



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

11 March 2015*

(Reference for a preliminary ruling — Approximation of laws — Directive 2003/6/EC — Article 1, point (1) — Directive 2003/124/EC — Article 1(1) — Inside information — Concept of ‘information of a precise nature’ — Potential effect in a particular direction on the prices of financial instruments)

In Case C-628/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decision of 26 November 2013, received at the Court on 2 December 2013, in the proceedings

Jean-Bernard Lafonta

v

Autorité des marchés financiers,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a Judge of the Second Chamber, J.-C. Bonichot, A. Arabadjiev and J.L. da Cruz Vilaça (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 13 November 2014,

after considering the observations submitted on behalf of:

- Mr Lafonta, by E. Piwnica, avocat,
- the French Government, by D. Colas, S. Menez and S. Ghiandoni, acting as Agents,
- the Czech Government, by M. Smolek and J. Vlácil, acting as Agents,
- the German Government, by T. Henze and A. Wiedmann, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,
- the Polish Government, by B. Majczyna, K. Maćkowska and K. Pawłowska, acting as Agents,

* Language of the case: French.

— the European Commission, by J. Hottiaux and I. Rogalski, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 18 December 2014,
gives the following

Judgment

- 1 This request for a preliminary ruling 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) (OJ 2003 L 96, p. 16) and Article 1(1) of Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation (OJ 2003 L 339, p. 70).
- 2 The request has been made in proceedings between Mr Lafonta and the Autorité des marchés financiers (French Financial Markets Authority; ‘the AMF’) concerning the decision of 13 December 2010 by which the Penalties Commission of the AMF ordered Mr Lafonta to pay a financial penalty for failing to make public, inter alia, information relating to a financial operation which enabled Wendel SA to acquire a significant shareholding in the Saint-Gobain group (‘Saint-Gobain’).

Legal context

EU law

Directive 2003/6

- 3 Recitals 2, 12 and 24 in the preamble to Directive 2003/6 state:

‘(2) An integrated and efficient financial market requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities and derivatives.

...

(12) Market abuse consists of insider dealing and market manipulation. The objective of legislation against insider dealing is the same as that of legislation against market manipulation: to ensure the integrity of Community financial markets and to enhance investor confidence in those markets.

...

(24) 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.

...’

4 The first paragraph of point (1) of Article 1 of Directive 2003/6 defines ‘inside information’, for the purposes of that directive, as ‘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’.

5 The first subparagraph of Article 2(1) of that directive 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.’

6 The first subparagraph of Article 6(1) of that directive provides:

‘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.’

Directive 2003/124

7 Recitals 1 and 3 in the preamble to Directive 2003/124 state:

‘(1) Reasonable investors base their investment decisions on information already available to them, that is to say, on *ex ante* available information. Therefore, the question whether, in making an investment decision, a reasonable investor would be likely to take into account a particular piece of information should be appraised on the basis of the *ex ante* available information. Such 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.

...

(3) Legal certainty for market participants should be enhanced through a closer definition of two of the elements essential to the definition of inside information, namely the precise nature of that information and the significance of its potential effect on the prices of financial instruments or related derivative financial instruments.’

8 Article 1 of that directive, 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.’

French law

9 By order of 12 November 2004 (JORF of 24 November 2004, p. 19749), Books II to VI of the General Regulation of the AMF were approved. Book II is entitled ‘Émetteurs et information financière’ (Issuers and Financial Reporting) and Book VI is entitled ‘Abus de marché: Opérations d’initiés et manipulations de marché’ (Market abuse: insider dealing and market manipulation).

10 In Book II of that General Regulation, Article 223-2, as laid down by order of 4 January 2007 (JORF of 20 January 2007, p. 1204), provides:

‘I. — Every issuer of financial instruments must inform the public as soon as possible of any inside information, as defined in Article 621-1, which directly concerns that issuer.

...’

11 In Book VI of the General Regulation, the first and second subparagraphs of Article 621-1 provide:

‘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 price of those financial instruments or on the price of related financial instruments.

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 enables a conclusion to be drawn from it as to the possible effect of that set of circumstances or event on the price of financial instruments or related financial instruments.’

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

12 The order for reference relates that, between December 2006 and June 2007, Wendel — a company of which Mr Lafonta was chairman of the Board of Directors — concluded with four credit institutions ‘total return swap agreements’ (‘the TRSs’), the underlying assets of which were shares in Saint-Gobain. In order to hedge their positions, those institutions acquired a total of 85 million shares in Saint-Gobain. At the same time as its entry into the TRSs, Wendel obtained financing, from the banks and another credit institution, for a total amount close to that of the TRSs.

13 After deciding 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. Between 26 September 2007 and 26 March 2008, Wendel informed the AMF that it had exceeded the thresholds of 5%, 10%, 15% and 20% of Saint-Gobain’s share capital.

14 Following an inquiry into the increase in the capital of Saint-Gobain, the AMF found that, although Wendel 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 inquiry report, and the simultaneous nature of the signing of the TRS agreements 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.

- 15 Accordingly, the AMF accused Wendel and Mr Lafonta of failing to make public the principal characteristics of the financial operation, prepared by Wendel and designed to enable it to acquire a significant shareholding in Saint-Gobain's capital — and of failing to make that information public by 21 June 2007 at the latest, at which date all the TRSs had been concluded — and of failing to make public, before Wendel incurred the obligation to report the passing of the 5% threshold, the inside information as to Wendel's implementation of that financial operation for the purposes of acquiring a substantial shareholding in Saint-Gobain's capital.
- 16 By decision of 13 December 2010, the Penalties Commission of the AMF held those complaints to be well founded and imposed a financial penalty on Wendel and Mr Lafonta in the amount of EUR 1.5 million.
- 17 Mr Lafonta brought an action before the Cour d'appel de Paris (Court of Appeal, Paris) for the annulment of that decision to the extent that it imposed a financial penalty on him. By judgment of 31 May 2012, the Cour d'appel de Paris dismissed the action.
- 18 Mr Lafonta lodged an appeal in cassation against that judgment. As grounds for that appeal, Mr Lafonta submits that information is precise for the purposes of the second subparagraph of Article 621-1 of the General Regulation of the AMF, to which Article 223-2 of that regulation refers, only '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 enables a conclusion to be drawn from it as to the possible effect of that set of circumstances or event on the price of financial instruments or related financial instruments'. It follows, according to Mr Lafonta, that information is precise, for the purposes of that provision, only if it allows the person in possession of that information to anticipate how the price of the security concerned will change when that information is made public. He argues 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 as compared with all the other actors on the market, who are unaware of that information. Mr Lafonta adds that, in the circumstances, it was impossible to predict whether the 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.
- 19 The AMF responds that such a requirement goes beyond the wording of Directive 2003/6 and Directive 2003/124, in which no reference is made to the direction of the possible effect on the prices of the financial instruments concerned. According to the AMF, 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, as the distinction between precise information and imprecise information is the likelihood of its having an effect on the market.
- 20 In those circumstances, the Cour de cassation decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:
- 'Must point (1) of Article 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?'

Consideration of the question referred for a preliminary ruling

- 21 The first point to note is that, according to recitals 2 and 12 to Directive 2003/6, the purpose of that directive is to protect the integrity of the EU financial markets and to enhance investor confidence in those markets. That confidence depends on, inter alia, investors being placed on an equal footing and

protected against the improper use of insider information (see, to that effect, judgments in *Spector Photo Group and Van Raemdonck*, C-45/08, EU:C:2009:806, paragraph 47; *IMC Securities*, C-445/09, EU:C:2011:459, paragraph 27; and *Geltl*, C-19/11, EU:C:2012:397, paragraph 33).

- 22 To that end, whereas Article 2(1) of Directive 2003/6 prohibits insider dealing, Article 6(1) of that directive places issuers of financial instruments under an obligation to inform the public as soon as possible of inside information which directly concerns those issuers. As recital 24 to Directive 2003/6 states, 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.
- 23 Under the first paragraph of point (1) of Article 1 of Directive 2003/6, ‘inside information’ is defined as ‘information of a precise nature which has not been made public’, which relates 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’.
- 24 Thus, the definition of ‘inside information’ under that provision comprises four essential elements: (i) the information must be of a precise nature; (ii) the information must not have been made public; (iii) it must relate, directly or indirectly, to one or more financial instruments or their issuers; and (iv) it must be information 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. (see, to that effect, judgment in *Geltl*, EU:C:2012:397, paragraph 25).
- 25 The Court has pointed out that, owing to its non-public and precise nature and its ability to influence significantly the prices of the financial instruments concerned, inside information grants the insider in possession of such information an advantage in relation to all the other actors on the market, who are unaware of it (see judgment in *Spector Photo Group and Van Raemdonck*, EU:C:2009:806, paragraph 52).
- 26 It is also important to note that, in order to enhance legal certainty for market participants, Directive 2003/124 was intended — as is apparent from recital 3 thereto — to define more closely the first and fourth elements essential to the definition of ‘inside information’, as set out in paragraph 24 of the present judgment.
- 27 Accordingly, as regards the first element, Article 1(1) of Directive 2003/124 provides that 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’. As regards the fourth element, Article 1(2) of that directive states that information likely to have a significant effect on the price of financial instruments is information which ‘a reasonable investor would be likely to use as part of the basis of his investment decisions’.
- 28 The Court has held that those two elements, essential to the definition of ‘inside information’ and defined more closely in Article 1 of Directive 2003/124, are mutually independent and constitute minimum conditions, each of which must be met if information is to be regarded as ‘inside’ information for the purposes of point (1) of Article 1 of Directive 2003/6 (see, to that effect, judgment in *Geltl*, EU:C:2012:397, paragraphs 52 and 53).
- 29 It should be noted that, by its question, the referring court seeks solely to obtain clarification regarding the first element essential to the definition of ‘inside information’, that is to say, regarding the ‘precise’ nature of that information.

- 30 It should be noted in that connection that, as the Advocate General noted in point 37 of his Opinion, it is not apparent from the wording of Article 1 of Directive 2003/124 that ‘precise’ information covers only information which makes it possible to determine the likely direction of a change in the prices of the financial instruments concerned, or the prices of related derivative financial instruments.
- 31 If the terms used in Article 1(1) of Directive 2003/124 are given their plain and ordinary meaning, it must be held that, for the condition in question to be satisfied, it is enough that the information be sufficiently exact or specific to constitute a basis on which to assess whether the set of circumstances or the event in question is likely to have a significant effect on the price of the financial instruments to which it relates. Consequently, the only information excluded from the concept of ‘inside information’ by virtue of that provision is information that is vague or general, from which it is impossible to draw a conclusion as regards its possible effect on the prices of the financial instruments concerned.
- 32 That interpretation is borne out both by the general scheme of Article 1 of Directive 2003/124 and by the purpose of Directive 2003/6.
- 33 As regards the general scheme of Article 1 of Directive 2003/124, Mr Lafonta submits that information cannot be regarded as precise unless it enables the holder of that information to anticipate the direction of a change in the prices of the financial instrument concerned, since only information that meets that condition would enable the holder to determine whether that financial instrument should be acquired or disposed of and, as a result, gives the holder of that information an advantage over all the other actors on the market.
- 34 It should be pointed out in that connection that, in common with Article 1(1) of Directive 2003/124, Article 1(2) of that directive does not require that the information make it possible to determine the direction of change in the prices of the financial instruments concerned. A particular item of information can be used by a reasonable investor as one of the grounds for his investment decision and, accordingly, satisfy the condition laid down in Article 1(2) of that directive, even though it does not make it possible to determine the movement in a given direction of the prices of the financial instruments concerned.
- 35 As regards the purpose of Directive 2003/6, it should be observed that — as the Advocate General noted in point 39 of his Opinion — to confine the scope of point (1) of Article 1 of Directive 2003/6 and Article 1(1) of Directive 2003/124 solely to information which makes it possible to anticipate the direction of a change in the prices of those instruments risks undermining the objectives referred to in paragraph 21 above.
- 36 The increased complexity of the financial markets makes it particularly difficult to evaluate accurately the direction of a change in the prices of those instruments, as was stated in recital 1 to Directive 2003/124, which refers to several factors likely to affect those prices in a given situation. In those circumstances — which can lead to widely differing assessments, depending on the investor — if it were accepted that information is to be regarded as precise only if it makes it possible to anticipate the direction of a change in the prices of the instruments concerned, it would follow that the holder of that information could use an uncertainty in that regard as a pretext for refraining from making certain information public and thus profit from that information to the detriment of the other actors on the market.
- 37 It should also be noted in that context that the *travaux préparatoires* for Directive 2003/124 disclose that a reference to the possibility of drawing a conclusion as regards the ‘direction’ of the effect of the information on the price of the financial instruments concerned, made in the version, subject to public consultation, of technical advice CESR/02-089d issued in December 2002 by the Committee of

European Securities Regulators (CESR), for the European Commission and entitled 'CESR's Advice on Level 2 Implementing Measures for the proposed Market Abuse Directive', was later deleted precisely in order to avoid such a reference being used as a pretext for not making information public.

- 38 In the light of all the foregoing, the answer to the question referred is that, on a proper construction of point (1) of Article 1 of Directive 2003/6 and Article 1(1) of Directive 2003/124, in order for information to be regarded as being of a precise nature for the purposes of those provisions, it need not be possible to infer from that information, 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.

Costs

- 39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

On a proper construction 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) and Article 1(1) of Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation, in order for information to be regarded as being of a precise nature for the purposes of those provisions, it need not be possible to infer from that information, 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.

[Signatures]