OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 10 September 2009 [1]

I — Introduction

1. The present reference for a preliminary ruling concerns the prohibition on insider dealing under Directive 2003/6/EC [2] on insider dealing and market manipulation (market abuse). The directive prohibits use of inside information to trade in financial instruments. The central question asked by the referring court is whether the definition of insider dealing is satisfied where a person who possesses inside information acts in full knowledge of that information.

1 — Original language: German.

2 — Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ 2003 L 96, p. 16 ('Directive 2003/6').

II — Legislative framework

A — *Community law*

2. The first sentence of Article 2(1) of Directive 2003/6 provides:

'Member States shall prohibit any person referred to in the second subparagraph who possesses inside information from using that information by acquiring or disposing of, or by trying to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates.'

3. Article 2(1) of its predecessor, Directive 89/592/EEC, [3] provided:

'Each Member State shall prohibit any person who […] possesses inside information from taking advantage of that information with full knowledge of the facts by acquiring or disposing of for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which that information relates.'

B — *National law*

4. The Belgian provisions on insider dealing can be found in the Law on the supervision of the financial sector and financial services ('the Law on financial supervision').

5. Article 25 of the Law on financial supervision, as amended by the Law of 2 August 2002, applicable to offences committed between 1 June 2003 and 31 December 2003 ('the initial version of Article 25'), stated:

'1. Any person who possesses inside information is prohibited from:

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

…'

6. The version of Article 25 applicable from 1 January 2004, introduced by the Law of 22 December 2003 ('the amended version of Article 25'), reads as follows:

'1. Any person who possesses information which he knows, or ought to have known, constitutes inside information is prohibited from:

(a) acquiring or disposing of, or trying to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, the financial instruments to which that information relates or connected financial instruments.

…'

3 — Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, OJ 1989 L 334, p. 30 ('Directive 89/592').

III — Facts and questions referred for a preliminary ruling

7. Spector Photo Group NV ('Spector') is an undertaking quoted on the stock exchange. In 1999 it approved a stock option programme for its own staff and the staff of associated undertakings.

8. As required by law, on 21 May 2003 Spector informed the Euronext Brussels stock exchange of its intention to buy its own shares in order to implement the stock option programme. From 28 May 2003 to 30 August 2003 Spector then purchased a total of 27 773 shares. The purchases occurred under six individual orders: five for 2 000 shares, all of which were executed, and one for 18 000 shares, which was executed in respect of 17 773 shares.

9. According to the order for reference, the management committee of the Commission for Banking, Finance and Insurance (Commissie voor het Bank-, Financie- en Assurantiewezen, 'CBFA') subsequently instructed the internal auditor to conduct an investigation into the misuse of inside information in the case of two share purchases effected for Spector's account: one order for 2 000 shares on 11 August 2003 and one for 18 000 shares placed on 13 August 2003.

10. The two individual orders in question were placed by Mr Van Raemdonck on Spector's behalf. [4]

11. The auditor found that from 13 August 2003 the purchasing pattern had been subsequently changed as regards both the number of shares and the price limits and that the purchases also assumed some urgency, although no justification could be provided for this. The auditor considered this to be unlawful insider dealing. He pointed out that Spector and Van Raemdonck had assumed that the share price would rise once the turnover details had been published and Spector's planned take-over of another undertaking had been announced. Both had therefore presumed that following publication Spector would be required to pay a higher purchase price and, as a result, Spector would incur a financial loss. After the publication of the turnover details, the price did indeed rise by 8%. It is not apparent from the order for reference whether the auditor also concluded that the order of 11 August also constituted a breach of the prohibition on insider dealing.

12. The auditor detected a link between the purchasing order placed on 13 August 2003, along with the change to the limit, and the purchases subsequently effected, on the one hand, and the information which Spector and

4 — It is not entirely clear from the order for reference whether Mr Van Raemdonck was Spector's current managing director when the shares were purchased or merely its former managing director.

Mr Van Raemdonck possessed concerning the take-over of the firm and the business figures.

13. By decision of 28 November 2006 ('the contested decision'), the CBFA found against Spector and Mr Van Raemdonck, considering at least the order of 13 August 2003 to constitute unlawful insider dealing, and imposed a fine on Spector and Mr Van Raemdonck ('the applicants') and ordered that the parties' names be disclosed as part of the penalty.

14. The applicants have challenged that decision before the Hof Van Beroep te Brussel (Court of Appeal, Brussels). By order of 1 February 2008, that court stayed its proceedings and referred the following questions to the Court of Justice:

'(1) Do the provisions of Directive 2003/6/EC, and especially Article 2 thereof, call for full harmonisation, with the exception of those provisions which explicitly permit the Member States to interpret measures as they wish, or do they, in their entirety, concern a minimum of harmonisation?

(2) Should Article 2(1) of Directive 2003/6 be interpreted as meaning that the mere fact that a person as referred to in Article 2(1) of that directive possesses inside information and acquires or disposes of, or tries to acquire or dispose of, for his own account or for the account of a third party, financial instruments to which that inside information relates, signifies in itself that he makes use of his inside information?

(3) If the answer to the second question is in the negative, must it then be assumed that application of Article 2 of Directive 2003/6 presupposes that a deliberate decision has been taken to use inside information?

If such a decision may also be unwritten, is it then required that the decision to use inside information be evident from circumstances susceptible to no other interpretation, or is it sufficient that those circumstances could be so interpreted?

(4) If in the determination of the proportionate nature of an administrative sanction, as referred to in Article 14 of

Directive 2003/6, account must be taken of the gains realised, should it be assumed that the publication of information to be designated as inside information has in fact had a significant effect on the price of the financial instrument?

If so, what minimum level of price movement must have occurred for it to be possible to regard it as significant?

(5) Whether or not the price movement after the publication of information must be significant, what period should be taken into account after the publication of the information for the determination of the scale of the price movement, and what date should be taken as the basis for gauging the financial advantage gained in the determination of the appropriate sanction?

(6) In the light of the determination of the proportionate nature of the sanction, should Article 14 of Directive 2003/6 be interpreted as meaning that, if a Member State has introduced the option of a criminal sanction, combined with an administrative sanction, account must be taken of the option and level of a criminal financial penalty in the consideration of its proportionality?'

IV — Legal assessment

A — *Admissibility of the reference for a preliminary ruling*

15. The Belgian and the German Governments and the CBFA have doubts as to the admissibility of the present reference for a preliminary ruling. In their view, the referring court asks hypothetical questions, the answers to which are irrelevant to the decision in the main proceedings. Those doubts stem from the fact that the referring court appears to ask about the interpretation of the directive having regard to Article 25 of the *amended version* of the Law on financial supervision, whereas it is clear from the contested decision itself that the decision was based on Article 25 of the *initial version* of that Law.

16. As a preliminary point, it must be observed that it is in principle for the national court before which a dispute has been brought to determine, in the light of the particular circumstances of the case pending before it, both the need for a preliminary ruling and the relevance of the questions submitted. It is ultimately for the referring court to assume responsibility for the subsequent judicial decision. The Court is, in principle, therefore bound to give a ruling on questions submitted concerning the interpretation of Community law. [5]

5 — See, inter alia, Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR-I-11125, paragraph 15, Case C-48/07 *Les Vergers du Vieux Tauves* [2008] ECR I-10687, paragraph 16, and the case-law cited.

17. However, in exceptional circumstances, it is for the Court to examine the conditions in which the case was referred to it by the national court. [6] The spirit of cooperation which must prevail in preliminary-ruling proceedings requires the national court to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions. It is settled case-law that the Court may refuse to rule on a question referred by a national court, inter alia, where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical. [7]

18. The referring court would appear to be asking about the interpretation of Directive 2003/6 in order to be able to assess the compatibility of Article 25 of the *amended version* of the Law on financial supervision with that directive. In defining unlawful insider dealing, the amended version of Article 25 does not take up precisely the wording of Directive 2003/06, but bases the definition of insider dealing on the fact that a person who possesses inside information which he knows, or ought to have known, constitutes inside information trades in financial instruments to which that information relates ('acting in full knowledge of inside information').

19. It is extremely doubtful, however, that the consistency of the *amended version* of the Belgian law with the directive is relevant to the decision in the main proceedings, as the main proceedings would seem to have to be assessed solely with reference to the *initial version* of Article 25.

20. The contested decision sanctions a situation which existed before the new law was valid. The *initial version* of the law should therefore be applicable to such a situation. The German Government referred in this respect to the principle *nulla poena sine lege*, according to which an offence is to be assessed in principle on the basis of the law applicable at the time the offence was committed.

21. The order for reference does state in one place [8] that the contested decision is based on the *amended version* of Article 25; however, that must be a clerical error, as it is clear from the contested decision itself that it was based on the *initial version* of Article 25. This was also confirmed by the parties to the main proceedings and by the Belgian Government at the hearing before the Court of Justice.

6 — Case 244/80 *Foglia* [1981] ECR 3045, paragraph 27, and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 27.

7 — Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25, and the case-law cited.

8 — Paragraph 18 of the order for reference.

22. The applicants' actions must therefore be assessed on the basis of the *initial version* of Article 25. [9]

23. However, it is not apparent at first glance why, if the main proceedings are not to be decided on the basis of the *amended version* of Article 25, the interpretation of Directive 2003/6 should be relevant to the decision in the main proceedings. The referring court is asking about the interpretation of the directive in order to be able to assess the consistency of the *amended version* of Article 25 with the directive.

24. However, I will show below that the interpretation of Directive 2003/6 is not manifestly irrelevant to the decision in the main proceedings and that, despite all the doubts, the reference for a preliminary ruling must be regarded as admissible.

9 — Nevertheless, the applicants added that the contested decision was based on the initial version of Article 25, but the defendant applied '*de facto*' to the amended version of Article 25. It is not clear what the applicant meant by such *de facto* application. It possibly wished to argue that the defendant interpreted the initial version of Article 25 in the light of the amended version of Article 25. Such an approach might also be problematical having regard to the principle *nulla poena sine lege*. This must be assessed by the referring court.

1. Interpretation of Directive 2003/6 as a criterion for interpreting the *initial version* of the Belgian Law

25. It is therefore possible that Directive 2003/6 is also to be used as a criterion for interpreting the *initial version* of the Law.

26. In response to a question from the Court at the hearing, the Belgian Government explained that the initial version of the Law had already been enacted in order to implement Directive 2003/6. The directive itself had not yet been adopted when the initial version of the law was enacted. However, the Belgian Government stated that at that time Belgium was pursuing a comprehensive revision of its banking rules and therefore based the revised version of its Law on banking supervision — in anticipation — on an existing draft directive.

27. According to case-law, an obligation on the Member States to interpret in conformity with a directive exists only once the period for

the transposition of that directive has expired. [10] If, however, the initial Law was enacted in order to implement Directive 2003/6, the answer to the questions referred on the interpretation of Directive 2003/6 may also be important for its interpretation.

28. Such anticipatory implementation of a directive must be treated in the same way as the case of 'excessive implementation' of a directive recognised by the Court.

29. In cases of excessive implementation of a directive, that is to say, where a Member State implements a directive for situations which do not in fact fall within the scope of the directive, a reference for a preliminary ruling is nevertheless admissible. [11]

30. The Court also considers that questions referred should be answered in such cases. It is manifestly in the interest of the Community legal order that, in order to avoid future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied. [12]

31. For the same reason, questions on the interpretation of a directive should also be admissible in cases of anticipatory implementation of the directive.

32. Lastly, Article 2(1) of Directive 2003/6 is reproduced almost verbatim in the *initial version* of Article 25. Its interpretation is not therefore manifestly irrelevant for understanding the *initial version* of Article 25.

2. The applicants' arguments relating to the principle of *lex mitior*

33. In order to justify why the consistency of the *amended* law with the directive is nevertheless relevant to the decision in the main

10 — Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 115. In my Opinion in that case, I had proposed a different solution; however, the Court did not adopt that solution. According to case-law, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive (see Case C-212/04 *Adeneler and Others*, paragraph 123).

11 — Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 36.

12 — Consistent case-law since the judgment in Joined Cases C-297/88 and C-197/89 *Dzodzi*, cited in footnote 11; see also Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraphs 21 and 22.

proceedings, the applicants advanced a very complex theory in the proceedings before the referring court. In this regard they rely on the principle of *lex mitior*. In the final analysis, those arguments are not convincing.

34. The applicants take the view that the *amended version* of Article 25 is incompatible with Directive 2003/6 and may not therefore be applied. Because the amended version of Article 25 is not applicable, a 'legal vacuum' is created which is to be treated in the same way as a *lex mitior*. It then follows from the principle of *lex mitior* that neither can there be a sanction under the *initial version* of Article 25, which is applicable to the contested decision.

35. It should be made clear at this point that the applicants do not argue that the *amended version* of Article 25 is itself more lenient than the initial version of Article 25. In fact, they even stress that the amended law is stricter because it does not require inside information to be used, but 'acting in full knowledge of inside information' is sufficient. Nor does the amended law appear to have ruled out the applicability of the initial law to the earlier situations. The more lenient law is to be seen in the legal vacuum created by the non-applicability of the amended version of Article 25.

36. The scope of the principle of *lex mitior* in the present context is primarily a matter for national law. Nevertheless, I have doubts whether that principle is actually relevant in the present case. The retroactive application of more lenient criminal provisions is based on the consideration that a defendant should not be punished for conduct which, in the revised view of the legislature at the time of the criminal proceedings, is no longer punishable. [13] The defendant is thus meant to enjoy the benefit of the revised assessment of the legislature. Thus, the third sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union [14] states: 'If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.'

37. In the present case, however, the Belgian legislature has not provided for a lighter penalty. The applicants themselves state that the legislature has introduced a stricter penalty. There is therefore no revised assessment of the legislature which classifies the conduct as less punishable.

38. The present case therefore also differs from the situation underlying *Berlusconi*. That case concerned the question whether a

13 — See my Opinions in Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, point 161, and in Case C-457/02 *Niselli* [2004] ECR I-10853, point 69.

14 — The Charter of Fundamental Rights of the European Union was solemnly proclaimed first in Nice on 7 December 2000 (OJ 2000, C 364, p. 1) and then again in Strasbourg on 12 December 2007 (OJ 2007, C 303, p. 1). Although the Charter of Fundamental Rights as such still does not have any binding legal effects comparable with primary law, it does, as a material legal source, shed light on the fundamental rights which are protected by the Community legal order; see also Case C-540/03 *Parliament* v *Council* ('family reunification') [2006] ECR I-5769, paragraph 38, and point 108 of my Opinion in that case, and the judgment in Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37.

more lenient penalty is to be applied retroactively if it infringes Community law. [15] In the present case, however, all the parties agree that the amended law does not constitute a more lenient law, with the result that the abovementioned follow-up question does not arise.

39. Moreover, it is irrelevant in the present case whether the principle of *lex mitior* under Belgian law can be given such a broad interpretation that a 'legal vacuum' — as is alleged by the applicants in the present case — is equated with a more lenient law. In the case at issue the legal vacuum alleged by the applicants, which the applicants equate with a more lenient law, simply does not arise.

40. Even if it is assumed that the applicants' arguments regarding the incompatibility of the amended law with the directive are correct, such incompatibility could be remedied by interpreting the Belgian law in conformity with the directive. The national courts are required to interpret domestic law, so far as possible, in conformity with the directive. [16] The amended version of Article 25 should therefore be interpreted in conformity with the directive and does not remain inapplicable in its entirety. There would not actually be a legal vacuum which the applicants equate with a more lenient law.

41. An interpretation in conformity with the directive is also possible in the present case. The applicants take the view that the amended law infringes the directive because it does not make the prohibition on insider dealing dependent on the inside information being used, but considers it sufficient that action is taken in full knowledge of the inside information. If that view is correct, the law could be interpreted in conformity with the directive if the 'using inside information' is read as a further requirement by way of a reduction in conformity with the directive. An interpretation in conformity with the directive which reduces the scope of insider dealing and thus benefits the individual is also perfectly possible.

3. Interim conclusion

42. It must therefore be concluded in summary that the admissibility of the reference for a preliminary ruling does not follow from any incompatibility of the *amended* law with the directive. However, because it cannot be ruled out a priori that the *initial* law is also to be assessed by the national court on the basis of the directive, the questions referred are not manifestly irrelevant. The reference for a preliminary ruling is therefore admissible.

15 — Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565; see also my Opinion in that case, cited in footnote 13.

16 — See, inter alia, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 114, and Case C-212/04 *Adeneler and Others*, cited in footnote 10, paragraph 115.

B — *Answers to the questions referred*

1. Second question

43. With its second question, which must be examined first of all, the referring court is seeking to ascertain whether Article 2(1) of Directive 2003/6 should be interpreted as meaning that the mere fact that a person possesses inside information and acquires or disposes of financial instruments to which that inside information relates signifies in itself that he 'makes use' of his inside information. It should be added, however, that, in the *amended version* of Article 25, Belgian law requires not only that someone possesses inside information, but also that the person knows, or ought to have known, that it constitutes inside information. In the present case it must therefore be clarified whether acting in full knowledge of inside information is sufficient, without exception, to assume the existence of insider dealing, or whether there must be a further additional element.

44. Article 2(1) of the directive provides that the Member States must prohibit the persons referred to in the second subparagraph who possess inside information from using that information by acquiring or disposing of financial instruments to which that information relates.

45. Considering the wording of Article 2(1), it is immediately apparent that it does not describe unlawful insider dealing as acquisition 'in full knowledge' of inside information, but requires that the instruments be acquired 'using' [17] the inside information.

46. It should be stated, first of all, that the terms 'using' and 'knowledge' are not used as synonyms in natural language usage, but both terms have their own meaning. 'Knowledge' means simply knowing in the sense of a specific awareness. 'Using', on the other hand, presupposes knowledge, but exists only where such knowledge is turned into an action.

47. However, the question whether acting 'in full knowledge' of inside information is always to be seen as using that information or whether acting in full knowledge of information is also conceivable where there is no use of inside information cannot be answered with the aid of a grammatical interpretation alone.

17 — In Dutch Article 2(1) states: '…om gebruik te maken …'

48. Whilst in the German wording the requirement of 'using' is made clear, the French version suggests that acting in mere knowledge of inside information is to be regarded as use of that information.

49. In the French version, the directive prohibits a person 'd'utiliser cette information en acquérant ou en cédant […]'. Literally translated, it thus prohibits a person from using inside information *by* acquiring or disposing of financial instruments to which that information relates. In the French wording 'utiliser en acquérant', the meaning therefore focuses on the distinction between the forms of use 'acquisition' and 'disposal', whilst according to the wording both forms of use are directly classified as using inside information. [18]

50. However, the different language versions of a provision of Community law must be uniformly interpreted. In the case of divergence between those versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part, [19] and, if appropriate, on the basis of the real intention of its author. [20]

51. Thus, Article 2(3) of the directive makes explicitly clear that knowledge of inside information at the time of the action is not detrimental if the action is merely carried out in the discharge of an obligation that has become due to acquire or dispose of financial instruments. If it is clear from the outset whether and how the action occurred and there is no further room for interpretation in that regard, one can rule out the possibility that inside knowledge which is subsequently acquired can influence the action, and this cannot be regarded as 'use'.

52. However, recital 18 in the preamble to the directive is also relevant in this connection. First of all, it mentions that use [21] of inside information 'can' consist in the acquisition or disposal of financial instruments in full knowledge of such information. Secondly, it cites specific examples of cases where, even though there is knowledge, 'use' should never-

18 — The same is true of the English version, which states: 'using that information by acquiring or disposing'.

19 — Case 19/67 *Van der Vecht* [1967] ECR 345; Case 30/77 *Bouchereau* [1977] ECR 1999, paragraphs 13 and 14; Case C-56/06 *Euro Tex* [2007] ECR I-4859, paragraph 27; and Case C-426/05 *Tele2 Telecommunication* [2008] ECR I-685, paragraph 25.

20 — Case 29/69 *Stauder* [1969] ECR 419, paragraph 3; Case 55/87 *Moksel Import und Export* [1988] ECR 3845, paragraph 49; Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 47; and Case C-188/03 *Junk* [2005] ECR I-885, paragraph 33.

21 — In so far as the German version of recital 18 in the preamble refers to 'Ausnutzung' and does not opt for the term 'Nutzung' from Article 2(1), this appears to be an editorial mistake. Other language versions, such as the French, English and Dutch, use the same term in recital 18 as in Article 2(1) of the directive.

theless not be taken to exist. At this point it thus intimates that whilst knowledge of inside information is a mandatory requirement for unlawful insider dealing, the criterion of acting in full knowledge of inside information does not define exhaustively the scope of the prohibition laid down by Article 2(1) of the directive.

53. Only a teleological interpretation of the directive which goes back to its drafting history allows a definitive answer to be given to the question.

54. According to recital 12 in the preamble to the directive, the prohibition on insider dealing imposed by the directive is intended to ensure the integrity of Community financial markets and thus to enhance investor confidence in those markets. That is clarified in recital 15. A functioning integrated financial market requires the legitimate expectation of economic actors in full and proper market transparency. It is necessary to guarantee equality of opportunity and to prevent individual market actors being given preferential treatment through the use of inside knowledge to the detriment of the other market actors.

55. Only a prohibition on insider dealing which is effectively enforceable in practice can guarantee the functioning of the financial markets in the best way possible. Only if the prohibition on insider dealing allows infringements to be effectively sanctioned does it prove to be powerful and encourage compliance with the rules by all market actors on a lasting basis. The Community legislature therefore took into consideration unsatisfactory experiences under the predecessor directive made its reformulation in Directive 2003/6.

56. Article 2(1) of the predecessor Directive 89/592 formulated the prohibition on insider dealing as follows: 'Each Member State shall prohibit any person who […] possesses inside information from *taking advantage of* that information with full knowledge of the facts by acquiring or disposing of for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which that information relates'. [22] In Directive 2003/6, the term 'taking advantage of' is now replaced by the term 'using'. [23]

57. With the expression 'taking advantage of', the old prohibition therefore incorporated a subjective element which was understood in the sense of effective action. The criterion of 'taking advantage' could be understood as meaning that the transaction effected had to be carried out specifically on the basis of

22 — My emphasis.

23 — Unlike, for example, the French (replacement of the expression 'en exploitant' by the term 'utiliser') or the English (replacement of the expression 'taking advantage' by the term 'using') language version, the Dutch versions of both Directive 89/592 ('met gebruikmaking') and Directive 2003/6 ('om gebruik te maken') employ the same expression for 'using' information. The subjective element was expressed in the Dutch language version of Directive 89/592 by an adverb ('welbewust'), stating: 'met gebruikmaking, welbewust, van deze voorwetenschap'.

inside information and with the intention of making a profit or avoiding a loss. [24] Clearly, considerable problems could occur in particular in proving a profit-making intention.

58. Against this background, during the consideration of Directive 2003/6, the Parliament requested the replacement of the requirement of 'taking advantage', eventually leading to the current version of Article 2(1), which now mentions only 'using'. [25] As justification for its amendment, the Parliament stated that the mere use of inside information should be sanctioned in the administrative context; therefore any final or intentional element should be deleted. [26]

59. A broad interpretation should therefore be given to the element of 'use', which is by and large free from subjective requirements and thus guarantees the aim pursued by the Community legislature of the simple manageability of the prohibition on insider dealing. First of all, 'using' does not require *any* subjective decision by a person to act specifically on the basis of inside information available to him. Knowledge of inside information does not therefore have to have influenced the action in terms of strict causality, a *conditio sine qua non*. It is not necessary that the person would not have acted without the inside information.

60. If it were required that the inside information had such a demonstrably causal influence on the action, this would not be consistent with the clearly expressed intention of the Community legislature to refrain from employing subjective elements.

61. Article 2(1) of Directive 2003/6 is therefore to be interpreted in principle as meaning that acting in full knowledge of inside information constitutes 'use' for the purposes of that provision.

62. Nevertheless, acting in full knowledge of inside information does not necessarily always constitute unlawful insider dealing. In situations where it is impossible for the knowledge of inside information to influence the action, there can be no 'use' of the inside information.

24 — See also the Opinion of Advocate General Mengozzi in Case C-391/04 *Georgakis* [2007] ECR-I-3741, point 51.

25 — In the Dutch version there was no change compared with the draft directive, as the draft already mentioned only 'using' ('gebruik te maken').

26 — See the report by Robert Goebbels MEP of 27 February 2002 (PE 307.438 A5-0069/2002, p. 25), on the proposal for a European Parliament and Council directive on insider dealing and market manipulation (market abuse) (2001/0118 (COD), which the European Parliament adopted in its legislative resolution of the European Parliament of 14 March 2002. In the Dutch version, however, the paragraph in question with that justification is not reproduced, probably because it was not necessary to change the text of the directive in the Dutch version.

63. Thus, the abovementioned recital 18 makes clear that acting in full knowledge of inside information does not necessarily constitute use for the purposes of Article 2(1) and lays down exceptions governing cases which are not intended to be unlawful insider dealing despite action in full knowledge of inside information. For example, the mere fact that persons authorised to execute orders on behalf of third parties with inside information confine themselves to carrying out an order dutifully should not be deemed to constitute use of inside information.

64. Bearing in mind the spirit and purpose of the directive, the exceptions laid down in recital 18 appear to be situations where market transparency is not jeopardised a priori. Irrespective of whether the actors described therein possess inside information, their role in market activities is such that that information does not influence their action.

65. Because Article 2(1) of the directive prohibits action using inside information and does not merely mention acting in full knowledge of inside information, it excludes, for example, the categories of persons referred to in recital 18 from the scope of the prohibition: In such cases it is ruled out a priori that the information influences the action, with the result that there can be no question of use of inside information.

66. Other cases are also conceivable where it is clear a priori that despite knowledge of inside information at the time of the action, no 'use' of the information can be taken to exist, since it does not influence the action a priori. The Government of the United Kingdom cited as a further example a person acting against the predicted market trend: a person sells shares, for example, even though he possesses inside information suggesting that the share price will rise, for instance because he requires the proceeds of the sale immediately and cannot wait for the price to rise.

67. In such a case, the person cannot be regarded as having sold the shares 'using' the inside information. If a person acts against the future market trend according to inside information, he cannot be said to have used the inside information. If, however, only

'acting in full knowledge of inside information' is taken as the basis, insider dealing would have to be taken to exist because there is a sale in full knowledge of the information. A written or deliberate decision to use information is not therefore necessary. In acting in full knowledge of inside information a person cannot filter this out entirely. Rather, the information normally influences his purchasing or selling decision. Consequently, use of the inside information can generally be taken to exist as a matter of course. No further evidence is needed.

68. The second question must therefore be answered as follows:

69. Article 2(1) of Directive 2003/6 should be interpreted as meaning that the fact that a person possesses inside information which he knows, or ought to have known, constitutes inside information and acquires or disposes of financial instruments to which that inside information relates *as a rule* signifies in itself that he 'makes use' of the information. In situations where it is clear a priori that inside information does not influence the action of a person, mere knowledge of inside information does not in itself imply use of that information.

2. Third question

70. With its third question, the referring court is seeking to ascertain whether a deliberate or written decision to use inside information is necessary. In this regard, reference can be made to a large extent to the statements made on the second question. With the revised version of the prohibition on insider dealing, any final or intentional element should be deleted from the definition.

3. First question

71. The first question concerns the level of harmonisation of Directive 2003/6 and in particular Article 2 thereof. This question is irrelevant to the decision in the main proceedings and is therefore inadmissible. As has already been explained above, only Article 25 of the *initial version* of the Belgian law on financial supervision applies in the main proceedings. However, the question of the level of harmonisation of Directive 2003/6 appears relevant only with regard to the *amended version* of Article 25.

72. Only the *amended version* of Article 25 departs from the wording of Article 2(1) of the directive and, by imposing a stricter prohibition than the directive, raises the question whether a prohibition on insider dealing

which goes further than the directive is actually lawful. The *amended version* of Article 25 relates only to knowledge of inside information and takes into consideration neither the exception laid down in Article 2(3) of Directive 2003/6 nor the exceptions to the prohibition on insider dealing stemming from the spirit and purpose of the directive and from the recitals in the preamble to the directive.

73. The *initial version* of Article 25, on the other hand, related to 'using' the inside information, like the directive, and thus did not go further than it. The question whether the directive nevertheless allowed scope for a stricter national provision remains purely hypothetical against the background of the *initial version* of Article 25, which is solely relevant in the main proceedings, and the first question is therefore inadmissible.

74. In the event that the Court should take the view that the first question is admissible, that question is answered below in the alternative.

75. It should be clarified, first of all, that the question of the extent of the harmonisation — exhaustive harmonisation or minimum harmonisation — of Directive 2003/6 cannot be answered in general terms for the directive as a whole. Rather each provision must be examined in itself.

76. In assessing the level of harmonisation, regard must be had to the wording and the spirit and purpose of the provision in question. [27]

77. In Directive 2003/6 there are provisions from whose wording it is clear that they constitute only minimum prescriptions and the Member States are authorised to take more far-reaching measures. This is true, for example, of the manner in which misuse of inside information is to be sanctioned. Article 14 of Directive 2003/6 merely provides that the Member States must take effective and dissuasive administrative measures. The directive leaves it explicitly for the Member States to determine whether they also impose criminal sanctions. As regards the manner of sanctioning, the directive therefore introduces only minimum harmonisation.

78. With regard to the prohibition on insider dealing laid down in Article 2(1), on the other hand, Directive 2003/6 does not make any express provision whether or not it is exhaustive.

27 — See Case C-52/00 *Commission* v *France* [2002] ECR I-3827, paragraph 16.

79. However, a first indication can be found from a comparison with the predecessor directive. Article 6 of Directive 89/592 expressly permitted the Member States to adopt provisions more stringent than those laid down by the directive. In the second sentence, Article 6 made clear that in particular the Member States may extend the scope of the prohibition laid down in Article 2. However, Directive 89/592 made that right to adopt stricter provisions subject to the condition that the provisions adopted apply generally; i.e. the scope of the provision is the same for all natural or legal persons subject to the legislation. [28]

80. This old Article 6 was not incorporated into Directive 2003/6. Directive 2003/6 does not include a general saving clause which expressly permits the Member States to extend the scope of the prohibition on insider dealing. This suggests that the Member States are no longer intended to be permitted in principle to adopt stricter provisions, but only in areas where the directive makes express provision.

81. The spirit and purpose of Directive 2003/6, as expressed in particular in its recitals, also indicate that the prohibition on insider dealing laid down in Article 2(1) is to be regarded as exhaustive harmonisation.

28 — See Case C-28/99 *Verdonck and Others* [2001] ECR I-3399, paragraph 35.

82. First of all, by prohibiting insider dealing the directive seeks to increase the confidence of market actors in the integrity of the financial markets and thus those markets themselves. The directive guarantees that the prohibition applies generally in all Member States so that no unregulated financial markets remain in the Community in this regard. The market actors may have an expectation that the prohibition on insider dealing applies throughout the Community.

83. Secondly, the directive also takes account of the fact not only that incomplete territorial application of the prohibition on insider dealing would create uncertainty among market actors, but also that if that prohibition is different from one Member State to the next, it may preclude the effective functioning of the internal market on the financial markets.

84. Thus, recital 11 expressly mentions that the directive is based on the finding that legal requirements governing insider dealing vary from one Member State to another, 'leaving economic actors often uncertain over concepts, definitions and enforcement'. This suggests that Article 2(1) of the directive should not be understood as mere minimum harmonisation. If it were assumed that the Member States are free to impose stricter prohibitions on insider dealing, that would

continue to leave economic actors uncertain over the scope of the prohibition on insider dealing and the intended clarification would not have been achieved.

85. Lastly, the view that Article 2 represents exhaustive harmonisation of the prohibition on insider dealing is confirmed further in the substance of that prohibition itself.

86. In answering the second question, it was explained that by employing the term 'using' in Article 2(1) of Directive 2003/6, a far-reaching, effective, easily sanctioned prohibition on insider dealing is laid down, where action despite knowledge of inside information is permitted only in specific exceptional cases. If it is also taken into consideration that the exceptions to be recognised, as set out for example in Article 2(3) or recital 18, all amount to a teleological reduction of the prohibition, and concern situations not covered by the spirit and purpose of the prohibition on insider dealing, there is no real need or substantial scope for stricter national prohibitions on insider dealing.

87. Two further reasons suggest that the prohibition imposed by the directive is exhaustive. Only then is the maximum conceivable protection of investors achieved in a uniform manner. In addition, for the sake of legal certainty, uncertainties among market actors regarding the scope of the prohibition are ruled out.

88. It must therefore be concluded that Article 2(1) of Directive 2003/6 represents exhaustive harmonisation.

89. Nor can any other conclusion be drawn from the fact that the so-called Lamfalussy process applies to Directive 2003/6. This means that the legislation is adopted at different levels, as is mentioned in recital 4. In level 1 the directive defines general framework principles, and the technical implementing measures are then adopted in level 2 with the assistance of a committee.

90. However, it is not possible to draw any conclusions from the application of the Lamfalussy process as regards the question whether the directive harmonises individual provisions exhaustively or permits derogations by the Member States. That process does not revolve around the level of harmonisation, but the question of how rules are made at Community level.

91. Finally, it is still necessary to examine the argument put forward by the Commission that employing the term 'using' in Article 2(1) was evidence that it provides for only minimum harmonisation. Because the term 'using' in the directive is not defined, it is an imprecise legal concept in the fleshing out of which the Member States enjoy a priori broad discretion, unlike in the case of exhaustive harmonisation.

92. Nevertheless, this reasoning is not convincing. Article 2(1) of Directive 2003/6 contains a definition of insider dealing. The Commission rightly acknowledges that the directive does not define any of the terms used in that definition. Thus, the directive does not contain a definition of the term 'using'. However, this does not mean that the Member States are free to define that term at their own discretion. The term 'using' is an autonomous term in Community law which is to be given a uniform definition for all Member States.

4. Fourth and fifth questions

93. These two questions concern the proportionality of the sanction. The referring court asks whether in the determination of the proportionate nature of a sanction, account must be taken of the gains realised, if it is also relevant whether the publication of inside information has indeed had a significant effect on the price of the financial instrument and how that 'significance' is to be determined. The referring court also asks what period should be taken into account for gauging the financial advantage gained.

94. Article 14 of the Directive 2003/6 provides, with regard to the nature and level of the sanction, that Member States must ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed where the prohibition contained in the directive has not been complied with. In this connection, the Member States must ensure that these measures are effective, proportionate and dissuasive. The directive does not set out specific criteria for determining the proportionality of a sanction.

95. The directive addresses the significance of the effect on the price only in the first paragraph of Article 1(1) of Directive 2003/6 in connection with the definition of inside information. Under that provision, information is inside information for the purposes of the directive only where, if it were made public, it would be likely to have a significant effect on the price of the financial instruments.

96. The first paragraph of Article 1(1) concerns an *ex ante* finding whether information is likely to have an effect on the price. The directive does not mention that unlawful insider dealing can be taken to exist only where an increase in price *actually* occurred subsequently.

97. However, in assessing the level of the sanction the question whether and to what extent the price was actually affected may be taken into consideration in the proportionality test. The extent of a price movement after the publication of inside information may be an indication of the significance and the potential of the inside information. These elements may be included in the proportionality test.

98. However, the amount of the price increase is also relevant in gauging the financial advantage gained.

99. With regard to the consideration of the financial advantage gained, it is clear from recital 38 in the preamble to the directive that sanctions should be proportionate to the gravity of the infringement and to the gains realised. The directive does not lay down detailed rules for gauging the financial advantage gained, in particular what period should be taken into account in making that assessment. Instead, it gives the Member States responsibility for determining the nature and form of the sanctions. Under Article 14 the Member States are required to provide for effective, proportionate and dissuasive measures in conformity with their national law by way of sanctions.

5. Sixth question

100. With this question the referring court asks whether Article 14 of the directive should be interpreted as meaning that, 'if a Member State has introduced the option of a criminal sanction, combined with an administrative sanction, account must be taken of the option and level of a criminal financial penalty in the consideration of its proportionality.'

101. The defendant in the main proceedings considers this question to be hypothetical and therefore inadmissible. Its view is correct in so far as it is not clear from the information provided by the referring court that the present case concerns an administrative sanction after a criminal sanction has already been imposed. Rather, it relates to the imposition of a sanction for the first time. There is no suggestion either that criminal proceedings have previously been conducted in relation to the same offences or that such proceedings are to be conducted. In administrative proceedings, however, account cannot really be taken of the possible future imposition of a criminal sanction.

102. The defendant in the main proceedings and the Belgian Government have argued, moreover, that Belgian law provides for the option of taking into account a previously imposed administrative sanction in the event of subsequent criminal proceedings. [29]

103. The question whether account should be taken of a previously imposed administrative sanction in subsequent criminal proceedings is possibly relevant not only in relation to the proportionality of the sanction, but also on account of the prohibition of *ne bis in idem*. [30] However, it would only be raised in subsequent criminal proceedings following the administrative proceedings.

C — *Buy-back of own shares*

104. Lastly, it is still necessary to examine one aspect in relation to which the referring court has not raised any specific questions. However, in the grounds of its order for reference it pointed out that the Belgian legislature failed to implement Article 8 of Directive 2003/6 in due time.

105. Under Article 8 of Directive 2003/6, the prohibitions provided for in the directive do not apply, inter alia, to dealing in own shares in 'buy-back' programmes, provided such dealing is carried out in accordance with implementing measures adopted in accordance with the procedure laid down in Article 17(2). The relevant implementing measures adopted are contained in Regulation (EC) No 2273/2003. [31]

106. According to the order for reference, that regulation had not yet entered into force when the applicants carried out the contested actions. It has now entered into force, however.

107. In this respect it should be pointed out that it follows from the principle of *lex mitior* recognised in Community law [32] that the exception under Article 8 of the directive should also be enjoyed by the applicants if its conditions were met. Article 8 of the directive makes clear that under certain conditions the Community legislature does not regard the buy-back of own shares in the context of a staff option programme as unlawful insider dealing. It follows that the applicants should no longer now be sanctioned for an action covered by this provision. Even if the Belgian legislature had not yet implemented that

29 — They refer in this respect to Article 73 of the Law on financial supervision as amended in the version of 2 August 2002.

30 — See also European Court of Human Rights, decisions of 14 September 1999, *Ponsetti* v *France*, No 36855/97 and No 41731/98, Reports of Judgments and Decisions 1999-VI, and of 14 September 2004, *Rosenquist* v *Sweden*, No 60619/00.

31 — Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments, OJ 2003 L 336, p. 33.

32 — See Case C-457/02 *Niselli* [2004] ECR I-10853, and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others*, cited in footnote 15, and my Opinions in those cases.

article, imposing a sanction on the applicants would not be consistent with the intention of the Community legislature and should be ruled out. However, that is the case only on the condition that the applicants' action happened to comply with the conditions for a buy-back programme set out in Regulation No 2273/2003, which had not yet entered into force. In particular, however, if the proceedings before the referring court confirmed that the applicants subsequently changed the purchase order as regards the number of shares, price and urgency, they could not have satisfied the requirements of the regulation. An infringement of the prohibition on insider dealing could not then be disregarded on the basis of Article 8 of Directive 2003/6 in conjunction with Regulation No 2273/2003.

V — Conclusion

108. Against the background of the above statements, I propose that the Court answer the questions referred for a preliminary ruling as follows:

— Article 2(1) of Directive 2003/6 should be interpreted as meaning that the fact that a person possesses inside information which he knows, or ought to have known, constitutes inside information and acquires or disposes of financial instruments to which that inside information relates as a rule signifies in itself that he 'makes use' of the information. In situations where it is clear a priori that inside information does not influence the action of a person, mere knowledge of inside information does not in itself imply use of that information.

— Article 2(1) of Directive 2003/6 does not permit the Member States to lay down a stricter prohibition on insider dealing than the directive.

— The specific form of the sanctions is left to the Member States, although they must ensure that the measures taken are effective, proportionate and dissuasive.