Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 18 December 2014[1]

Case C-628/13

Jean-Bernard Lafonta
v
Autorité des marchés financiers (AMF)

(Request for a preliminary ruling from the Cour de cassation (France))

(Approximation of laws — Financial services — Directive 2003/6/EC — Concept of 'inside information' — Information 'of a precise nature' — Directive 2003/124/EC — Potential effect in a particular direction on the prices of financial instruments)

I – **Introduction**

1. This request for a preliminary ruling, lodged by the Cour de cassation (Court of Cassation) (France) at the Court Registry on 2 December 2013, concerns the interpretation of point (1) of Article 1 of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)[2] and of Article 1(1) of Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6 as regards the definition and public disclosure of inside information and the definition of market manipulation.[3]

2. The question put by the referring court is raised in proceedings between Mr Lafonta and the Autorité des marchés financiers (French Financial Markets Authority; 'the AMF') in relation to a financial operation which enabled Wendel SA, a company of which Mr Lafonta was at the material time Chairman of the Board of Directors, to acquire a significant shareholding in Saint-Gobain. The AMF took the view that, by failing to make public the information relating to implementation of that operation, Mr Lafonta acted in breach of the provisions of national law concerning the public disclosure of inside information, and ordered him to pay a fine of EUR 1.5 million.

1 — Original language: French.

2 — OJ 2003 L 96, p. 16.

3 — OJ 2003 L 339, p. 70. I would point out that, pursuant to Article 37 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 and Commission Directives 2003/124, 2003/125 and 2004/72 (OJ 2014 L 173, p. 1), Directives 2003/6 and 2003/124 are repealed with effect from 3 July 2016. It should be borne in mind, however, that Article 7 of Regulation No 596/2014, entitled 'Inside information', reproduces the content of point (1) of Article 1 of Directive 2003/6 and of Article 1 of Directive 2003/124 and clarifies the scope of that concept.

II – **EU law**

A – *Directive 2003/6*

3. Under point (1) of Article 1 of Directive 2003/6:

‘For the purposes of this Directive:

1. “Inside information” shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments 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 or on the price of related derivative financial instruments.

…’

4. Article 2 of that directive provides:

‘1. 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.

The first subparagraph shall apply to any person who possesses that information:

(a) by virtue of his membership of the administrative, management or supervisory bodies of the issuer; or

(b) by virtue of his holding in the capital of the issuer; or

(c) by virtue of his having access to the information through the exercise of his employment, profession or duties; or

(d) by virtue of his criminal activities.

2. Where the person referred to in paragraph 1 is a legal person, the prohibition laid down in that paragraph shall also apply to the natural persons who take part in the decision to carry out the transaction for the account of the legal person concerned.

3. This Article shall not apply to transactions conducted in the discharge of an obligation that has become due to acquire or dispose of financial instruments where that obligation results from an agreement concluded before the person concerned possessed inside information.’

5. Under Article 6(1) and (2) of that directive:

‘1. Member States shall ensure that issuers of financial instruments inform the public as soon as possible of inside information which directly concerns the said issuers.

…

2. An issuer may under his own responsibility delay the public disclosure of inside information, as referred to in paragraph 1, such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead the public and provided that the issuer is able to ensure the confidentiality of that information. Member States may require that an issuer shall without delay inform the competent authority of the decision to delay the public disclosure of inside information.'

B – *Directive 2003/124*

6. Article 1 of Directive 2003/124, entitled 'Inside information', provides:

'1. For the purposes of applying point 1 of Article 1 of Directive 2003/6/EC, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments.

2. For the purposes of applying point 1 of Article 1 of Directive 2003/6/EC, "information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments" shall mean information a reasonable investor would be likely to use as part of the basis of his investment decisions.'

III – **The dispute in the main proceedings and the question referred for a preliminary ruling**

7. Between December 2006 and June 2007, Wendel concluded with four credit institutions ('the banks') total return swap agreements ('the TRSs'), the underlying assets of which were shares in Saint-Gobain, a company in which the banks acquired 85 million shares in order to hedge their positions.

8. Over the term of the agreements, Wendel was required to pay a fee to the banks and received from them the amount of the dividends attached to the Saint-Gobain shares. On termination of the agreements, which could occur upon the expiry of the period fixed therein or in advance at the initiative of Wendel, it was necessary to calculate the difference between the 'reference price', corresponding to the value of the security at the time the TRSs were entered into, and the 'termination price', corresponding to the value of the security at the date of termination. If the value of the shares increased, that added value was to accrue to Wendel; if the value of the shares decreased, Wendel was to pay the difference to the bank.

9. At the same time as the conclusion of the TRSs, Wendel obtained financing from the banks and another credit institution of a total amount close to that of the TRSs.

10. Having decided, on 3 September 2007, to phase out the TRSs progressively, Wendel acquired, between that date and 27 November 2007, more than 66 million shares representing 17.6% of the share capital of Saint-Gobain, and informed the AMF, between 26 September 2007 and 26 March 2008, that it had exceeded the thresholds of 5%, 10%, 15% and 20% of Saint-Gobain's share capital.

11. The AMF took the view that, although Wendel's Board of Directors had officially taken the decision on 3 September 2007 to transform the economic exposure to Saint-Gobain into an actual shareholding in that company, the evidence contained in the investigation report produced by the AMF's Investigations and Market Supervision Directorate into the circumstances surrounding Wendel's increased stake in Saint-Gobain, and the simultaneous nature of the signing of the TRSs and

Wendel's acquisition of financing enabling it subsequently to acquire the Saint-Gobain shares sold by the banks in the context of the phasing out of the TRSs, show that Wendel had intended from the outset to acquire a significant shareholding in Saint-Gobain's capital and that it was primarily for that purpose that the operation in question had been carried out.

12. As a result, the AMF accused Wendel and Mr Lafonta of failing to make public the principal characteristics of the 'financial operation' prepared by Wendel and 'intended to enable its acquisition of a significant shareholding in Saint-Gobain's capital', 'at the latest by 21 June 2007, at which date all the TRSs had been concluded with the banks' and of failing to make public, before it had incurred the obligation to report the passing of the threshold of 5%, the inside information as to 'the implementation, by Wendel, of the operation described above, in order to be able to acquire a substantial shareholding in Saint-Gobain's capital'.

13. By decision of 13 December 2010, the Penalties Commission of the AMF held those complaints to be well founded and imposed a financial penalty in the amount of EUR 1.5 million on Wendel and Mr Lafonta.

14. Mr Lafonta brought an appeal before the Cour d'appel de Paris (Court of Appeal, Paris), which upheld the AMF's decision. Mr Lafonta lodged an appeal in cassation against that judgment before the referring court.

15. In Mr Lafonta's view, information is 'precise' only if it allows the person in possession of that information to anticipate how the price of the financial instrument of the issuer concerned will change when that information is made public. He claims that only information that enables the person in possession of it to predict whether the price of the security concerned is going to increase or decrease allows that person to know whether he should buy or sell and, accordingly, grants him an advantage in relation to all the other actors on the market, who are unaware of that information. He adds that, in the circumstances, it was impossible to predict whether disclosure of the information concerning Wendel's acquisition of a shareholding in Saint-Gobain would result in an increase or a decrease in Wendel's share price.

16. The AMF contends that such a requirement goes beyond the wording of Directive 2003/6 and Directive 2003/124, which does not refer to the upward or downward nature of the possible effect on the prices of the financial instruments concerned. According to the AMF, the 'distinction between precise information and imprecise information is the likelihood of its having an effect on the market, with the result that any information in respect of which it may be concluded that, if it were known, it would be likely to bring about a change in prices, constitutes, for that reason alone, precise information, in addition to which the significant effect that the event in question is likely to have on the price of the security must be demonstrated'.

17. In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 1(1) of Directive [2003/6] and Article 1(1) of Directive [2003/124] be interpreted as meaning that only information in respect of which it may be determined, with a sufficient degree of probability, that, once it is made public, its potential effect on the prices of the financial instruments concerned will be in a particular direction may constitute inside information?'

IV – **The procedure before the Court**

18. Mr Lafonta has submitted written observations, as have the French, Czech, German, Italian and Polish Governments and the European Commission. At the hearing on 13 November 2014, oral argument was presented by Mr Lafonta, by the French and Polish Governments and by the Commission.

V – **Analysis**

A – *Preliminary observations*

19. The question put by the referring court concerns the concept of 'inside information', as defined in point (1) of Article 1 of Directive 2003/6 and, more specifically, the phrase 'of a precise nature', as used in Article 1(1) of Directive 2003/124.

20. As its title makes clear, the purpose of Directive 2003/6 is to combat insider dealing and market abuse.

21. In order to achieve those objectives, Directive 2003/6 lays down, inter alia, a prohibition on insider dealing,[4] that is to say, a prohibition on the improper use of insider information[5] (Article 2(1)) and an obligation on issuers of financial instruments to inform the public as soon as possible of inside information which directly concerns those issuers (Article 6(1), first subparagraph). In addition, the directive provides that Member States are to impose administrative measures or sanctions[6] against the persons responsible where, inter alia, Article 2(1) and the first subparagraph of Article 6(1) have not been complied with[7] (Article 14(1)).

22. Consistently with recitals 2 and 12 in the preamble thereto, Directive 2003/6 therefore prohibits insider dealing with the aim of protecting the integrity of financial markets and enhancing investor confidence, a confidence which depends, inter alia, on investors being placed on an equal footing and protected against the improper use of inside information.[8] The EU legislature states the view, in recital 15 to Directive 2003/6, that insider dealing and market manipulation prevent full and proper market transparency, which is a prerequisite for trading for all economic actors in integrated financial markets. The first sentence of recital 24 to Directive 2003/6 states that prompt and fair disclosure of information to the public enhances market integrity, whereas selective disclosure by issuers can lead to a loss of investor confidence in the integrity of financial markets.[9]

23. It follows that the concept of 'inside information', as defined in point (1) of Article 1 of Directive 2003/6, is a key concept of fundamental importance, given the central role accorded to it in Article 2(1) and the first subparagraph of Article 6(1) of that directive. In addition, the obligation on the part of Member States to apply sanctions under Article 14(1) of the directive means that the definition of that concept must be clear and satisfy the requirements of legal certainty.

4 — In paragraph 48 of the judgment in *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806), the Court ruled that 'the purpose of the prohibition laid down by Article 2(1) of Directive 2003/6 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'.

5 — See the judgment in *Geltl* (C-19/11, EU:C:2012:397), paragraph 33 and the case-law cited.

6 — Those administrative measures and sanctions to be provided for by Member States are 'without prejudice to the right of Member States to impose criminal sanctions'. See Article 14(1) of Directive 2003/6.

7 — In that regard, Member States are required to ensure that those measures are effective, proportionate and dissuasive (Article 14(1) of Directive 2003/6).

8 — See judgment in *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806, paragraph 47).

9 — See also, to that effect, judgment in *Geltl* (C-19/11, EU:C:2012:397, paragraph 34).

24. The facts at the origin of the case before the referring court concern the obligation, laid down in the first subparagraph of Article 6(1) of Directive 2003/6, to inform the public as soon as possible of inside information. That 'positive'[10] obligation, an obligation imposed on the issuers of financial instruments, is designed to guarantee the transparency necessary to ensure compliance with the objectives of that directive.[11]

25. Point (1) of Article 1 of Directive 2003/6 sets out the four elements essential to inside information: (i) its precise nature; (ii) the fact that it has not been made public; (iii) the fact that it relates, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments; and (iv) its capacity to have a significant effect on the prices of the financial instruments concerned.[12]

26. With a view to strengthening the legal certainty of market participants, who include the issuers of financial instruments, Directive 2003/124 defines more closely two of the four elements essential to the definition of inside information,[13] namely, the 'precise' nature of the information and the scale of its potential impact on the prices of the financial instruments concerned or of related derivative financial instruments.

27. In paragraph 53 of the judgment in *Geltl* (EU:C:2012:397), the Court ruled that the two elements of inside information set out, respectively, in paragraphs 1 and 2 of Article 1 of Directive 2003/124 were minimum conditions, each of which had to be satisfied for information to be held to be 'inside' information for the purposes of point 1 of Article 1 of Directive 2003/6.

28. In addition, the Court has emphasised the mutually independent nature of those two elements. The precise nature of information does not depend on the capacity of that information to have a significant effect on the prices of the financial instruments concerned.[14] Indeed, in accordance with the observations of the French Government, 'when assessing the precise nature of the information, there is no need to consider whether such information may serve as the basis for the decisions of a reasonable investor'.

29. I would point out in this regard that information 'of a precise nature' is, in reality and in practice, often likely to have a significant effect on the prices of financial instruments and therefore constitutes inside information. Nevertheless, it should be made clear once again that the precise nature of information, on the one hand, and the likelihood of it having a significant effect on the prices of financial instruments, on the other, are two criteria which are both mandatory and legally distinct.

B – *'Of a precise nature'*

30. Under Article 1(1) of Directive 2003/124, information is to be deemed to be of a precise nature if two cumulative conditions are satisfied: (i) the information must refer to a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so; and (ii) it must be specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments concerned or related derivative financial instruments.[15]

10 — By contrast, Article 2(1) of Directive 2003/6 lays down a 'negative' obligation, that is to say, it places persons in possession of inside information under an obligation to refrain from certain conduct on the markets.

11 — See points 20 to 22 above.

12 — See, to that effect, the judgments in *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806, paragraph 52) and *Geltl* (C-19/11, EU:C:2012:397, paragraph 25).

13 — Recital 3 to Directive 2003/124.

14 — See the judgment in *Geltl* (C-19/11, EU:C:2012:397, paragraph 52).

15 — The first condition was interpreted by the Court in the judgment in *Geltl* (C-19/11, EU:C:2012:397) and is not covered by the present request for a preliminary ruling.

31. The question referred by the national court concerns the second of those conditions and seeks to ascertain, in essence, whether that condition must be interpreted as meaning that, in order to be 'of a precise nature', the information must make it possible to anticipate the direction — upwards or downwards — of the price change of the financial instruments concerned.

32. There is a general consensus among the Member States which submitted written observations and the Commission that that question should be answered in the negative.

33. Mr Lafonta alone proposes an alternative answer, taking the view that a breach of the equal treatment of investors comes about only if the person in possession of the information is able to anticipate the market trend (upwards or downwards) once that information is made public. In his view, only a prediction to that effect would enable that person to determine whether he should buy or sell the security in question in order to make a profit. In the absence of such knowledge, the investor would run the same risk as all other market participants when trading that security.

34. It is clear from Article 1(1) of Directive 2003/124 that, in order to be deemed to be 'of a precise nature', information must be specific [16] or exact enough [17] to enable a conclusion to be drawn as to a possible effect on the prices of the instruments concerned.

35. However, it must be stated that neither point (1) of Article 1 of Directive 2003/6 nor Article 1(1) of Directive 2003/124 make any specific reference to information on the basis of which it would be possible to anticipate the direction — upwards or downwards — of a change in the prices of those instruments. [18] It goes without saying that such information would clearly constitute information of a precise nature [19] but the question referred to the Court is whether without that element such information may be deemed to be of a precise nature.

36. I would further point out that Article 1(1) of Directive 2003/124 is worded in very general and inclusive terms. [20]

37. Indeed, the words '*a* conclusion … as to the *possible* effect' [21] clearly have a very broad scope and cannot be construed narrowly as covering only information which makes it possible to determine the potential direction of a change in the prices of the financial instruments concerned. [22]

16 — The Court used the word '*specific*' in paragraph 48 of the judgment in *Geltl* (C-19/11, EU:C:2012:397).

17 — See, to that effect, the Spanish language version ('suficientemente específic'), the Czech language version ('dostatečně konkrétní'), the German language version ('spezifisch genug'), the French language version ('suffisamment précise'), the Italian language version ('sufficientemente specifica'), the Dutch language version ('specifiek genoeg'), and the Slovak language version ('dostatočne konkrétna').

18 — The Czech Government points out there is nothing in Directive 2003/6 or Directive 2003/124 regarding the need to determine the direction in which the prices of the financial instruments would probably change. In the view of the French Government, it by no means follows from the wording of Article 1(1) of Directive 2003/124 'that, in order to be deemed to be precise, information would have to satisfy a further condition, namely that on the basis of that information it would be possible to anticipate the direction of the change in the prices of the financial instruments concerned once the information is made public'.

19 — Information of that kind would satisfy the separate condition, relating to significant effect, laid down in Article 1(2) of Directive 2003/124 because it would constitute, in my view, 'information a reasonable investor would be likely to use as part of the basis of his investment decisions'.

20 — It should be pointed out that Directives 2003/6 and 2003/124 preclude 'selective disclosure'. See recital 24 to Directive 2003/6.

21 — Emphasis added.

22 — See, by analogy, the judgment in *Geltl* (C-19/11, EU:C:2012:397, paragraph 46). As the Italian Government has pointed out, Directive 2003/124 'clearly refers in the second sentence of Article 1(1) to a "conclusion … as to the *possible* effect … on the prices" and not to the "*probable* effect … on the prices". In the Italian Government's opinion, it is sufficient to ascertain whether information could, technically speaking, have an effect on the price of the financial instrument in question. The German Government considers that the expression 'of a precise nature' is intended 'solely to exclude information of a vague or secondary nature, which cannot reasonably have any impact on prices and cannot, therefore, serve as the basis for an assessment of them, such as private rumours concerning appropriate matters of fact'.

38. It is true that that provision excludes from the definition of 'inside information' vague or general information which, on account of its lack of precision or specificity, does not enable any conclusion to be drawn as to the impact or possible effect of that information on the prices of the instruments concerned.[23] Such information is, by its very nature, inconclusive and therefore incapable of undermining the objectives of Directive 2003/6. It is therefore appropriate to exclude such information from the concept of 'inside information' in order to avoid a surfeit of unnecessary information for market participants which might, on the one hand, 'drown' them and, on the other hand, impose excessive obligations on the issuers of financial instruments.

39. I also believe that, in view of the difficulty, in a very significant number of cases, of assessing[24] *ex ante* whether information may cause the prices of the financial instruments concerned to rise or to fall, restricting the scope of the concept of information 'of a precise nature' solely to information which makes it possible to anticipate the direction of a change in the prices of those instruments would render Directives 2003/6 and 2003/124 virtually meaningless.[25] Such an approach would encourage the selective disclosure of information by issuers, in contravention of the objectives of Directive 2003/6.

40. Nevertheless, Mr Lafonta argues that his position is supported by the published views of the Committee of European Securities Regulators ('the CESR').[26] In point 1.8 of a document entitled 'Market Abuse Directive, Level 3 — second set of CESR guidance and information on the common operation of the directive to the market' of July 2007 ('the CESR guidance'),[27] the CESR states that an item of information is, for example, specific enough in two situations. The first situation is where the information is of such a nature as to enable the reasonable investor to take an investment decision without financial risk, or at very low financial risk, that is to say, where it enables the investor to assess with confidence how the information, once publicly known, will affect the price of the relevant financial instrument and related derivative financial instruments. For example, a person aware that a particular issuer is about to be subject to a takeover bid may be confident that the issuer's share price will rise when the bid becomes public. The second situation is where the information is of such a nature that it is likely to be exploited immediately on the market.[28]

23 — In point 73 of his Opinion in *Geltl* (C-19/11, EU:C:2012:153), Advocate General Mengozzi states that 'Directive 2003/124 does no more than lay down minimum requirements in the absence of which information cannot be regarded as precise information. As far as concerns what is meant by reasonable expectation, it does not require a high degree of probability that the set of circumstances in question will arise; nor does it require the information to be so specific that certain, or near-certain, conclusions may be drawn from it as to the possible effect on trading in the financial instruments at issue or in related derivative instruments'. In footnote 16 to that Opinion, Advocate General Mengozzi adds that 'information will not be precise where reason dictates that the event be regarded as *impossible or improbable*, the necessary element of reasonableness being absent, for example, where it is *no more than rumour, or where the information is so vague as to make it impossible to draw inferences* as to the possible effect on trading in the financial instruments at issue or in related derivative instruments'. Emphasis added.

24 — The Czech Government takes the view that 'virtually nobody is able to predict with any precision price changes on the financial market; to use a more colloquial turn of phrase, nobody has a crystal ball'.

25 — See, by analogy, the judgment in *Geltl* (C-19/11, EU:C:2012:397, paragraph 47). According to the Polish Government, 'issuers would easily circumvent the obligation for public disclosure of inside information, an obligation laid down in Article 6 of Directive 2003/6, by arguing the existence of various possible scenarios as regards the impact of the disclosure of the information concerned on the prices of the financial instruments. That situation would be manifestly contrary to the objectives of Directive 2003/6, which is to guarantee the equal treatment of investors with regard to access to information and to increase investor confidence in the capital markets. At the same time, the means provided for in Directives 2003/6 and 2003/124 in order to combat fraud on the market would be seriously compromised.'

26 — The CESR was established by Commission Decision 2001/527/EC of 6 June 2001 (OJ 2001 L 191, p. 43). Under Article 2 of that decision, as amended by Article 1 of Commission Decision 2004/7/EC of 5 November 2003 (OJ 2004 L 3, p. 32), 'the role of the [CESR] shall be to advise the Commission, either at the Commission's request, within a time limit which the Commission may lay down according to the urgency of the matter, or on the Committee's own initiative, in particular for the preparation of draft implementing measures in the field of securities, including those relating to undertakings for collective investment in transferable securities'. Decision 2001/527 was repealed by Commission Decision 2009/77/EC of 23 January 2009 establishing the Committee of European Securities Regulators (OJ 2009 L 25, p. 18). Article 2 of that decision essentially reproduces the wording of Article 2 of Decision 2001/527.

27 — CESR/06-562b.

28 — It seems to me that that second example does not relate to the criterion of information of a precise nature, but is rather intended to clarify the concept of 'significant effect' referred to in Article 1(2) of Directive 2003/124.

41. It should be pointed out first of all that, in point 8 of the CESR's Feedback Statement [29] relating to the CESR guidance and published at the same time, the CESR stated that the purpose of the guidance was, inter alia, to provide examples of the types of information which could potentially constitute 'inside information'. However, it should be noted that the CESR guidance does not have binding legal effect; that it cannot be relied on for the purposes of derogating from Directives 2003/6 and 2003/124; and, moreover, that it was published before the judgments in *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806) and *Geltl* (C-19/11, EU:C:2012:397).

42. I share the view expressed in the observations made by the Commission at the hearing, to the effect that the first example provided in point 1.8 of the CESR guidance is very extreme and relates to a very rare situation in which the information is clear, complete and leaves no room for doubt. As the Commission pointed out, such certainty is clearly not necessary in order for a piece of information to be deemed to be inside information. In addition, the Commission quite rightly stated that point 1.15 of the CESR guidance provided other examples of events which support my view that information concerning the direction of the change in price is not necessary for the purposes of the concept of 'inside information'. The eighth indent of point 1.15, relating inter alia to the 'purchase or disposal of equity interests or other major assets', appears quite clearly to cover the information at issue in the case of Mr Lafonta, namely the TRSs. According to the CESR guidance, this is a classic case of inside information. Furthermore, the third, seventh and penultimate indents of point 1.15 of the CESR guidance also provide examples of 'inside information', even though the direction of price changes can by no means be predicted on the basis of such information. In conclusion, assuming that the CESR guidance is relevant, it seems to me that Mr Lafonta cannot rely on it to support his argument.

43. I am therefore of the view that point (1) of Article 1 of Directive 2003/6 and Article 1(1) of Directive 2003/124 must be interpreted as meaning that information is to be deemed to be 'of a precise nature' if it 'indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so' and it may be concluded that that set of circumstances or that event is capable of resulting in a change or a fluctuation in the prices of the financial instruments. Such information must be 'specific enough to enable a conclusion to be drawn as to the possible effect [of the circumstances or events] on the prices of financial instruments …'.

44. It is not necessary, however, for it to be possible to conclude, with a sufficient degree of probability, that the potential effect of that information on the prices of the financial instruments concerned will be in a particular direction, once that information is made public.

C – *Significant effect on prices*

45. The question referred for a preliminary ruling by the national court makes no reference to the 'significant' [30] effect of an item of information on the prices of the financial instruments concerned. It is therefore only for the sake of completeness that I will now consider that condition very briefly.

46. I would point out that, as the Commission stated in its observations, the issue of whether or not the potential effect on prices of the disclosure of certain information is significant in nature has no relevance for the purposes of the condition relating to precision laid down in point (1) of Article 1 of Directive 2003/6. [31] Accordingly, an item of information, even if it is 'of a precise nature', does not

29 — CESR/07-402.

30 — See point (1) of Article 1 of Directive 2003/6 and Article 1(2) of Directive 2003/124.

31 — See points 28 and 29 above.

undermine the objectives of Directives 2003/6 and 2003/124 if it is likely to affect the prices of the financial instruments concerned only insignificantly and does not therefore constitute 'information a reasonable investor would be likely to use as part of the basis of his investment decisions', as provided for in Article 1(2) of Directive 2003/124. [32]

47. Article 1(2) of Directive 2003/124, which is concerned with the scale of the potential impact of an item of information on the prices of the financial instruments concerned, is intended to exclude or filter out information — even information of a precise nature — which would have an *insignificant* impact on those prices and which, therefore, would not affect the integrity of the market. [33]

48. As in the case of Article 1(1) of Directive 2003/124, I take the view that Article 1(2) of that directive is likewise by no means limited to information which enables the direction of a change in the prices of the financial instruments concerned to be determined. Information concerning the potential volatility of a security, regardless of the direction, could in certain circumstances be information that a reasonable investor would be likely to use as a basis for his investment decisions.

49. It is clear from the documents before the Court that there are financial mechanisms which enable an investor to profit from a significant change in the price of a security, irrespective of the direction of that change, if certain market conditions are met.

50. It is therefore necessary to examine, on a case-by-case basis, whether an item of information concerning even the possibility of a significant change could be information that a reasonable investor would be likely to use as part of the basis for his investment decisions, even if that information does not indicate the direction of the change.

51. To conclude, I will refer to the examples given by the Polish Government at the hearing of information which, although not indicating the direction of a possible change in prices, nevertheless still constitutes inside information for the purposes of Directives 2003/6 and 2003/124. Thus, the fact that the CEO of an undertaking in the construction industry is retiring and might be replaced by an executive with many years of experience in the field of telecommunications may be information of a precise nature likely to be taken into account by reasonable investors, some of whom will take the view that that replacement will breathe new life into the undertaking whereas others will consider that the recruitment of an executive from outside the industry can only weaken the undertaking. [34] In both cases, the information will have to be made public as soon as possible, in accordance with Article 6 of Directive 2003/6.

VI – **Conclusion**

52. In the light of the foregoing considerations, I propose that Court should answer the question referred for a preliminary ruling by the Cour de cassation as follows:

Point (1) of Article 1 of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) and Article 1(1) of Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6 as regards

32 — Article 1(2) of Directive 2003/124, like Article 1(1) of that directive, is worded in very general terms. As is stated in recital 1 to Directive 2003/124, reasonable investors base their investment decisions on *ex ante* available information. See recital 1 to Directive 2003/124, which adds that '[s]uch an assessment has to take into consideration the anticipated impact of the information in light of the totality of the related issuer's activity, the reliability of the source of information and any other market variables likely to affect the related financial instrument or derivative financial instrument related thereto in the given circumstances'. See also, to that effect, paragraph 55 of the judgment in *Geltl* (C-19/11, EU:C:2012:397).

33 — That provision may be regarded as a *de minimis* rule.

34 — The Polish Government also gave the example of a milk-producing undertaking which is converted into a construction undertaking and uses the land previously given over to the production of milk as construction sites. The effect of that change on the direction of the undertaking's share price is likewise impossible to predict.

the definition and public disclosure of inside information and the definition of market manipulation must not be interpreted as meaning that the only information capable of constituting inside information is information from which it is possible to conclude, with a sufficient degree of probability, that, once it is made public, the potential effect of that information on the prices of the financial instruments concerned will be in a particular direction.