his son T.L., who in turn disclosed it to G.N. so that G.N. could trade on it. In each case, after G.N. received the MNPI from T.L., he executed securities trades based on the MNPI, and then profited after the news was publicly announced.[229]

b) The charges

G.N. and T.L. acts fell, according to their indictment, under the following provisions of US criminal law:

- 18 USC § 371 (conspiracy to commit securities fraud);
- 18 USC. § 371 (conspiracy to commit securities fraud and fraud in connection with a tender offer);
- 18 USC § 1349 (conspiracy to commit wire fraud and securities fraud);
- 15 USC §§ 78j (b) and 78ff, 17 CFR § 240.10b-5 (securities fraud);
- 15 USC §§ 78n (e) and 78ff, 17 CFR §§ 240.14e-3 (a) and 240.14e-3 (d) (fraud in connection with a tender offer);
- 18 USC § 1343 (wire fraud);
- 18 USC § 1348 (securities fraud).

Leaving aside the conspiracy charges, which constitute rather a special type of crime, such as attempted crime or the participation in crime of continental European legal systems and are totally irreconcilable with the continental doctrine (at least the German and the German-oriented ones, like the Greek one)[230], it is remarkable for the European legal scholar that the wording "market abuse" appears neither in the allegations nor in the charges. For the US legal system these allegations constitute a mere fraud (of multiple counts) case. In plain words: Under US law "insider trading" is fraud.

Above all, the charge according to title 15 USC §§ 78j (b) and 78ff, title 17 CFR § 240.10b-5 catches the eye. This general antifraud provision[231] (described as "the world's most powerful body of antifraud law"[232]) defines the first ever statutory market abuse offence in the U.S.A., enacted by § 10 of the Securities Exchange Act of June 6, 1934[233] (along with the market manipulation offence enacted at the same time by § 9 of the Securities Exchange Act[234]). Since then this provision "served as the backbone for both civil and criminal insider trading enforcement".[235] Under § 10 private plaintiffs may bring lawsuits and seek damages, SEC may bring civil-administrative (regulatory) actions or lawsuits, seeking disgorgement of profits, fines etc. and the Department of Justice may prosecute for securities fraud (provided that a "willful conduct" can be established).[236] The original provision of

[228] See press release and downloadable indictment at https://www.justice.gov/usao-sdny/pr/six-members-global-insider-trading-ring-charged-manhattan-federal-court (2.6.2022).

[229] T. L. was arrested and found guilty on all counts in a jury trial (U.S.A. v. T.L, 19 CR 716 (DLC). G.N. remained at large, since he was at the time in Greece and, as a Greek national, protected from extradition to a foreign country. The civil enforcement action against him from S.E.C. concluded in a settlement agreement, waiving "findings of fact and conclusions of law" (S.E.C. v. G.N, 19 CV 09645 (CM). Remaining at large, he never got the chance to defend himself, for the reason that in the USA a trial cannot take place, if the accused person does not place himself under US jurisdiction, i.e., unlike European legal systems, where the accused person has the right to be represented by a lawyer and does not have to place himself under arrest in order to file legal remedies (cf. e.g, ECHR, Judgment of 18.12.2003 – 63000/00, 74291/01, 74292/01 [Skondrianos v. Greece]).

[230] See, e.g., *Momsen/Washington*, ZIS 2019, 182 et seq. (243 et seq.); *Mylonopoulos*, Poinika Chronika 2018, 184.

[231] *Finigan*, Marquette Law Review 70 (1987), 692 (695).

[232] *Buell*, Duke Law Journal 61 (2011), 540 (581).

[233] *Anderson*, Insider Trading – Law, Ethics, and Reform, 2018, p. 29; *Byrne*, Villanova Law Review 66 (2021), 187 (188 et seq.); *Adams/Runklett*, University of Pennsylvania Law Review 145 (1997), 1098 (1100 et seq.); *Lowenfels/Bromberg*, The Business Lawyer 57 (2001), 1 et seq; *Finigan*, Marquette Law Review 70 (1987), 692 (695 et seq.). About the early development of the state case law leading up to the promulgation of the Securities Exchange Act of 1934 see *Anderson*, ibid., p. 11 et seq.

[234] Market Manipulation and the Securities Exchange Act, The Yale Law Journal 46 (1937), 629 et seq. Not only insider trading but also open market and misstatement manipulation are unlawful under § 10 (b), thus § 10 (b) is an overall market abuse offence (see *Fox/Glosten/Rauterberg*, Yale Journal on Regulation 35 [2018], 118 et seq.).

[235] *Byrne*, Villanova Law Review 66 (2021), 187 (191); *Finigan*, Marquette Law Review 70 (1987), 692 (697); *Adams/Runklett*, University of Pennsylvania Law Review 145 (1997), 1098 (1101).

[236] *Buell*, Duke Law Journal 61 (2011), 540 (543 et seq.).

1934 (June 6, 1934, ch. 404, title I, § 10, 48 Stat. 891), still in effect (Title 15 USC §§ 78j (a) and (b) as amended, reads as follows: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange – (a) (1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. (2) Paragraph (1) of this subsection shall not apply to security futures products. (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors".

This criminal act is punished by the penalties of § 78ff USC (namely § 32 of the Securities Exchange Act of June 6, 1934). The relevant above-mentioned Federal Regulation promulgated by SEC (Title 17 CFR § 240.10b-5), often referred to as "Rule 10b-5", includes an extensive definition of the relevant terms, which constitute the offence of this (first ever) "securities fraud".[237] According to SEC Rule 10b-5 the offence is committed only by the use of fraudulent means, given that it is necessary:

(a) To employ any device, scheme, or artifice to defraud;
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Utilized together § 10 (b) of the Securities Exchange Act and Rule 10b-5 constitute the traditional legal grounds for both civil and criminal liability in matters of insider trading violations.[238] The general antifraud provisions of § 10 and Rule 10b-5 cover, in conclusion, both market abuse offences that the MAD defines for European law, namely market manipulation and insider dealing or unlawful disclosure of insider information.[239]

Yet another form of "securities fraud" was enacted by congress after the infamous scandals of the early 2000s under Title 18 § 1348 USC[240] This relatively new crime of "securities and commodities fraud" was introduced under the famous Sarbanes-Oxley Act of 2002; § 807 of the Sarbanes-Oxley Act amended the U.S.C. by establishing "criminal penalties for defrauding shareholders of publicly traded companies". The enacted § 1348 is meant for criminal actions only, aiming to provide criminal authorities with greater flexibility when pursuing insider trading charges.[241] This provision, as amended, describes a criminal act without reference to a breach of federal regulations promulgated by SEC, in contrast to the old provision of the Securities Exchange Act of 1934.[242] It reads as follows:

> "Whoever knowingly executes, or attempts to execute, a scheme or artifice- (1) to defraud any person in connection with any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); or (2) to obtain, by means of false or fraudulent pretences, representations, or promises, any money or property in connection with the purchase or sale of any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); shall be fined under this title, or imprisoned not more than 25 years, or both."

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[237] § 240.10b–5 Employment of manipulative and deceptive devices: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." Sec. 10; 48 Stat. 891; 15 U. S. C. 78j; 13 FR 8183, Dec. 22, 1948, as amended at 16 FR 7928, Aug. 11, 1951. The Rule is followed by extensive notes explaining the above used terms (Pt. 240 17 CFR Ch. II [4–1–21 Edition]), available at https://www.govinfo.gov/content/pkg/CFR-2021-title17-vol4/pdf/CFR-2021-title17-vol4-part240-subpartA.pdf (2.6.2022).

[238] *Byrne*, Villanova Law Review 66 (2021), 187 (192); *Finigan*, Marquette Law Review 70 (1987), 692 (695 et seq.).

[239] Cf. *Adams/Runklett*, University of Pennsylvania Law Review 145 (1997), 1098 (1100 et seq.); *Finigan*, Marquette Law Review 70 (1987), 692 (188).

[240] *Byrne*, Villanova Law Review 66 (2021), 187 (189 et seq.).

[241] *Byrne*, Villanova Law Review 66 (2021), 187 (189, 199 et seq.); *Buell*, Duke Law Journal 61 (2011), 540 (541).

[242] See extensive statutory interpretation in *Byrne*, Villanova Law Review 66 (2021), 187 (208 et seq.).

Nevertheless, as apparent in the above-mentioned case, US criminal authorities utilize both the traditional Title 15 provisions and § 1348 when pursuing insider trading charges and thus continue "to rely on Title 15 as the primary vehicle for both civil and criminal insider trading actions", while courts struggle "to identify where the Title 15 provisions overlap with Section 1348 and where they diverge"[243]. In addition, in view of the fact that all trading of securities in the modern era takes place in the world wide web by means of information technology systems, every such act falling under the "securities fraud" provisions constitutes always a "wire fraud" too, according to Title 18 § 1343 USC.[244]

Nonetheless, the understanding of market abuse offences as fraud-property offences requires further scrutiny.

c) Market abuse offences as fraud-property offences in US law and doctrine

Evidently, insider dealing and unlawful disclosure of insider information are considered in the USA, wherefrom they originate as offences, a mere form of fraud, i.e., a "securities fraud".[245] The criminal act (like the civil fault[246]) consists in using or employing, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement, a manipulative or deceptive device or contrivance in contravention of the rules and regulations set by the Securities and Exchange Commission (SEC). However, the actus reus of the criminal offence does not involve reliance, economic loss and loss causation, contrary to the requirements for a civil action; establishing a scheme to defraud, a form of violating conduct and scienter is sufficient for a criminal conviction (though not sufficient to sustain a private plaintiff's claim).[247]

In US doctrine insider trading is discussed under the topic of Stock Market and Financial Market Frauds.[248] With *Finnigan*, "section 10(b) and Rule 10b-5 are considered 'catch-all' provisions of the securities laws, but what they must catch is fraud".[249] In the U.S.A. fraud is considered "a subset of theft, equivalent to the early statutory offense of false pretences", following the tradition of common law.[250] Fraud consists of deceitful means or acts used to cheat a person, corporation, or governmental agency and it can be a form of theft.[251] Theft consolidates in the modern American doctrine the crimes of larceny, embezzlement, and false pretences.[252]

Securities fraud is, however, a "constructive fraud", meaning "an equitable principle that would allow abusive behaviour (including fiduciary breaches) to be treated as if deceptive to avoid unjust enrichment, even if the common law elements of deceit are absent";[253] thus, "perhaps the most flexible and permissive account of the legal idea of fraud".[254] *Buell* held that: "One can commit any number of transgressions that the law labels 'securities fraud.' Securities fraud is based not on one conception of fraud but on many available conceptions of fraud".[255] Notably, under the influence of the "misappropriation theory" securities fraud tends to be viewed as a theft of material information akin to embezzlement, because it always involves a breach of fiduciary duty.[256]

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[243] *Byrne*, Villanova Law Review 66 (2021), 187 (189 et seq.).

[244] Cf. *Langevoort*, Watching Insider Trading Law Wobble: Obus, Newman, Salman, Two Martomas, and a Blaszczak, 2019, p. 46 et seq., available at https://scholarship.law.georgetown.edu/facpub/2209 (3.6.2022). Title 18 § 1343 USC reads: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretences, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

[245] *Buell*, Duke Law Journal 61 (2011), 540; *Finigan*, Marquette Law Review 70 (1987), 692; cf. Further *Byrne*, Villanova Law Review 66 (2021), 187 et seq.; *Anderson* (fn. 233), p. 29.

[246] See supra II. 4.

[247] *Buell*, Duke Law Journal 61 (2011), 540 (545 et seq.). Again cf. supra II. 4.

[248] *Gardner/Anderson*, Criminal Law, 11th ed. 2012, p. 404 et seq.

[249] *Finigan*, Marquette Law Review 70 (1987), 692 (713).

[250] *Green*, in: Dubber/Hörnle (fn. 209), p. 773 et seq., especially p. 777; *Jamaha*, Criminal Law, 10th ed. 2011, p. 378 et seq.; *Baughman/La Fond/Singer*, Criminal Law, 8th ed. 2022, p. 297, 308. About securities fraud as a "common law-like subject" see *Langevoort* (fn. 244), p. 1 et seq.

[251] *Gardner/Anderson* (fn. 248), p. 396; *Baughman/La Fond/Singer* (fn. 250), p. 297, 308.

[252] *Wallace/Roberson*, Principles of Criminal Law, 5th ed. 2012, p. 205; *Baughman/La Fond/Singer* (fn. 250), p. 297.

[253] *Langevoort* (fn. 244), p. 11; cf. *Buell*, Duke Law Journal 61 (2011), 540 (515 et seq.). Deceit is not necessary in embezzlement, although the conversion hat to be "fraudulent", see *Baughman/La Fond/Singer* (fn. 250), p. 308.

[254] *Buell*, Duke Law Journal 61 (2011), 540 (517, 541).

[255] *Buell*, Duke Law Journal 61 (2011), 540 (565).

[256] *Finigan*, Marquette Law Review 70 (1987), 692 (704 et seq., 719 et seq.); *Byrne*, Villanova Law Review 66 (2021), 187 (194 et seq.); *Langevoort* (fn. 244), p. 11 et seq., 23 et seq. The misappropriation theory was first endorsed in Carpenter v. United States, 484 U. S. 19 (1987), and then engrained in United States v. O'Hagan, 521 U. S. 642 (1997). In Judge Rakkof's plain words in United States v. Pinto-Thomaz (see supra *Langevoort* [fn. 244], p. 22): "Essentially, insider trading is a variation of the species of fraud known as embezzlement, which is defined in Black's Law Dictionary as '[t]he

Therefore, "the government is not required to establish actual economic injury incurred by securities investors. Rather, the government's burden is to establish that there is potential for some injury to occur".[257]

Consequently, overcharging with numerous counts for the same act, which falls under more than one overlapping fraud offence provisions, is in US market abuse cases rather evident.[258] Yet, the main observation in contrast to the European criminal provisions against market abuse, as outlined in MAD, remains the nature of the offences as simple property offences,[259] which belong to the common law grouping of theft offences.[260] Insider trading and market manipulation are from a doctrinal point of view, in this way, deprived of any "added value" in view of the protected legal good.

Securities fraud by using the "deceptive device" of insider trading is primarily conceived as an act of fraud against the company and its stockholders, since they are deprived/ defrauded of their material nonpublic information, i.e., their property.[261] The "classical theory" approach since Dirks v. SEC "is premised on the insider's breach of duty to shareholders", whereas the "misappropriation theory" approach, initiated in Carpenter v. United States and solidified in United States v. O'Hagan, conceives a securities fraud "akin to embezzlement" committed by "undisclosed misappropriation of [MNPI], in violation of a fiduciary duty".[262]

As a result and regardless of the theoretical approach, the actus reus always includes a breach of fiduciary duty either to the company's shareholders (classical theory) or to the source of the inside information (misappropriation theory) even for establishing the liability of remote tippees.[263] The latter are criminally liable because of "a breach of their duty of trust and confidence to the source of the MNPI, rather than their duty to shareholders"[264] or as receivers of "stolen goods".[265]

fraudulent taking of personal property with which one has been entrusted, especially as a fiduciary.' If the embezzler, instead of trading on the information himself passes on the information to someone who knows it is misappropriated" information but still intends to use it in connection with the purchase or sale of securities, that 'tippee' is likewise liable, just as any knowing receiver of stolen goods would be".

[257] *Finigan*, Marquette Law Review 70 (1987), 692 (719 et seq.).

[258] Cf. *Langevoort* (fn. 244), p. 46 et seq.; *Byrne*, Villanova Law Review 66 (2021), 187 (189 et seq., 200 et seq.).

[259] Cf. *Langevoort* (fn. 244), p. 33 et seq.

[260] Cf. *Green* (fn. 250), p. 769 et seq.

[261] Cf. *Finigan*, Marquette Law Review 70 (1987), 692 (719 et seq.), about "the harm from Misappropriation".

[262] *Anderson* (fn. 233), p. 59; *Byrne*, Villanova Law Review 66 (2021), 187 (193 et seq.); *Langevoort* (fn. 244), p. 23 et seq.; *Finigan*, Marquette Law Review 70 (1987), 692 (698 et seq.).

[263] *Byrne*, Villanova Law Review 66 (2021), 187 (196); *Langevoort* (fn. 244), p. 2 et seq., 48.

[264] *Byrne*, Villanova Law Review 66 (2021), 187 (195 et seq.); *Finigan*, Marquette Law Review 70 (1987), 692 (713 et seq.).

[265] *Langevoort* (fn. 244), p. 20 et seq., 44 et seq.

A brief, but characteristic, sketch of this property-based notion of securities fraud offences in U.S. Law and doctrine can be found in Judge D. L. Cote's instructions as to the law in the examined case of U.S. vs. T.L. (United States District Court Southern District of New York).[266] The jury was provided with the following definitions:

> "A 'scheme' is merely a plan to accomplish an object. A 'scheme to defraud' exists where an individual engages in any plan, device, or course of action to accomplish a fraudulent objective. 'Fraud' is a general term that embraces all efforts and means that individuals devise to take unfair advantage of others. It includes fraudulently embezzling or fraudulently converting for one's own use property belonging to another. […] 'property' includes confidential business information. The law protects a company's exclusive right to use and decide how to use confidential information that it has acquired or compiled in the course and conduct of its business. […] 'Intent to defraud' means to act with an intent to deceive or to harm another. A person acts with 'intent to defraud' if he engages or participates in a fraudulent scheme with a purpose of causing some harm to the property rights of the victim. This can include trading on the victim's confidential information. The government need not prove that A. or any of its stockholders suffered monetary loss. Because an essential element of the crime charged is intent to defraud, it follows that good faith on the part of the defendant is a complete defense to this charge. […] For example, a defendant's good faith belief that information he obtains or discloses is not confidential is a complete defense, however, inaccurate that belief may turn out to be. On the other hand, fraudulent intent may be proven by showing that the defendant knew that his conduct in the scheme was calculated to fraudulently deprive A. of its right to the exclusive use of its confidential information and, nonetheless, he associated himself with the fraudulent scheme. A scheme to defraud is 'in connection with' a security if you find the alleged conduct 'touched upon' a securities transaction. It is not necessary for you to find that the defendant actually purchased or sold securities. It is sufficient if the defendant, while in knowing possession of A.'s confidential information, participated in a scheme that involved A. Securities. […] Counts Three through Five charge the defendant with engaging in the deceptive device known as insider trading. […] A relationship of trust and confidence exists between the stockholders of a corporation and corporate 'insiders' – such as a corporation's officers, directors, and employees – who have obtained material nonpublic information by reason of their position in the corporation. An insider must abstain from trading on the basis of material nonpublic information, or passing that information on to others, because the law forbids corporate insiders from taking unfair advantage of the corporation's uninformed stockholders and using 'inside' information for their personal advantage. The person

[266] U.S.A. vs. T.L., transcript January 14, 2020, p. 1018 et seq.

who wrongfully receives such information from an insider is referred to as a 'tippee.' The law also prohibits a tippee from buying or selling securities on the basis of material nonpublic information received from an insider, or giving that information to others so that they can trade the securities on the basis of that information. … In assessing whether information is 'nonpublic,' the key word is 'available.' If information is available, for example, in the public media, analysts' reports, scientific journals, or SEC filings, it is public. Information is nonpublic if it is not available to the public through sources such as press releases, Securities and Exchange Commission filings, scientific journals, trade publications, analysts' reports, newspapers, magazines, television, radio, rumors, word of mouth, websites, Internet chat rooms, or online message boards. The fact that information has not appeared in the newspaper or other widely available public media does not alone determine whether the information is nonpublic. Sometimes a corporation authorizes the release of information, or is otherwise willing to make information available to securities analysts, investors, or members of the press who ask for it even though it may never have appeared in any newspaper or other publication. Such information would be considered public. Information is not necessarily nonpublic simply because there has been no formal announcement or because only a few people have been made aware of it. On the other hand, the confirmation by an insider of unconfirmed facts or rumors – even if those facts or rumors are reported in a newspaper or analyst report – may itself be inside information. […] A tip from an insider that is more reliable and specific than unconfirmed facts or public rumors is nonpublic information. […] Information is 'material' if a reasonable investor would have viewed the information as having significantly altered the total mix of information then available. Material facts include those which may affect the desire of investors to buy, sell, or hold a company's securities. Material information includes any fact which, viewed objectively, might affect the value of the corporation's stock or other securities."

d) What if this was a European market abuse case?

The above market abuse acts, supposing they had taken place in the EU, would fall certainly under the provisions of Art. 3 §§ 2, 3 MAD (Insider dealing, recommending or inducing another person to engage in insider dealing), which reads as follows:

"2. For the purposes of this Directive, insider dealing arises where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates.3. This Article applies to any person who possesses inside information as a result of:
(a) being a member of the administrative, management or supervisory bodies of the issuer or emission allowance market participant;
(b) having a holding in the capital of the issuer or emission allowance market participant;
(c) having access to the information through the exercise of an employment, profession or duties; or
(d) being involved in criminal activities. This Article also applies to any person who has obtained inside information under circumstances other than those referred to in the first subparagraph where that person knows that it is inside information."

The main issue in the examined case of U.S. v. T.L. was not the criminal liability of the tipper,[267] but that of the first tippee and of a further, thus "remote" tippee. In Europe the tippee, even the remote one, has the same criminal liability as the insider, regardless of holding a fiduciary position and breaching the deriving duty of trust.[268] He is (or should be) criminally liable pursuant to national provisions transposing MAD, even if he obtains the information by chance or thanks to his good fortune, as long as he knows its origin and its nature as material and nonpublic, thus ineligible to use for trading in securities. In the USA, however, the personal benefit requirement, first established in Dirks v. SEC, dictates that "a tipper must receive a "direct or indirect" personal benefit from the disclosure of MNPI to be liable for insider trading under the Title 15 securities fraud provisions" and, further, that the "tippee-and even remote tippee-liability is contingent on the original tipper receiving a personal benefit for divulging the MNPI; if the court finds that the original tipper received a personal benefit, the tippee may be held liable-but only if the tippee or remote tippee knows or should have known that the tipper acted for the tipper's own personal benefit".[269]

[267] The actual insider-tipper, i.e, the person, who disclosed the MNPI, despite his fiduciary duty to the company, was probably not even indicted. No such indictment is mentioned in the U. S. Attorney's Office press release or indictments (supra fn. 228). This leaves the inquisitorial-trial-schooled observer wandering about the outputs of a plea-bargaining-centered, adversarial-trial-system: Did the actual insider/original tipper enter a deal with the federal authorities, giving up his own son? How can the tippee be criminal liable and the tipper not, if, according to U. S. Supreme Court case law (see text supra), the tipper must share the information for the purpose of tippee trading in order for the latter to get convicted? An adversarial and plea-bargaining-centered system, where the Public Prosecutor disposes of the charge freely does indeed "operate in the shadows" (cf. *McConville/ Wilson*, The handbook of criminal justice process, 2002, p. 376; *Androulakis*, Themeliodis ennies tis poinikis dikis [Basic principles of criminal procedure], 4th ed. 2012, p. 166 et seq.).

[268] Cf. Explanatory Report to [Greek] Law 4443/2016, p. 7 et seq.

[269] *Byrne*, Villanova Law Review 66 (2021), 187 (197 et seq.); *Langevoort* (fn. 244), p. 2 et seq.; *Anderson* (fn. 233), p. 78 et seq.

Again, Judge Cote's instructions as to the U.S. law in the examined jury trial (U.S.A. vs. T.L.) are very enlightening:[270]

> "In order to find that the defendant, the alleged tippee, was forbidden to give material nonpublic information to others so that they could trade in A. Securities, you must find that: The defendant's father had a fiduciary or other relationship of trust and confidence with A. and that A. owned the information at issue in the count that you are considering; the defendant's father knowingly violated that relationship of trust and confidence by disclosing A. 's material nonpublic information to the defendant; the defendant's father anticipated that the defendant would use the information to trade securities or to cause others to trade securities using the information; the defendant's father anticipated receiving a personal benefit, directly or indirectly, from his disclosure of the information to the defendant; the defendant knew the information he obtained from his father had been disclosed in breach of a duty of trust and confidence owed by his father to A.; the defendant knew that his father anticipated receiving a personal benefit from disclosing the information to the defendant; knowing that the information was material and nonpublic, the defendant disclosed the information to another; the defendant anticipated that the individual to whom he disclosed the material nonpublic information would use the information to trade securities or disseminate the information further for that individual's own benefit; and the defendant personally benefited, directly or indirectly, from so disclosing the information. […] A fiduciary or other similar relationship of trust and confidence exists between two parties when one party, because of the relationship with the other, is intended to act not for his own benefit, but for the benefit of the other party. A fiduciary may not use or communicate information confidentially given to him by the other party or acquired during the course of or on account of their relationship. […] a member of a corporation's board of directors is a fiduciary of the corporation and has a fiduciary relationship with the stockholders of the corporation. … The law defines personal benefit broadly. Therefore, the personal benefit that the person disclosing the information intends to receive by making the disclosure can be direct or indirect and need not take any particular form. For instance, the person disclosing the information may intend to benefit himself financially, either immediately or in the future. A personal benefit could be the enhancement of a relationship that the discloser hopes will translate into future earnings. A personal benefit may also include the creation or enhancement of a relationship with the recipient that suggests a quid pro quo or exchange of benefits either now or in the future. The personal benefit may be intangible and it need not be pecuniary in nature. A personal benefit could be simply the intention to confer a benefit on the recipient of the information. For example, a personal benefit may include a gift of confidential information to a relative or friend so that the recipient can profit from trading in securities. In this example, the disclosure is essentially a gift of the profits to the recipient. […] The disclosure of information for a legitimate corporation purpose is not, however, the disclosure of information to receive a personal benefit. On a related topic, the government need not prove that the person disclosing the material nonpublic information to another knew for a certainty that the recipient would use the information to trade securities or to cause others to trade securities. It is sufficient if the government proves that the person disclosing the information anticipated that the information would be used in that way. […] Acting with an intent to defraud in the context of an insider trading scheme means to act with an intent to disclose confidential information obtained from a company, here A, without its knowledge or approval. One who deliberately tips information which he knows to be material and nonpublic to another, who may reasonably be expected to use it to his advantage or who one knows is able to use it to his advantage, has acted with intent to defraud. The government need not prove that the defendant acted with an intent to harm or that he knew he was breaking any particular law."

On the contrary, in European law the American construct of the tippee acquiring the tippers fiduciary duty and breaching it himself "by trading on the information with full knowledge that it had been improperly disclosed" is irrelevant; the same applies to the scienter prerequisite in order to establish the remote tippee's criminal liability confirmed by the Supreme Court in Salman v. United States, namely that the tipper must share the information for the purpose of tippee trading and the tipper must know/expect, that the tippee would, not merely could, trade on the basis of the MNPI.[271]

The apparently broader criminal liability of the remote tippee in European criminal law can only be explained by the conception of market abuse crimes as criminal acts against a legal good other than (and rising above) individual property.

[270] U.S.A. vs. T.L., transcript January 14, 2020, p. 1030 et seq.

[271] See about tipper-tippee liability and the element of scienter in this context *Langevoort* (fn. 244), p. 2 et seq., 36 et seq., 42 et seq.; *Anderson* (fn. 233), p. 71 et seq.; *Byrne*, Villanova Law Review 66 (2021), 187 (196 et seq.); *Buell*, Duke Law Journal 61 (2011), 540 (541 et seq.); *Eisenberg*, Insider Trading Law After Salman, 18.1.2017, available at https://corpgov.law.harvard.edu/2017/01/18/insider-trading-law-after-salman/ (2.6.2022). By ruling in United States v. Blaszczak, that personal benefit is not necessary within the misappropriation theory of insider trading liability and that the personal benefit requirement does not apply to insider trading cases brought under § 1348 USC (see the extensive analysis of: *Byrne*, Villanova Law Review 66 [2021], 187 [204 et seq.]; *Langevoort* [fn. 244], p. 44 et seq.), the United States Court of Appeals for the Second Circuit took a step closer to the broader European view, even if, at least for the German influenced European doctrine, the notion of insider trading as a form of embezzlement of the information itself seems rather awkward.

Thus, in European law neither the establishment of a connection between a fiduciary related to the company tipper and a collaborating tippee, who both knowingly and wilfully defraud the company of its property, i.e., its private and material information, is relevant, nor a breach of a duty towards the rightful owner of MNPI needs to be established.[272] The very essence of market abuse crimes against the integrity of the market is the unfair advantage obtained by anyone who gets hold of MNPI, even by chance or good fortune, and uses it to gain an unfair advantage in comparison to other investors.[273] This inflicts harm to the "smooth functioning of securities markets" and undermines "public confidence in markets".

In consequence, this information represents a hazard for the integrity of the market and everybody who gains control over this hazardous object is charged with a special obligation-and consequently with the responsibility/liability to handle it with caution. By acting (or omitting) against this special obligation (duty) he inflicts harm to the protected (collective) legal good. Therefore, *market abuse offences like insider trading should be conceived as "duty crimes" or "special guarantor crimes"* according to the German theory founded particularly by *Roxin* and further elaborated by *Schünemann*.[274] The actus reus of these crimes consists in *violating a special obligation/duty deriving from the guarantor position of the perpetrator in view of the protected legal good*, which (guarantor position) is described and presupposed in the relevant provision. In the European criminal law outlined by MAD (i.e., the minimum standard of criminalization set by the directive) every holder of MNPI is to be considered a special guarantor of the integrity of the market and of public confidence in its smooth working, notwithstanding the way a person obtained control (hence dominance) over this hazardous object. Inflicting harm to individual property of a company and/or its stockholders is in this context plainly irrelevant.

e) Why do we need non-property, genuine market abuse offences?

The previous comparison of US law and doctrine, wherefrom market abuse offences originate (nevertheless, as fraud/ property offences), and European criminal law set by MAD (in view of the continental doctrine's understanding of market abuse offences as criminal acts or omissions against a "collective legal good", other than individual property of market participants) leads to the following conclusion: Market abuse according to European perception is not merely a special kind of fraud. It inflicts, in quality and quantity, more harm than simple fraud does to individual property. Market abuse offences disorganize the capitalistic economic system and the total financial loss goes beyond individual property losses of certain individual investors and other market participants.[275]

Furthermore, a special market abuse offence is in Europe absolutely necessary out of doctrinal reasons, mainly because continental fraud, unlike its Anglo-American counterpart, is not considered as an offence fitting in to the "family" of "theft", in the meaning of the old common law tradition. In Europe fraud is only what some American scholars refer to as "core fraud".[276]

To be exact, the following elements, which build a common ground especially in German influenced continental criminal laws, are necessary to establish a fraud offence:[277] The perpetrator either creates a false impression to another person, or fails to lift one otherwise created, although he has a relevant duty to. Under this false impression, the misled person disposes of property by act or omission and causes damage. The damage must, thus, be self-inflicted by the victim (or another person empowered to dispose of his property on his behalf), who acts under a false impression and gives away his property. There must be causality connecting the perpetrator's deceitful act or omission, the victim's false impression and the economic damage suffered by disposal of property. The perpetrator must deceive knowing the above elements and with the (further) purpose of obtaining an economic benefit out of the victim's property loss (not from other sources). The derivation of the benefit out of the property's loss establishes another material element, the so called "material correspondence" of loss and benefit. Apart from the sophisticated scienter element and the "material correspondence", the remaining elements apply to the French "l'escroquerie" too (Art. 313-1 CP).[278]

Nonetheless, all these conditions of continental fraud do not apply (at the very least according to Greek doctrine and legislator) in insider trading cases, like the one we examined.[279] Neither company A, nor its stockholders acted under

[272] Cf. the criticism to the misappropriation theory of *Langevoort* (fn. 244), p. 25 et seq.

[273] Cf. *Byrne*, Villanova Law Review 66 (2021), 187; *Buell*, Duke Law Journal 61 (2011), 540 (562 et seq.); *Langevoort* (fn. 244), p. 8, 23; *Finigan*, Marquette Law Review 70 (1987), 692 (696 et seq., 723).

[274] *Roxin*, Strafrecht, Allgemeiner Teil, Vol. 2, 2003, § 25 paras 267 et seq.; *id.*, Täterschaft und Tatherrschaft, 10th ed. 2019, p. 352 et seq.; *Schünemann*, in: Laufhütte/Rissing-van Saan/Tiedemann (eds.), Leipziger Kommentar, Strafgesetzbuch, Vol. 1, 12th ed. 2007, § 25 paras 42 et seq.; *id.*, Gesammelte Werke, Vol. 2, 2020, p. 543 et seq., especially p. 551 et seq.; *Chen*, Das Garantensonderdelikt, 2006, passim.

[275] Explanatory Report to [Greek] Law 4443/2016, p. 6.

[276] *Buell*, Duke Law Journal 61 (2011), 540 (526 et seq.); cf. *Langevoort* (fn. 244), p. 11.

[277] See, e.g., *Hefendehl*, in: Erb/Schäfer (eds.), Münchener Kommentar zum Strafgesetzbuch, Vol. 5, 4th ed. 2022, § 263 paras 9–19; *Perron*, in: Schönke/Schröder, Strafgesetzbuch, Kommentar, 30th ed. 2019, § 263 paras 5, 5a; *Nestler* (fn. 213), p. 145; *Mylonopoulos*, Poiniko Dikaio, Eidiko Meros (Criminal Law, Special Part), 4th ed. 2021, p. 367 et seq.; *Bertel/ Schwaighofer/Venier*, Österreichisches Strafrecht, Besonderer Teil, Vol. 1, 11th ed. 2010, p. 249.

[278] *André* (fn. 210), p. 319 et seq.

[279] Cf. *Petropoulos*, in: Pavlou/Samios (eds.), Eidikoi Poinikoi Nomoi (Special Criminal Laws), 2012, Art. 30 L. 3340/2005 paras 123 et seq.; Explanatory Report to [Greek] Law 4443/2016, p. 6 et seq. *Trüg*, Neue Zeitschrift für Ge-

some false impressions and gave away their own property (the material nonpublic information); nor did the perpetrators intend to obtain an economic benefit out of the company's or the stockholders' loss. The US fraud notion cannot be adjusted to fit the continental fraud doctrine. The tippees are, in general, not after the material nonpublic information per se. The tippees rather want to trade based on it, or sell it, or exchange it with other benefits.

Therefore, the real victims of the perpetrator's conduct – following the European notion of victim laid out in Directive 2012/29/EU, including, among others, a person who suffered substantial economic loss-are the other market participants, who initiate or take part in securities transactions without knowledge of the material information, thus in unfair disadvantage, and, subsequently, suffer (or put themselves in danger to suffer) substantial economic loss, because they based their trading decisions on insufficient knowledge or information. In simple words: They get harmed because they participate in securities transactions being unknowingly in a position of unfair disadvantage. Nonetheless, as mentioned before, MAD does not protect their private property interests, but only the integrity of the market, hence placing the point of intervention of criminal law at an early stage of the criminal course towards inflicting property damage to investors and regardless of any tangible realization of it.[280]

It should also be noted that in the US legal system securities' fraud is prosecuted within an adversarial criminal procedure, where investors are a priori excluded from participating as a party in the criminal proceedings. They are, therefore, inevitably diverted to the civil action procedures.[281] The Anglo-American adversarial criminal procedure is a competitive process to determine the facts and application of the law accurately between the public prosecutor and the defendant in a *fair* trial (thus, resembling a fair competition); the public prosecutor is a party and the judge is an impartial referee. Most European criminal procedures, on the other hand, follow (or at least start out from) the inquisitorial model.[282] In the inquisitorial criminal procedure judicial authorities are actively involved in investigating the facts of the case and apply the law without prejudice; the objective is a *just* trial.[283] The public prosecutor is an impartial and sometimes, (as in Greece), even a judicial authority; furthermore, the judge does not only hold the balance between the parties but protects the innocent and convicts the guilty, seeing that he has an obligation to determine the relevant facts and find the truth by all legal means at his disposal. Consequently, the harmed natural person or legal entity can be a party and pursue his/her/its interests in the inquisitorial trial.

Hence, only in the inquisitorial criminal procedure is there room for the victim to participate as a party. The relevant European legal framework is established in Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 "establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA". According to Art. 1 § 1, the purpose of this Directive is to ensure that victims of crime are able to participate in criminal proceedings and according to Art. 2 § 1 (a) the term 'victim' is, among others, determined as a natural person who has suffered economic loss which was directly caused by a criminal offence.

It is therefore only true, that within the European legal framework criminal charges for property offences in market abuse cases ensure legal protection by means of criminal law to individual investors, who suffered financial loss due to market abuse acts and omissions. Still, drawing up a fraud charge including all the above elements of continental fraud in market abuse cases and, furthermore, proving them is a difficult task for European prosecution authorities. This takes inevitably its toll on the investors trying to pursue their interests by taking part in the criminal procedure, since the genuine market abuse offences outlined in MAD do not protect private interests and, as a result, investors are excluded, i.e., they cannot participate in the capacity of a party.

3. Market manipulation and fraud: The Folli Follie Case

a) The allegations[284]

Folli Follie S.A. was founded in 1982 by D.K., who was during the relevant time period BoD president. His son G.K. was at the same time the Company's CEO. Together they were the main stockholders, hence in control of the company. The accused, along with other key managers of the company, were, allegedly, forging bank documents of foreign subsidiaries based in Asia in an attempt to show that the group was financially robust. One bank account of an Asian subsidiary, which according to its financial statements had a balance of € 70 million, had only € 60. They were also accused of falsely showing inflated sales in the Asian subsidiaries by engag-

sellschaftsrecht (NZG) 2014, 809 et seq., accepts fraud according to § 263 StGB (German Penal Code) only, when the perpetrator is under obligation by a specific law provision to reveal certain information to the public. However, the acceptance of such a "fraud against the public" undermines the nature of the fraud offence as a "communication and relation offence" ("Kommunikations- und Beziehungsdelikt", see *Hefendehl* (fn. 277), § 263 paras 36 et seqq.).

[280] *Pananis* (fn. 216), WpHG § 119 para. 11.

[281] Cf. supra II. 5. about civil class actions in the USA.

[282] According to the relevant protocol to the Treaty of the EU the United Kingdom did not take part in the adoption of the Directive and was therefore not bound by it or subject to its application. Therefore, even before BREXIT, the application of MAD-based criminal law within the main adversarial legal system in EU was not anticipated.

[283] See a comparison between the European inquisitorial and the American adversarial procedure by *Grande*, in: Brown/Turner/Weisser (eds.), The Oxford Handbook of Criminal Process, 2019, p. 67 et seq.; from an inquisitorial point of view see the brief sketch of *Roxin/Schünemann*, Strafverfahrensrecht, 27th ed. 2012, p. 86 et seq.

[284] Athens Court of First Instance no. 2896/2021 (in chambers).

ing in a scheme involving phantom companies. The false financial statements of those companies were sent to Greece, where they were consolidated with the financial statements of the other subsidiaries in Europe and North America and of the parent Greek public company, head of the group.

By publishing these false consolidated financial statements, they, allegedly, managed to deceive investors to buy stock and bonds and, furthermore, they manipulated the share price in order to secure large bank loans for the company and sell some of their own stock with profit. The bogus thriving financial status of the company, based upon false consolidated financial statements, was uncovered in 2018 by an activist equity fund, which conducted independent research and published a report on the company's Asian subsidiaries causing the Greek capital market regulatory authority to investigate and take action against the company and the entire management. The main defendants confessed during pretrial questioning before the judge of judicial investigations (juge d'instruction) to knowingly allowing other persons to alter financial statements of the Asian subsidiaries.

b) The charges

The accused were indicted on charges of:

- Forgery (216 Greek Penal Code);
- Repeated fraud against investors, among them public entities, e.g., the Public Insurance Fund (386 GPC);
- Repeated market manipulation by disseminating information through the media, including the internet, or by any other means, which gives false or misleading signals as to the supply of, demand for, or price of a financial instrument, where the persons who made the dissemination derive for themselves or for another person an advantage or profit from the dissemination of the information in question (Art. 31 §§ 1c, 2 L. 4443/2016, which transposed MAD to Greek national law);
- Establishing a criminal organization to commit acts of forgery, fraud and market manipulation (187 GPC).

Both fraud against the investors and market manipulation charges are described in the indictment by decision of the Athens First Instance Court in Chambers with the exact same facts, i.e., in the exact same way. In other words, both counts share the same factual basis. The fraud charge, however, made it possible for stockholders, who saw the value of their securities registered in Athens Exchange vaporize in a very short period of time, among them funds and entities of the public sector, to take part in the proceedings as "supporters of the charge" (ex "civil parties") establishing rights of access to the file etc. At the first day of the trial hearing, nearly 200 natural persons and legal entities listed in the indictment as investors/shareholders, who suffered loss, declared their will to support the charges as a party.[285]

c) Do we need a fraud charge to process market manipulation after MAD?

The difference to the above described overlapping of various fraud counts in US law is evidently the concurrence of a traditional property offence, namely fraud (in the continental conception), with the special market abuse offences against the collective legal good of market integrity (i.e., the smooth functioning of the market). Even if market manipulation started out across Europe as a statutory special fraud offence ("Kursbetrug"), in Germany dating back to 1884,[286] the turn to a protection of a collective legal good by MAD reflects the result of the relevant evolution of continental, especially German, law.[287] Therefore, the dilemma arises: Is the fraud offence, even according to the narrower continental conception, indeed sufficient to cover market abuse in form of market manipulation (at the very least), thus rendering MAD superfluous? Should the compelling enforcement reasons for prosecution authorities trying to fit market manipulation and insider dealing in the strict framework of continental fraud have gone extinct after MAD setting minimum standards for an all European criminalization of market abuse offences protecting universal legal goods?

At first, it is evident that the above-mentioned criminal acts fall under Art. 5 § 2 MAD, which describes the offence of market manipulation.[288] Art. 31 §§ 1, 2 of Law 4443/2016

[285] Many of the individual investors involved formed a club to represent them in the proceedings, but this indirect participation through a legal entity, which suffered no direct loss from the alleged fraud, was denied by court decision. Art. 63 et seqq. of the Greek Criminal Procedure Code resemble in this issue the provisions of the French Code of Criminal Procedure (see supra 1.).

[286] *Mülbert* (fn. 177), Vor Art. 12 VO Nr. 596/2014 para. 1 (p. 1695). In Greece this "exchange fraud against the public" was first enacted in 1928 by Art. 34 of Law 3632/1928.

[287] Cf. *Mülbert* (fn. 177), Vor Art. 12 VO Nr. 596/2014 paras 1 et seqq. (p. 1694 et seqq.).

[288] It reads as follows: "2. For the purposes of this Directive, market manipulation shall comprise the following activities: (a) entering into a transaction, placing an order to trade or any other behaviour which: (i) gives false or misleading signals as to the supply of, demand for, or price of, a financial instrument or a related spot commodity contract; or (ii) secures the price of one or several financial instruments or a related spot commodity contract at an abnormal or artificial level; unless the reasons for so doing of the person who entered into the transactions or issued the orders to trade are legitimate, and those transactions or orders to trade are in conformity with accepted market practices on the trading venue concerned; (b) entering into a transaction, placing an order to trade or any other activity or behaviour which affects the price of one or several financial instruments or a related spot commodity contract, which employs a fictitious device or any other form of deception or contrivance; (c) disseminating information through the media, including the internet, or by any other means, which gives false or misleading signals as to the supply of, demand for, or price of a financial instrument, or a related spot commodity contract, or secures the price of one or several financial instruments or a related spot commodity contract at an abnormal or artificial level, where

reiterated these provisions of MAD, thus transposed MAD fast mot a mot to Greek national law. Similarly, the French legislator transposed the provisions for market manipulation by reiterating MAD provisions in Code Monétaire et Financier (see Art. L465-3-1 et seq. CMF). In Germany the national legislator chose to cross-refer directly to the relevant Articles of MAR for the description of the material elements of both crimes of market manipulation and insider dealing (see §§ 119, 120 WpHG).[289] In view of the above, we may speak of a common European description of the elements of market abuse offences, in this case market manipulation.

This common European conception of the elements of market manipulation involves indeed the use of all traditional fraudulent means to deceive the person who disposes of the targeted property, but neither requires a personal communication to convince the latter, nor are causation of the perpetrator's act or omission to inflicting financial damage to certain individual investors and the self-inflicting nature of the financial loss (by the investor who acts upon false or misleading information, thus under false impressions caused by the perpetrator's deceitful acts or not lifted due to his omissions) elements of the actus reus; nor is the intent to defraud specific investors, who trade on securities, an element of mens rea; nor does the benefit of the market manipulator need to correspond to the investor's financial loss (i.e., to gain his, or her, economic benefit out of the victim's economic loss).[290] The inadequacy to establish and prove these elements builds therefore a solid defence, at least from a doctrinal point of view, against a fraud charge in Europe, leaving room only for the prosecution of the special market abuse offences, which have to meet the minimum standards determined by MAD.[291] The offences outlined in MAD are indeed sufficient to bring severe punishment upon market abusers, and yet it seems that prosecuting authorities and courts across Europe are somehow reluctant to disregard fraud in market abuse cases.[292]

d) Why do national prosecutors across Europe insist on bringing fraud charges in market abuse cases?

According to German jurisprudence and doctrine, fraud ("Betrug") and market abuse offences (insider trading, market manipulation) can be concurrent offences, i.e., the market abuser can be convicted for both, based on the same facts (e.g., in cases of "Churning", "Front-Running" and "short sales/bucket orders").[293] The same applies to Greek jurisprudence,[294] as exemplified in the above-mentioned case of F.F.,[295] notwithstanding the criticism in the Greek doctrine[296] and the expressed legislator's will in the explanatory report to Law 4443/2016, which transposed MAD (p. 8 et seq). Consequently, the question arises, why continental prosecutors and jurisprudence insist on fraud charges and convictions in market abuse cases. It is certainly not a mere doctrinal matter of how different national legal orders perceive the concurrence of crimes described in different provisions; such an assumption would be extremely short-sighted.

The correct answer is already implied: Absent common European legal grounds for a civil claim, the European criminal legal framework of MAD deprives, by protecting only a collective legal good, investors, who suffered financial loss by trading, while being in unfair disadvantage due to insider dealing or unlawful disclosure of insider information or market manipulation, of taking part in the criminal proceedings; in other words: of their classification as victims in the criminal procedure, who enjoy certain well established rights in the European legal order (for example, taking part in restorative justice procedures[297] and raising a claim against the perpetrator's confiscated property within the criminal proceedings).

Nevertheless, the investors should be allowed to pursue their personal financial interests in market abuse criminal proceedings. A fraud charge holds this advantage.[298] It involves as victims in the (inquisitorial) criminal proceedings people who suffered substantial financial loss and want to pursue their interest as a party. Even so, this effort results inevitably in construing the strict elements of continental fraud in a very broad, indeed law bending, manner.[299] Ensuring procedural participation rights for investors, who suffered actual substantial financial loss caused by market abuse acts or omissions is, therefore, a step the European legislator should consider, since the concurrence of fraud and market

the persons who made the dissemination derive for themselves or for another person an advantage or profit from the dissemination of the information in question; or (d) transmitting false or misleading information or providing false or misleading inputs or any other behaviour which manipulates the calculation of a benchmark".

[289] *Saliger* (fn. 215), WpHG § 119 para. 44; *Hilgendorf/ Kusche*, in: Park (fn. 215), Vorbemerkungen zu Insiderdelikten, para. 28; *Nestler* (fn. 213), p. 250 et seq., 268 et seq.

[290] See especially *Petropoulos* (fn. 279), Art. 30 L. 3340/2005 paras 123 et seqq.; Explanatory Report to [Greek] Law 4443/2016, p. 7.

[291] Explanatory Report to [Greek] Law 4443/2016, p. 6.

[292] Cf. *Trüg*, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2014, 809 et seq.

[293] *Mülbert* (fn. 209), Art. 12 VO Nr. 596/2014 para. 19 (p. 1728 et seq.); *Nestler* (fn. 213), p. 145, 151; *Theile* (fn. 213), ch. 7 § 38 WpHG a.F. para. 98 (p. 1993); *Trüg*, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2014, 809 et seq.; *Saliger* (fn. 215), WpHG § 119 para. 281; *Pananis* (fn. 216), WpHG § 119 para. 278.

[294] See Areios Pagos [Supreme Court of Greece] decisions no. 75/2016, 1626/2011, 336/2010, 1056/2008 (db. NOMOS).

[295] Athens Court of First Instance no. 2896/2021 (in chambers).

[296] See again *Petropoulos* (fn. 279), Art. 30 L. 3340/2005 paras 123 et seq.

[297] Cf., e.g., *Kerner*, Restorative Justice 2013, 430 et seq.; *Lauwaert*, Restorative Justice2013, 414 et seq.

[298] *Buell*, Duke Law Journal 61 (2011), 540 (575).

[299] Cf. *Mülbert* (fn. 177), Art. 12 VO Nr. 596/2014 para. 19 (p. 1728 et seq.); Explanatory Report to [Greek] Law 4443/2016, p. 8 et seq.; Areios Pagos [Supreme Court of Greece] no. 1056/2008 (db. NOMOS).

abuse offences presents a clear and present danger for the common European approach of market abuse offences.

The following constitutes an attempt to briefly describe this problem and provide suggestions.

4. The victimological aspect

a) The investor as a victim in market abuse criminal proceedings?

As mentioned before, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, pursues the goal to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings. For investors, who suffered loss due to market abuse offences, it is indeed of major significance to participate in criminal proceedings to be heard during criminal proceedings and to provide evidence, to also be able to exercise the right to a review of a decision not to prosecute and to have access to safe and competent restorative justice services in order to limit their losses as much as possible (see Art. 10, 11, 12 of Directive 2012/29/EU).

However, a victim entitled to these rights is according to Art. 2 § 1 of Directive 2012/29/EU only "a natural person who has suffered harm, including […] economic loss which was directly caused by a criminal offence". Hence, a company or any other legal entity falls outside the "victim" definition and is therefore ex lege deprived of the right to take part in criminal proceedings, even if it suffered substantial financial loss[300]. Furthermore, as far as natural persons of investors are concerned, it is rather questionable if their related to a market abuse act or omission economic loss is (or can be proven as) "directly caused" by it. It is, on the contrary, common between national European legislatures to let the capital market regulating authority act as a party in criminal proceedings for market abuse offences. The capital market authority seems to assume the role of a collective litigator, like the lawyers involved in civil class actions.[301] Here the authority definitely controls the litigation while serving its own interests (and not the individual investors', ones who suffered the property losses).

E.g., in Greece the regulatory authority takes part in the criminal proceedings as a "supporter of the charge" (Art. 33 § 3 L. 4443/2016),[302] given that the "partie civile" of French origin was abolished in favour of a "supporter of the criminal charge" in the new Criminal Procedure Code of 2019. In France the regulatory authority takes part in the criminal proceedings as a "partie civile" (Art. L621-16-1 CMF).[303] In contrast, the German BaFin shares information with the public prosecutor's office, but refrains from further involvement as a party in the criminal investigation and proceedings; even so, it exercises a great influence by filing criminal notices at discretion and through its employees, who are normally summoned to report and testify as experts in the proceedings.[304]

Since the European legal framework does not establish victim rights for the investor, neither in MAD nor within the framework set by Directive 2012/29/EU, the solutions on national level vary as national criminal and criminal procedure laws vary. In Greece, for example, due to the collective nature of the protected legal good, the only way for the investor to take part in the criminal proceedings is through filing a criminal complaint for fraud. Such fraud charges in market abuse cases are very frequent in Germany also.

Nota bene: Taking part in criminal proceedings means most importantly, apart from pursuing the conviction of the wrongdoer, taking part in restorative justice proceedings and/or having an opportunity to restore damages by taking part in the distribution of confiscated property of the offender.[305] The participation of a regulatory authority, acting as partial prosecutor (contrary to the judicial-impartial notion about the prosecutor of the inquisitorial model) or imposing sanctions of punitive nature,[306] as a "victim" in market abuse criminal proceedings (like in Greece or France) adds nothing to the protection of the rights of the real victims, i.e., the investors. Furthermore, it tosses the inquisitorial procedure off balance in detriment of the suspect or accused person, since the regulatory authority acts as a para-prosecutor, who, above all, investigates the crime to impose parallel administrative sanctions of punitive nature!

The examination of the European legal framework about the criminal offences of market abuse reveals, therefore, a shortcoming regarding the protection of the investor's rights who sustained financial loss. He is excluded from the crimi-

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[300] *Kerner*, Restorative Justice 2013, 431 et seq. The author notes correctly: "Since the Directive lays down only minimum rules, however, Member States may extend the rights set out in (it) not only with regard to natural persons (Rec 11) hit by crime as such but also to those acting as owners or representatives or family members or employees of a legal entity respectively juridical person."

[301] See supra II. 5.

[302] Cf. Explanatory Report to [Greek] Law 4443/2016, p. 11.

[303] About "la partie civile" in general, see *Bouloc/Matsopoulou* (fn. 222), p. 263 et seq.

[304] *Gehrmann*, in: Wabnitz/Janovsky/Schmitt, Handbuch Wirtschafts- und Steuerstrafrecht, 5th ed. 2020, ch. 11 paras 215 et seq.

[305] See above (fn. 300).

[306] See about the French "Autorité des Marchés Financiers" (AMF) *Bouloc/Matsopoulou* (fn. 222), p. 63 et seq., 380; *Bouloc*, Droit pénal général, 25th éd. 2017, p. 428, 461 et seq. Further, about the German "Bundesanstalt für Finanzdienstleistungsaufsicht" (BaFin), see *Nestler* (fn. 213), p. 12 et seq., 19, 243, 313 et seq.; *Theile* (fn. 213), ch. 7 § 38 WpHG a.F. paras 102 et seqq., § 38 WpHG paras 54, 88 et seqq., § 39 WpHG para. 38 (p. 1994 et seq, 2050, 2057, 2087). These independent regulatory authorities are built after SEC, but have to operate in an inquisitorial criminal legal system, where, in addition, an administrative jurisdiction is distinct to civil and criminal jurisdiction [cf. *Nestler* (fn. 213), p. 315 et seq.]. The same applies to the Greek Capital Market Commission: see *Avgitidis* (fn. 18), p. 487 et seq.

nal proceedings, even though a person who suffered economic loss by a criminal act is considered, in general, a victim in the European legal order. MAD is consequently short of a legal apparatus that allows investors, who sustained financial loss due to market abuse behaviours, to participate in the criminal proceedings (as a party), or at least to enjoy some pertinent rights (e.g., access to the file in order to substantiate their civil actions), or pursue their interest in compensation through restorative justice institutions within the criminal procedure against the market abuse offender, or by acquiring rights to seized and frozen assets or confiscated property (as instrumenta vel productas celeris). It is not fair for the state to be making money out of the confiscated property of the market offender, whereas the investor who suffered substantial loss must file, pay expenses for and prove the relevant facts during along-lasting civil action (if the relevant civil jurisdiction even permits such a claim) against the (already) broke offender, whose assets have already fallen to the state.

Consequently, the danger lies near, that the investors, especially the financial powerful ones, will turn to a "forum shopping" in cases with international features, looking for that national jurisdiction between EU Member States, where the conditions to establish a property offence, namely fraud, are more loose, or national jurisprudence is more inclined to sustain such charges, in order to participate in the criminal procedure and reap the fruits of legal instruments, like restorative justice procedures, return of seized property and frozen intangible assets, claiming civil compensation for damages in the context of criminal proceedings (similar to the French "partie civile" or the German "Adhäsionsverfahren"[307]), apply pressure to the offender to seek reconciliation through some form of compensation etc.

b) The need of a "compensation procedure" within MAD to avoid "forum shopping" for fraud charges

This unavoidable tendency to a "forum hunt" for European jurisdictions with loose conditions concerning a fraud-property crime, i.e., similar to the US fraud notion, can undermine the very essence of MAD, that is a common European criminal legal framework for market abuse offences, which harm not each national, but inevitably the common European Capital Market. Consequently, there is a need for a European solution to avert investors from going "forum shopping", thus looking for jurisdictions inside the EU, which promise more chances to establish, apart from civil claims based on tort, criminal liability for a property offence in order for them to be able to take part in criminal proceedings and pursue their interests towards some form of swift compensation. The acknowledgement of some rights (namely access to the file) and, above all a disgorgement remedy, should therefore be in place. The German legal institutes of the "rights of the victim" ("Befugnisse des Verletzten", although in German criminal procedure not applicable in financial crimes) established in §§ 406d et. seq. StPO[308] and, above all, the new German disgorgement remedies securing just distribution of seized and confiscated assets amongst the victims, namely the special procedure about the "compensation of the victim" ("Entschädigung des Verletzten"), established in § 459h StPO,[309] and the "Insolvency procedure" ("Insolvenzverfahren") established in § 111i StPO,[310] can present a plausible springboard for a relevant Europeanlegislative action. The latter proceedings follow a confiscation of seized or frozen property assets by the competent court and are managed by the Public Prosecutors Office. By initiating these proceedings, the victims can lay claim to the confiscated property, even if they cannot support their claim with a final decision in civil jurisdiction.[311] Obviously, creating a similar procedure in market abuse cases within the pre-existing framework drafted by MAD would require an autonomous and sufficient definition of the investor-victim of market abuse criminal offences.[312]

IV. Closing remarks

Breaking the boundaries of a mere fraud-property offence across Europe by conceiving market abuse offences as genuine offences against another more important, rising above individual property, legal good (or value), is indeed a great service to European Criminal Law, credited to MAD. Every unification of national criminal laws brings the EU a little step closer to federalization.

On the other hand, de lege ferenda, the European legislator should take the victimized investor's interests more seriously into consideration, when it comes to criminal proceedings against market abuse offenders. Fraud charges in market abuse cases are, due to shortcomings in investor protection by MAD, inevitable and overload the criminal system, threatening to neutralize the above positive effect of MAD. Our case study of the F.F. bears significant proof: As a result of overloading the criminal procedure with nearly 200 potential (Greek and foreign) fraud victims, demanding to take part in the criminal proceedings as parties in order to gain access to the file and claim a part of the confiscated property of the company and of the defendants, the constitutional pretrial confinement time limits expired during the trial and the main defendants were released from custody for the rest of their, still ongoing, main hearing. Therefore, a legal apparatus should be established within MAD, whereby the investors can pursue their interests in criminal proceedings, such as the

[307] See e.g, *Roxin/Schünemann* (fn. 283), p. 524 et seq.

[308] See about this institution, e.g., *Roxin/Schünemann* (fn. 283), p. 527 et seq.

[309] See about this institution. e.g., *Appl*, in: Hannich (ed.), Karlsruher Kommentar zur Strafprozessordnung, 8th ed. 2019, § 459h paras 1 et seq.; *Coen*, in: Graf (ed.), Beck'scher Online-Kommentar, Strafprozessordnung, 1.10.2021, § 459h paras 1 et seq.

[310] See about this institution, e.g., *Spillecke*, in: Hannich (fn. 309), § 111i paras 1 et seq.; *Huber*, in: Graf (fn. 309), § 111i para. 1 et seq.

[311] *Coen* (fn. 309), § 459h para 2.

[312] The proposed German procedures do not apply in relation to crimes against universal legal goods (*Spillecke* [fn. 310], § 111i paras 1, 3; *Huber* [fn. 310], § 111i para. 3; cf. further *Appl* [fn. 309], § 459h para. 2).

return or distribution of confiscated property (preferably in separate proceedings following the proposed German model), by taking part in restorative justice proceedings, having access to the file of the criminal case (without being a party) etc. This way, especially the main criminal trial hearing can be safeguarded from the enormous burden of a de facto substitute for a civil class action (namely the participation of all potential investor-victims in the criminal proceedings), which is bound to throw it off course.

Alternatively, in the absence of criminal proceedings, investors should be able to sue for damages in which an additional penalty can be imposed. Such a solution presents the advantage of allowing investor compensation, while discouraging future illegal behaviours and imposing a punishment. A critique should be addressed to EU legislators for leaving a wide margin of discretion to national legislators and sacrificing the prospect of a uniform regulation of damage reparation. As for the behaviours that can give rise to civil liability, which can differ from the behaviours prohibited under MAR and MAD, investor confusion could arise, in particular when an administrative sanction has already been imposed. Regarding the amount of compensation, damages suffered due to the stock price alteration and due to the alteration of the investment decision should be awarded to the extent that the causation between the injurious behaviour and the loss is proven. Further, EU legislators could attain effective investor protection and legal certainty by facilitating the burden of proof.

The investor has confidence only in a regulated market system, that helps him get (at least some) of his money back, if he falls prey to market abusers.