Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 16 September 2021 [1]

Case C-302/20

Mr A
v
Autorité des marchés financiers (Financial Markets Authority, France)

(Request for a preliminary ruling from the Cour d'appel de Paris (Court of Appeal, Paris, France))

(Reference for a preliminary ruling – Single market for financial services – Functionality and integrity of capital markets – Inside information and insider dealing – Directive 2003/6/EC (market abuse directive) – Prohibition on disclosing inside information – Directive 2003/124/EC – Article 1(1) – Definition of inside information – Requirements of precision and ability to influence prices – Market rumour – Disclosure by a journalist to another person about the forthcoming publication of an article relaying a market rumour – Regulation (EU) No 596/2014 (market abuse regulation) – Article 21 – Disclosure of inside information for the purpose of journalism – Article 10 – Disclosure of inside information in the normal exercise of an employment or a profession)

I. Introduction

1. The primary aim of European legislation on market abuse is to ensure a capital market with integrity and equal rights for investors. This is intended to create investor confidence, which in turn plays a key role in the economic functioning of the market. [2] Insider dealing law, as a key component of legislation on market abuse, helps to achieve this goal by ensuring that all market participants are on an equal footing. No investor should profit from relevant, but not publicly available, information to the detriment of other investors who are not (cannot) be aware of it. [3]

2. Therefore, insider dealing law provides, first, that the relevant information should, in principle, be made public as soon as possible, by obliging an issuer of securities to regularly publish information concerning that issuer (known as ad hoc disclosure). [4] Secondly, any information

1 Original language: German.

2 See, for example, the Commission's Proposal for a Market Abuse Directive of 19 November 2002, COM(2002) 625 final (OJ 2003 C 71 E, p. 62): 'Financial markets can survive periodic bouts of volatility, cyclical corrections or underperformance of individual stocks. They will not survive the erosion of investor confidence if markets are … susceptible to market abuse.'

3 See, in particular, judgments of 10 May 2007, *Georgakis* (C-391/04, EU:C:2007:272, paragraph 38), and of 23 December 2009, *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806, paragraphs 47 and 48).

4 See Article 17 of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ 2014 L 173, p. 1).

asymmetry that should arise must not be exploited (prohibition on insider dealing), [5] and must be kept in as restricted a circle as possible (prohibition on unlawful disclosure of inside information). [6]

3. This request for a preliminary ruling concerns, in essence, the prohibition on disclosing inside information and the limits of that prohibition. In the main proceedings, a financial journalist is opposing a penalty imposed on him for having allegedly disclosed inside information, essentially claiming an infringement of his press freedom. Given that the aim of insider dealing law is to create as much transparency as possible, it seems desirable for inside information to be handled by journalists at least to some extent, including under that law. However, insider dealing law may come into conflict with the freedom of the press and the freedom of expression in the media, in particular at the stage before information is widely disseminated and published in the media. How to resolve such a conflict is the subject of the second set of questions referred to the Court by the Cour d'appel de Paris (Court of Appeal, Paris, France).

4. However, this Court must first consider the question of whether the disclosure of which the applicant is accused did in fact involve inside information. When considering the first set of questions referred, the Court will have to clarify in this regard under what circumstances a market rumour, that is to say manifestly uncertain information, can trigger the mechanisms of insider dealing law.

II. Legal framework

A. EU law

1. Directive 2003/6 (Market Abuse Directive)

5. Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) ('the MAD'), [7] defines the concept of 'inside information' in point 1 of Article 1.

'… 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.'

6. According to point (c) of the second subparagraph of Article 2(1), Member States shall prohibit any person who possesses inside information, by virtue of his or her having access to that information through the exercise of his or her employment, profession or duties, from using that information by acquiring or disposing of, or by trying to acquire or dispose of, for his or her own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates.

[5] Article 14(a) and (b) of Regulation No 569/2014.

[6] Article 14(c) of Regulation No 569/2014.

[7] OJ 2003 L 96, p. 16.

7. In addition, under Article 3 of the MAD, Member States must prohibit any person subject to the prohibition laid down in Article 2 from:

'(a) disclosing inside information to any other person unless such disclosure is made in the normal course of the exercise of his employment, profession or duties;

(b) recommending or inducing another person, on the basis of inside information, to acquire or dispose of financial instruments to which that information relates.'

2. Directive 2003/124

8. The first two recitals 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 ('Directive 2003/124') [8] read:

'(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.

(2) *Ex post* information may be used to check the presumption that the *ex ante* information was price sensitive, but should not be used to take action against someone who drew reasonable conclusions from *ex ante* information available to him.'

9. Article 1 of this directive defines the concept of 'inside information' more precisely:

'1. For the purposes of applying [point 1 of Article 1 of the MAD], 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 the MAD], "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.'

3. Regulation No 596/2014 (market abuse regulation)

10. Regulation No 596/2014 ('the MAR') replaced the MAD and, pursuant to its Article 39(2), has been applicable in the Member States since 3 July 2016.

[8] OJ 2003 L 339, p. 70.

11. Recital 77 of this regulation states:

'This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union ("the Charter"). Accordingly, this Regulation should be interpreted and applied in accordance with those rights and principles. In particular, when this Regulation refers to rules governing the freedom of the press and freedom of expression in other media and the rules or codes governing the journalist profession, account should be taken of those freedoms as guaranteed in the Union and in the Member States and as recognised pursuant to Article 11 of the Charter and to other relevant provisions.'

12. The definition of inside information in Article 7(1)(a) of the MAR corresponds to that in Article 1(1) of the MAD.

13. Article 7(2) and (4) of the MAR read, in extract, as follows:

'2. For the purposes of paragraph 1, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where 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 the financial instruments or the related derivative financial instrument, the related spot commodity contracts, or the auctioned products based on the emission allowances. In this respect in the case of a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, those future circumstances or that future event, and also the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or that future event, may be deemed to be precise information.

…

4. For the purposes of paragraph 1, information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments, derivative financial instruments, related spot commodity contracts, or auctioned products based on emission allowances shall mean information a reasonable investor would be likely to use as part of the basis of his or her investment decisions. …'

14. Article 10(1) of the MAR sets out, under the heading 'Unlawful disclosure of inside information':

'For the purposes of this Regulation, unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties. …'

15. Article 14(c) of the MAR stipulates that the unlawful disclosure of inside information constitutes a prohibited act.

16. Article 21 of the MAR, headed 'Disclosure or dissemination of information in the media', reads as follows:

'For the purposes of [Article 10], where information is disclosed or disseminated and where recommendations are produced or disseminated for the purpose of journalism or other form of expression in the media, such disclosure or dissemination of information shall be assessed taking into account the rules governing the freedom of the press and freedom of expression in other media and the rules or codes governing the journalist profession, unless:

(a) the persons concerned, or persons closely associated with them, derive, directly or indirectly, an advantage or profits from the disclosure or the dissemination of the information in question; or

(b) the disclosure or the dissemination is made with the intention of misleading the market as to the supply of, demand for, or price of financial instruments.'

B. French law

17. Article 1(1) of the MAD and Article 1 of Directive 2003/124 were reproduced almost word for word in Article 621-1 of the Règlement général de l'AMF (General Regulation of the AMF; 'the RGAMF'), and thus implemented in French law.

18. Article 622-1 of the RGAMF provides that any person referred to in Article 622-2 thereof must refrain from using the inside information in his or her possession and from disclosing that information to another person outside the normal course of his or her employment, profession or duties. Article 622-2 of the RGAMF applies to, inter alia, any person who possesses inside information as a result of his or her access to information by reason of his or her employment, profession or duties.

III. Facts and main proceedings

19. Mr A, the applicant in the main proceedings, is a retired journalist who worked for several British daily newspapers during his professional career. Most recently, he worked for the widely read website of a British newspaper, on which he regularly published articles relaying market rumours. Two of these articles are relevant to the main proceedings.

20. First, on the evening of 8 June 2011, the applicant in the main proceedings published an article relating to a possible takeover bid by a group for stock in an undertaking at a specifically indicated price, with an 86% premium as compared with the undertaking's closing day price. The share price of the alleged target undertaking increased by 0.64% at market opening on the next trading day, and then by 4.55% during the course of the session.

21. Secondly, on the evening of 12 June 2012, the applicant published an article about another possible takeover at a specific purchase price with an 80% premium as compared with the closing day price of the alleged target undertaking. The share price of this undertaking had risen by 17.69% when the markets closed on the next trading day. The undertaking concerned denied the rumour two days later.

22. Shortly before these two articles appeared on the website of the newspaper concerned, several persons resident in the United Kingdom had purchased the respective shares and sold them the next day at a profit.

23. An analysis of telephone communication records allowed the Autorité des marchés financiers (French Financial Markets Authority; 'the AMF') to establish that the applicant in the main proceedings had telephone contact with one or more of the subsequent purchasers on the day that the articles were published. Those persons are financial analysts with whom the applicant in the main proceedings had been in regular contact for years, exchanging information relating to the capital market. In at least one case, shortly after the end of the telephone conversation with the applicant in the main proceedings, the person concerned called her broker, who then placed a buy order for the securities discussed in the articles that were published shortly afterwards.

24. The AMF alleges that the applicant in the main proceedings informed the aforementioned persons about the forthcoming publication of the articles during the telephone conversations in question. It takes the view that information relating to the forthcoming publication of a press article relaying a market rumour could constitute inside information, and that the information at issue satisfied the conditions for classification as inside information. On that ground, after consulting with its Penalties Commission, it imposed a financial penalty of EUR 40 000 on the applicant in the main proceedings. The purchasers of the securities concerned received financial penalties for insider dealing.

25. The action against that decision is pending before the referring court, the Cour d'appel de Paris (Court of Appeal, Paris).

26. In the action, the applicant denies having discussed the articles about the takeover rumours with the subsequent purchasers and claims that the information about the forthcoming publication of these articles could not in any case be considered to be inside information. He argues that mere rumours lack the necessary precision due to their inherent uncertainty and inexactness, and that the precise nature of information is defined as an independent requirement for classification as inside information by Article 1(1) of the MAD and Article 7(1)(a) of the MAR. In particular, in his view, the precision requirement is not rendered obsolete if the information is classified as price-sensitive. In addition, the applicant's penalty constituted an infringement of Article 21 of the MAR, which provided an exception from the prohibition on disclosing inside information for journalists, and applying this exception to his situation must lead to the annulment of the financial penalty imposed on him.

27. The referring court takes the view that the significant fluctuations in the price of the securities following the publication of the articles concerned in particular demonstrated that the information in question constituted price-sensitive information within the meaning of Article 1(2) of Directive 2003/124 and Article 7(4) of the MAR. However, it considers not clear whether the information about the forthcoming publication of the articles meets the precision criterion, because the content of the articles – that is to say the reference to a market rumour – is potentially not specific enough.

28. Regarding the application of Article 21 of the MAR, the question for the referring court is whether the applicant's activities in the main proceedings were 'for the purpose of journalism' within the meaning of that provision and whether that provision contains an exhaustive set of special rules in that regard. As regards the general exception to the prohibition on the disclosure of inside information for professional purposes, the Court required that the disclosure of inside

information must be strictly necessary for the exercise of that profession and must comply with the principle of proportionality. [9] In the referring court's view, it is therefore necessary to clarify which requirements are laid down in Article 21 of the MAR, if appropriate in conjunction with Article 10(1) of the MAR, in relation to the lawfulness of the conduct of the applicant in the main proceedings.

IV. Questions referred for a preliminary ruling and the procedure before the Court

29. Against this background, the Cour d'appel de Paris (Court of Appeal, Paris) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling under Article 267 TFEU:

'(1) (a) Is point 1 of Article 1 of the MAD in conjunction with Article 1(1) of Directive 2003/124 to be interpreted as meaning that information relating to the forthcoming publication of a press article relaying a market rumour about an issuer of financial instruments can satisfy the requirement of precision laid down in those articles for classification as inside information?

(b) Does the fact that the press article, the forthcoming publication of which constitutes the information at issue, mentions – as a market rumour – the price of a public takeover bid affect the assessment of the precise nature of the information at issue?

(c) Are the reputation of the journalist who authored the article and of the media outlet which published it and the genuinely significant ("*ex post*") effect of that publication on the price of the securities to which the published article relates relevant factors for the purposes of assessing the precise nature of the information at issue?

(2) In the second place, if the first question is answered to the effect that information such as that at issue can satisfy the necessary requirement of precision:

(a) Is Article 21 of the MAR to be interpreted as meaning that the disclosure by a journalist, to one of his usual sources, of information relating to the forthcoming publication of an article authored by him relaying a market rumour is made "for the purpose of journalism"?

(b) Is the answer to that question dependent on, inter alia, whether or not the journalist was informed of the market rumour by that source or whether or not the disclosure of the information on the forthcoming publication of the article was expedient in order to obtain clarifications from that source with regard to the credibility of the rumour?

(3) In the third place, are Articles 10 and 21 of the MAR to be interpreted as meaning that, even where inside information is disclosed by a journalist "for the purpose of journalism" within the meaning of Article 21, the lawful or unlawful nature of the disclosure requires an assessment of whether the disclosure was made "in the normal exercise of … the profession [of journalist]" for the purposes of Article 10?

(4) In the fourth place, is Article 10 of the MAR to be interpreted as meaning that, in order to occur in the normal exercise of the profession of journalist, the disclosure of inside information

[9] Judgment of 22 November 2005, *Grøngaard and Bang* (C-384/02, EU:C:2005:708).

must be strictly necessary for the exercise of that profession and must comply with the principle of proportionality?'

30. The applicant in the main proceedings, the AMF, the French Republic, the Kingdom of Norway, the Kingdom of Sweden, the Kingdom of Spain and the European Commission submitted their observations on the questions referred for a preliminary ruling in the written procedure before the Court. With the exception of the Kingdom of Norway, all parties concerned also participated in the hearing on 22 June 2021.

V. Legal assessment

31. With its questions referred, the Cour d'appel de Paris (Court of Appeal, Paris) seeks to clarify whether the applicant in the main proceedings rightly received a financial penalty for infringing the prohibition on disclosure under Article 622-1 of the RGAMF.[10] That provision essentially transposed Article 3(a) of the MAD into French law.

32. With Questions 1(a) to (c), the referring court would first like to ascertain whether information relating to the forthcoming publication of a press article relaying a market rumour can be considered 'inside information' within the meaning of point 1 of Article 1 of the MAD,[11] and thus in principle fall under the prohibition on disclosure set out in Article 3(a) of the MAD (see section A). Questions 2 to 4 then relate to the exceptions to the prohibition on disclosing inside information, specifically in the particular context of journalistic activities (see section B).

A. The first question referred

33. By its first question, the referring court would essentially like to know whether and under what conditions information relating to the imminent publication of a press article relaying a market rumour is to be regarded as precise within the meaning of point 1 of Article 1 of the MAD and Article 1(1) of Directive 2003/124.

34. The requirement of precision is the first of four conditions set out in point 1 of Article 1 of the MAD which have to be fulfilled for information to be considered inside information. Secondly, this information must not have been made public. Thirdly, it must relate, directly or indirectly, to one or more financial instruments or their issuers. Fourthly, 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 ('price-sensitive').[12]

35. In the view of the referring court, the second, third and fourth requirements are fulfilled. Specifically, it assumes that the information concerning the forthcoming publication of the articles was price-sensitive within the meaning of the fourth condition. It bases this finding, in particular, on the fluctuations in the prices of the securities discussed in the article following publication.

[10] The prohibition on disclosure now follows directly from Article 10(1) in conjunction with Article 14(c) of the MAR.

[11] Corresponds to Article 7(1)(a) of the MAR.

[12] Judgment of 28 June 2012, *Geltl* (C-19/11, EU:C:2012:397, paragraph 25).

36. The precision requirement has two components according to Article 1(1) of Directive 2003/124. First, the information must indicate 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. Secondly, the information 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 financial instruments or related derivative financial instruments.

37. The referring court easily establishes the first of these two conditions, namely the sufficient likelihood, at the time of disclosure, that the articles would go on to be published. It is thus only the second condition that it considers a problem, that is to say the specificity [13] of the information in terms of possible effects on prices. In the view of the Cour d'appel de Paris (Court of Appeal, Paris), the fulfilment of this condition might be problematic, because the information at issue, namely the forthcoming publication of the press article, relates to a rumour. There were doubts as to the specificity of that rumour, as it could be considered too imprecise or uncertain to be able to draw conclusions about possible effects on prices. In the view of the referring court, this could have an effect on the specificity of the information at issue. The referring court considers itself thus not in a position to establish whether the information concerned is inside information, even though in its view the information was not publicly known and was price-sensitive, therefore giving those in possession of it an advantage in relation to the other actors on the market. [14]

38. According to the case-law of the Court, the criterion of specificity, as the second component for determining the precision of inside information, [15] is, however, a stand-alone condition for establishing the existence of inside information, independent of price sensitivity. [16] Consequently, it is necessary to first examine whether the information relating to the forthcoming publication of a press article is specific within the meaning of the second alternative in Article 1(1) of Directive 2003/124, despite the fact that it concerned a market rumour (in this regard, see section 1).

39. Only then, in relation to Question 1(c), will it be necessary to clarify whether the specificity of the information in question can also be demonstrated by the fact that prices increased following publication of the press articles in question (in this regard, see section 2).

1. Determining the specificity of the information in question

40. It results from the aforementioned definition of the specificity criterion in the second alternative in Article 1(1) of Directive 2003/124 that information must have content or value enabling it to be deemed price-sensitive (or not). [17] That suggests that the threshold is not intended to be high. [18] Rather, information should be excluded only if, in light of the price sensitivity assessment, it is deemed to have no relevant informational value from the outset.

41. According to recital 1 of Directive 2003/124, when assessing price sensitivity, a reasonable investor would take account in particular of information showing the economic impact of a piece of information on a company [19] and the reliability of that piece of information. On this basis,

[13] Hereinafter I will use this term to describe the second criterion for precision within the meaning of Article 1(1) of Directive 2003/124 and assume that this is the sole key issue for the Court.

[14] Judgment of 23 December 2009, *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806, paragraph 52).

[15] See point 36 of this Opinion.

[16] Judgment of 11 March 2015, *Lafonta* (C-628/13, EU:C:2015:162, paragraph 28).

[17] See, to that effect, judgment of 11 March 2015, *Lafonta* (C-628/13, EU:C:2015:162, paragraph 31).

[18] See, to that effect, Opinion of Advocate General Wathelet in *Lafonta* (C-628/13, EU:C:2014:2472, point 37).

[19] See the wording 'the anticipated impact … in light of the totality of the related issuer's activity'.

according to the wording of the Court, the specificity criterion should only exclude 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. [20]

42. It is true that information about the forthcoming publication of an article from the author of that article is not vague, as it describes a specific event from a reliable source as certain to occur. However, that information is, in itself, obviously too general to allow a conclusion to be drawn as regards its possible effect on the prices of the financial instruments concerned. Such a conclusion could be reached only in connection with the subject matter of the article concerned – that is to say, in the present case, the market rumour concerning the company takeovers.

43. The applicant in the main proceedings also makes reference to this connection. He concludes that the information about the publication of the articles can only be specific if the subject matter of the articles themselves is specific. He argues that the content of the articles at issue in the present case was not specific, however, because it concerned rumours, which were by nature non-specific. In that regard, he refers, inter alia, to a statement by the former Committee of European Securities Regulators (CESR), according to which rumours represented the exact opposite of verifiable and thus precise information. [21]

44. Both claims are, in my view, incorrect.

(a) The general (non-)specificity of market rumours

45. If market rumours were generally considered to be non-specific, they could never constitute inside information. [22] However, the MAD does not expressly exclude rumours from insider dealing law. On the contrary, as already explicitly mentioned above, recital 1 of Directive 2003/124 states that 'the reliability of the source of information' plays a role when assessing the value of a piece of information. This implies that the directive does not require absolute reliability for classification as inside information, and that reliability is a matter of degree and must be assessed on a case-by-case basis.

46. Additionally, rumours play a significant practical role in market practice. [23] Similarly, point 2(c) of Article 1 of the MAD assumes that rumours are processed by the market, as they can create misleading signals which may manipulatively distort prices. In order to achieve the purposes of the directive, namely ensuring investor confidence by placing them on an equal footing in terms of information, [24] the exploitation of information asymmetry must be prohibited in this field.

47. This is all the more true given that the reliability of information that is not publicly known is seldom certain. In other words, a lot of information about (future) events could be considered or formulated as rumour until it becomes known or is publicly clarified. As uncertain information cannot in any case be completely excluded from the scope of insider dealing law, difficulties will

[20] Judgment of 11 March 2015, *Lafonta* (C-628/13, EU:C:2015:162, paragraph 31).

[21] See CESR, Market Abuse Directive Level 3 – second set of CESR guidance on the common operation of the Directive of the Market, CESR/06-562b, paragraph 1.5. See, to that effect, also CESR's Advice on Level 2 Implementing Measures for the proposed Market Abuse Directive, CESR/02-089d, paragraph 20, first indent.

[22] This is because specificity is, as the second characteristic of precision within the meaning of point 1 of Article 1 of the MAD, a mandatory requirement for classification as inside information.

[23] See, for example, Van Bommel, *Rumors*, The Journal of Finance, Vol. 58 No 4 (2003), p. 1499.

[24] See judgment of 23 December 2009, *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806, paragraphs 47 to 49).

inevitably arise in establishing how specific that information needs to be. There are therefore no grounds for a generalised exclusion of rumours as non-specific due to their inherent uncertainties. In any case, this cannot create any significant legal certainty. [25]

(b) The connection between the subject matter and publication of the article

48. In addition, if the subject matter of an article lacks specificity, this does not in itself lead to the conclusion that the information relating to its publication is non-specific. As the AMF also rightly points out, this would disregard the fact that the value of information contained in an article may change precisely because it has been published. This is particularly true of rumours, the content of which is often indefinite and the reliability of which depends on the number of persons broadcasting them and the status of these persons. A rumour may thus gain credibility as a result of publication and achieve precision by being set down in writing.

49. Taking a different approach would also not be consistent with the protective purpose of insider dealing law. This is because, apart from the fact that a rumour may change as a result of its publication, the information about the publication has added value of its own. An investor who is aware of the date of publication of a rumour has an advantage in terms of information, which he or she may exploit to the detriment of other investors.

50. The connection between publication and the content of an article is thus correctly understood as meaning that the specificity of information such as that at issue in the present case depends on the content of the article in the form it takes upon publication. For it is precisely this – the published content of the article – that is processed by the market and thus forms the basis of an investor's assessment.

51. In terms of content, what matters is whether specific economic implications might arise for an issuer as a result of the published rumour. Therefore, to give an example, an article referring to a 'major' takeover 'in the automotive sector' without naming the undertakings concerned would be considered as too general and thus non-specific. It is true that, in so far as the undertakings concerned can be deduced at least implicitly from the article, mentioning the offer price in the event of a takeover rumour makes the article and therefore the rumour somewhat more specific. However, as public takeovers are regularly accompanied by takeover premiums on the share price, the market can assess the possibility of an effect on prices even in the absence of an offer price. [26]

52. Whether the reliability of a published rumour can also be inferred from its publication depends on whether criteria for sufficiently determining credibility and believability can be established as a result of publication. Such criteria may consist, first, of a reference to the sources of the rumour in the article. Secondly, the reputation of the journalist and the reputation of the media outlet can also play a role in this regard, [27] because their publishing such information might imply that it has been sufficiently verified. For example, it is one of the professional

[25] See, as regards the objective of identifying inside information with legal certainty, recital 3 of Directive 2003/124.

[26] See also, in this regard, judgment of 22 November 2005, *Grøngaard and Bang* (C-384/02, EU:C:2005:708, paragraphs 37 and 38). See, in this regard, also CESR, Market Abuse Directive Level 3 – second set of CESR guidance on the common operation of the Directive of the Market, CESR/06-562b, paragraph 1.8.

[27] See, for an empirical evaluation of the role of these factors, Ahern/Sosyura, *Rumor Has It – Sensationalism in Financial Media*, The Review of Financial Studies, Vol. 28 No 7 (2015), p. 2050 et seq.

obligations of a journalist carefully to examine the veracity of information to be published,[28] and it cannot be assumed that this duty has been disregarded, particularly by a respected journalist. Other criteria may also be relevant, such as the precision of the wording and content.[29] Mentioning a specific offer price can again play a role in this regard. When examining specificity, however, it does not (yet) matter whether the information is ultimately reliable enough to form an investment incentive within the meaning of Article 1(2) of Directive 2003/124; it needs only to allow a robust and reasonable assessment.

2. The ex post *price fluctuation*

53. With Question 1(c), the Cour d'appel de Paris (Court of Appeal, Paris) also seeks to ascertain whether the price fluctuation following publication of the information in question (*ex post*) is a relevant factor when assessing whether information is sufficiently specific.

54. Whether or not information is to be considered inside information must necessarily be assessed from an *ex ante* perspective, as the essential characteristic of inside information is precisely that it is not publicly known. Consequently, when considering whether information is precise within the meaning of the second alternative in Article 1(1) of Directive 2003/124, a subsequent price fluctuation can in principle only be indirectly relevant, specifically if evidence is later provided.

55. In this sense, recital 2 of Directive 2003/124 provides that a subsequent price fluctuation may be used to verify the presumption that the *ex ante* information was price-sensitive (but should not be used to take action against someone who drew reasonable conclusions from *ex ante* information available to him or her). This is because it stands to reason that information was in fact price-sensitive if there was a price fluctuation after publication.[30] The referring court questions whether that reasoning can also be applied to assessing specificity.

56. This question would have to be answered in the affirmative if specificity were a necessary precondition for inside information to be price-sensitive. In that case, it would also be possible to conclude that the published information was specific from a subsequent price fluctuation. There seems to be much in favour of this interpretation: according to the definition in Article 1(2) of Directive 2003/124, information is price-sensitive if a reasonable investor would use it as part of the basis of his or her investment decisions. This assumes, at least on the face of it, that the subject matter of this information was such as to make its assessment as relevant to this investment decision possible in the first place. That expressly means that it was sufficiently specific to draw the conclusion that there might be an effect on the prices of financial instruments.

57. By contrast, the referring court and the applicant in the main proceedings seem to assume that information can be price-sensitive, but nevertheless non-specific. If this were correct, however, such information could not be considered inside information due to the absence of the first precondition under point 1 of Article 1 of the MAD. This approach would consequently lead

[28] See, for example, the Landespressegesetze der deutschen Bundesländer (press laws of the German Federal States) which impose an obligation to be truthful throughout. The duty to produce truthful and accurate reporting is also a prerequisite for journalists to be afforded protection under Article 10 ECHR, see, for instance, ECtHR, judgment of 7 February 2012, *Axel Springer AG v. Germany* (CE:ECHR:2012:0207JUD003995408, § 93).

[29] See also Ahern/Sosyura (footnote 27).

[30] It should be borne in mind in that regard that the reasonable investor is the yardstick by which price sensitivity is measured (see paragraph 41 above); in other words, a price fluctuation may also occur when information is not price-sensitive within the meaning of Article 1(2) of Directive 2003/124, particularly as a result of an unforeseeable market reaction.

to certain price-sensitive information, which gives those in possession of it a particular advantage due to this price sensitivity, being excluded from the prohibition on insider dealing. This advantage could thus be exploited without sanction, which would undermine investor confidence in information symmetry. [31] There does not seem to be any objective reason for this. [32]

58. However, for the purposes of answering Question 1(c), it is not necessary definitively to establish whether non-specific price-sensitive information may exist, because even if that were the case, the fact remains that a reasonable investor generally bases his or her investment decisions on information that has a certain degree of precision. In other words, price-sensitive information will also be specific, at least in the vast majority of cases. In my view, this circumstance is sufficient to extend the idea contained in recital 2 of Directive 2003/124, according to which a subsequent price fluctuation at most *indicates* that the information is price-sensitive, to specificity. Since this subsequent proof or verification in no way excludes the requirement to establish the specific facts of the case and in any event to examine, when imposing penalties, whether the information could have been classified as inside information from the *ex ante* circumstances.

3. Interim conclusion

59. The answer to the first question referred for a preliminary ruling is therefore: Information provided by the author of a newspaper article about the forthcoming publication of that article, which concerns a market rumour relating to a company takeover, fulfils the precision requirement under point 1 of Article 1 of the MAD in conjunction with the second alternative of Article 1(1) of Directive 2003/124, if the subject matter of the article in its published form is sufficiently specific that conclusions can be drawn as regards its possible effect on the prices of one or more financial instruments. This is the case if the publication of the article provides indications which make it possible to assess the reliability of the information contained therein and from which economic implications for the issuer can be inferred. The prominence and reputation of the journalist under whose byline the article appears, the reputation of the media outlet that publishes it and the fact that the article gives a specific price for the takeover bid concerned might also be relevant. Any fluctuation in price following publication of the information concerned can be used within the meaning of recital 2 of Directive 2003/124 to verify the assumption that the *ex ante* information was specific within the meaning of the second alternative of Article 1(1) of that directive.

B. The second to fourth questions referred

60. If the referring court concludes, applying the aforementioned criteria, that the information about the forthcoming publication of the articles at issue is to be regarded as inside information, the question then arises as to whether the disclosure of this information, that is to say its communication to the persons concerned, was also unlawful and worthy of sanction.

61. Article 3(a) of the MAD, the provision in force when the event at issue occurred, does not preclude every disclosure of inside information. Rather, it states that the disclosure thereof is prohibited 'unless such disclosure is made in the normal course of the exercise of [his or her] employment, profession or duties'. That provision is based on the premiss that a categorical

[31] Judgment of 23 December 2009, *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806, paragraph 52).

[32] In the judgment of 28 June 2012, *Geltl* (C-19/11, EU:C:2012:397, paragraph 48), the Court made reference in this regard to the legal certainty for the issuer. However, the latter should not play any role in rumours relating to itself, as an issuer is not obliged to publish rumours relating to itself in any case.

prohibition on disclosure would paralyse other important processes. In practice, it is inconceivable that corporate activity could take place without inside information being processed and forwarded to a limited circle of persons within an undertaking (for example, to the relevant departments) or even externally (to lawyers and auditors, for example).

62. The Court has, however, clarified that the exception to the prohibition on disclosure must be interpreted strictly, and applies only if disclosure is strictly necessary for the exercise of a profession and complies with the principle of proportionality. [33]

63. A provision with almost identical wording to Article 3(a) of the MAD can today be found in Article 10(1) of the MAR (in conjunction with Article 14(c) of the MAR). In addition, the legislation currently in force provides in Article 21 of the MAR that the rules governing the freedom of the press and freedom of expression in other media and the rules or codes governing the journalist profession must be taken into account when applying Article 10 of the MAR for the purpose of journalism.

64. In its second to fourth questions referred, the Cour d'appel de Paris (Court of Appeal, Paris) asks how the communication regarding the forthcoming publication of the articles should be assessed in light of the aforementioned provisions; in other words, whether the requirements for an exception from the prohibition on disclosure are fulfilled under these rules.

65. The legal regime provided for by the MAR for handling inside information in a journalistic context must therefore be clarified. Thus, it must ultimately be determined how the freedom of the press and freedom of expression in the media can be appropriately balanced with protecting market integrity, which is particularly emphasised by the Court in its tendency to interpret strictly the prohibition on disclosure in the course of professional activity. It is therefore appropriate to answer the second to fourth questions together (see section 2).

66. However, it is first necessary to consider the admissibility of the questions referred for a preliminary ruling, since – as the referring court itself established – the MAR had not yet entered into force when the events at issue in the main proceedings occurred, and the provisions of the MAD applied (see section 1 below).

1. The applicability of the MAR in the main proceedings (admissibility of the second to fourth questions referred)

67. The referring court takes the view that Article 21 of the MAR is a more favourable provision for journalists than Article 3(a) of the MAD, which was actually in force at the time. It also considers that, in the present context of imposing a penalty, Article 21 of the MAR was applicable to actions completed before its entry into force under the *lex mitior* principle. [34] Consequently, the questions concerning Article 21 of the MAR were relevant to the decision in the main proceedings.

[33] Judgment of 22 November 2005, *Grøngaard and Bang* (C-384/02, EU:C:2005:708, paragraph 34).

[34] See the third sentence of Article 49(1) of the Charter. The infringement of the prohibition on disclosure is, according to the referring court, a criminal offence under French law. The Court has already held that administrative sanctions under market abuse law can also be criminal in nature and therefore justify, inter alia, the application of Article 48 of the Charter, see judgment of 2 February 2021, *Consob* (C-481/19, EU:C:2021:84, paragraphs 42 and 43).

68. It cannot be easily established whether Article 21 of the MAR actually contains a more lenient provision, given that fundamental rights, in particular Article 11 of the Charter and Article 10 ECHR, already had to be taken into account when interpreting and applying Article 3(a) of the MAD. [35] Rather, this appraisal ultimately depends on the specific interpretation of Article 21 of the MAR. However, since this is precisely the subject of the questions referred for a preliminary ruling, it is in accordance with the requirements of the proper administration of justice to examine them on their merits. [36]

69. This also applies in relation to Article 10(1) of the MAR, the interpretation of which is expressly requested in the third and fourth questions referred. It is true that Article 3(a) of the MAD contains a comparable provision in this respect – at least in terms of wording – meaning that application of the *lex mitior* principle can be ruled out, at least on the face of it. However, Article 21 of the MAR makes explicit reference to Article 10, with the provisions forming part of a single set of rules. It is therefore necessary to examine the mutual relationship between the two provisions in order to ensure their proper interpretation.

70. It follows that examination of the merits of the second to fourth questions referred for a preliminary ruling is admissible.

2. Exceptions to the prohibition on disclosing inside information for journalistic activities

71. The second to fourth questions referred concern, first, the applicability of Article 21 of the MAR in the main proceedings. The referring court asks whether disclosure of information relating to the forthcoming publication of an article can be considered to be disclosure of inside information 'for the purpose of journalism'. Secondly, it questions the relationship between Article 21 and Article 10(1) of the MAR.

72. The reason for this question is that the applicant in the main proceedings is of the opinion that Article 21 of the MAR represented an exhaustive set of special rules for journalistic activity, and thus that the general requirements concerning the lawfulness of disclosing inside information in a professional context under Article 10 of the MAR did not apply to him. There was therefore no need to examine the requirement of necessity and proportionality of the disclosure of inside information, as established by the Court, [37] in relation to journalistic activities.

(a) The concept of disclosing inside information 'for the purpose of journalism'

(1) Interpretation of the concept

73. Against that background, the AMF and the French Government in particular have argued in favour of a particularly strict interpretation of the concept of 'for the purpose of journalism' in the present proceedings. In their view, this should only cover the publication of the information itself and directly related acts. Providing information about the forthcoming publication of an article would therefore not be covered by this concept, as it is only revealed to a small number of people and is thus neither published nor directly serves the publication of the article concerned.

[35] See also recital 44 of the MAD.

[36] See, to that effect, judgments of 26 February 2002, *Council* v *Boehringer* (C-23/00 P, EU:C:2002:118, paragraph 52), and of 5 November 2019, *ECB* v *Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraph 46).

[37] See, in this regard, point 62 of this Opinion.

74. However, in light of the spirit and purpose of Article 21 of the MAR, such an interpretation of the concept of 'for the purpose of journalism' is difficult to justify. If taken to its logical conclusion, it would exclude from the outset a substantial proportion of journalistic activity that takes place prior to actual publication, such as research activities, from the protection relating to the freedom of the press and freedom of expression provided under insider dealing law. However, the scope of application of Article 21 of the MAR must correspond to the protective scope of the freedom of the press and freedom of expression in the media. [38] That is consistent with the purpose of that regulation, as recital 77 of the MAR demonstrates. According to that recital, any reference to these fundamental rights in the body of the Regulation is intended to ensure that account is taken of those freedoms as recognised in the Charter and in the ECHR.

75. This is especially true in light of the fact that Article 21 of the MAR would only have relatively limited scope otherwise, because the publication of information in a widely circulated press medium is in any case permitted independently of the application of Article 21 of the MAR. This is because publication of this kind means that the requirement that the information has not been made public no longer applies, meaning that the information can no longer be considered to be inside information. [39]

76. The European Court of Human Rights ('the ECtHR') stresses, in relation to Article 10 ECHR, [40] the role played by journalism in imparting information and ideas on all matters of public interest. [41] However, it cannot be concluded from this that, objectively, only the actual publication of information and closely related activities are protected by the freedom of the press. On the contrary, the ECtHR expressly includes activities like research and investigations, which are merely preparation for subsequent dissemination or publication, within the scope of protection. These activities are even adjudged to require special protection. [42] Against this background, the verification of facts from a source [43] before their publication, as referred to in Question 2(b), is unquestionably covered by the protective scope of the freedom of the press and freedom of expression in the media and thus by the scope of Article 21 of the MAR. This also applies if the applicant in the main proceedings were to have disclosed, in the context of such a verification, that he was about to publish an article relating to those facts.

77. According to the AMF, however, the conversations between the applicant in the main proceedings and the subsequent purchasers did not involve verifying information, but were limited to indicating that the publication of an article about the rumour concerned was imminent.

[38] By contrast, if, in the event of a restrictive interpretation, those fundamental rights were in any case taken into consideration when examining the normal exercise of the profession of journalist within the meaning of Article 10(1) of the MAR, Article 21 of the MAR and the restrictive interpretation thereof would in turn have no practical relevance.

[39] See, to that effect, judgment of 10 May 2007, *Georgakis* (C-391/04, EU:C:2007:272, paragraph 39), according to which an insider cannot commit insider dealing in the absence of information asymmetry. The situation may be different if the information is published in a press report with very limited readership.

[40] The guarantees provided for in Article 10 ECHR in relation to the freedom of expression and the freedom of the press correspond, for the purposes of Article 52(3) of the Charter, to those in Article 11 of the Charter, see the explanatory notes to the Charter (OJ 2007 C 303, p. 21 and 33), and judgments of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325, paragraph 147), and of 14 February 2019, *Buivids* (C-345/17, EU:C:2019:122, paragraph 65). According to the explanatory notes to Article 52(3) of the Charter (OJ 2007 C 303, p. 33), when determining the meaning and scope of the corresponding rights in the ECHR, it is necessary to consider not only the wording but also the case-law of the ECtHR, see judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* (C-205/15, EU:C:2016:499, paragraph 41).

[41] See ECtHR, judgments of 7 February 2012, *Axel Springer v. Germany* (CE:ECHR:2012:0207JUD003995408, § 79); of 8 November 2016, *Magyar Helsinki Bizottság v. Hungary* (CE:ECHR:2016:1108JUD001803011, § 168); see also judgment of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia* (C-73/07, EU:C:2008:727, paragraph 61).

[42] ECtHR, judgment of 25 April 2006, *Dammann v. Switzerland* (CE:ECHR:2006:0425JUD007755101, § 52).

[43] On protecting sources, see only judgments of 27 March 1996, *Goodwin v. United Kingdom* (CE:ECHR:1996:0327JUD00174889), and of 5 October 2017, *Becker v. Norway* (CE:ECHR:2017:1005JUD002127212).

78. However, an action of this kind may also be covered by the protective scope of the freedom of the press. In this respect, the ECtHR does not require that the action in question directly benefits a particular publication. Therefore, when a journalist who regularly reports on criminal cases requested confidential information from an employee at the public prosecution service, in order to generally keep up to date with investigations without working on a specific publication or research, this was readily considered to be covered by the protective scope of the freedom of the press. [44]

79. Therefore, to be covered by the protective scope of the freedom of the press and thus the scope of application of Article 21 of the MAR, all that matters is that an action or activity takes place in a journalistic, and not private, capacity. [45] This requires that that action is connected both objectively and in terms of intention to the journalistic activity of the person concerned. That journalistic activity must, in general, aim to disclose information to the public. However, the action itself need not consist of informing the public.

80. Consequently, providing information about the forthcoming publication of an article would be considered a disclosure 'for the purpose of journalism' within the meaning of Article 21 of the MAR, if the referring court were to conclude that the research activity of a financial journalist in practice involves contact with financial analysts, in the context of which information about forthcoming articles and their publication is also exchanged.

81. However, a different assessment would be required if the contact in question is not motivated by obtaining information for (future) articles, but has the objective, quite independently of this, of creating or exploiting an information advantage. The referring court must make the factual findings necessary to carry out this assessment. [46]

82. Another question, separate from that relating to the applicability of Article 21 of the MAR, is whether a journalistic practice of this kind results in a lawful disclosure of inside information. Since, contrary to what is claimed by the applicant in the main proceedings, the fact that the conditions for applying Article 21 of the MAR are fulfilled does not mean that an exception from the prohibition on disclosure applies. That aspect forms the subject matter of the third question referred.

83. In this respect, it is clear from the wording of Article 21 of the MAR that 'for the purposes of Article 10 … such disclosure or dissemination of information shall be assessed taking into account the rules governing the freedom of the press and freedom of expression in other media and the rules or codes governing the journalist profession'. Thus, the provision apparently assumes that, where inside information is disclosed for the purpose of journalism, Article 10(1) of the MAR is the relevant provision for assessing the lawfulness of that disclosure. The fundamental rights concerned, like the rules of professional conduct, can only be taken into account in the context of this provision. Accordingly, Article 21 of the MAR does not provide for any independent legal consequence and cannot, for that reason alone, constitute an independent exception to the prohibition on disclosure.

[44] ECtHR, judgment of 25 April 2006, *Dammann v. Switzerland* (CE:ECHR:2006:0425JUD007755101, § 28).

[45] As 'consequence of journalistic activity', see ECtHR, judgments of 20 October 2015, *Pentikäinen v. Finland* (CE:ECHR:2015:1020JUD001188210, § 35), and of 5 January 2016, *Erdtmann v. Germany* (CE:ECHR:2016:0105DEC005632810, § 16).

[46] See, more specifically on this point, point 85 et seq. of this Opinion.

84. As a consequence, the lawfulness or unlawfulness of a disclosure for the purpose of journalism must, in a second step, be assessed on the basis of whether it was carried out during the normal exercise of the journalistic profession within the meaning of Article 10(1) of the MAR.[47] This in turn justifies equating the scope of application of Article 21 of the MAR with the protective scope of the freedom of the press and freedom of expression in the media and always assuming that a disclosure of inside information is 'for the purpose of journalism' where it takes place in a journalistic capacity.[48]

(2) Proof of journalistic purposes in a particular case

85. As is already clear from the considerations above,[49] examining and proving journalistic purposes can pose difficulties in terms of fact.

86. According to the general rules, the burden of proof for an infringement of the prohibition on disclosure lies with the competent State authorities. They must therefore also demonstrate that the disclosure was not made for the purpose of journalism. To that end, they must establish the objective circumstances of the offence, on the basis of which the court dealing with the matter can determine whether there is any connection with the journalistic activity of the person concerned or whether there are at least specific indications of such a connection.

87. In that regard, it is obvious that a court will find it easier to conclude that an action took place for the purpose of journalism if the journalist concerned provides explanations as to how that action forms part of his or her journalistic activity. However, that must not lead to the burden of proof for the existence of journalistic purposes falling on the person concerned. On the contrary, every person concerned has the right to remain silent, including during proceedings relating to an administrative sanction,[50] the exercise of which should not be to his or her detriment. The presumption of innocence (Article 4(1) of the Charter) also applies to the prosecution of insider dealing offences.[51] Consequently, a journalist cannot be required to declare anything about the reasons for disclosing the information in question. Lastly, this complies with the requirement to protect journalistic sources.

88. In cases of doubt, therefore, disclosure 'for the purpose of journalism' within the meaning of Article 21 of the MAR can only be excluded for professional journalists either if the objective circumstances of the act have no intrinsic link to their professional activity or, alternatively, if it can be established – using the methods provided for under national law – that the disclosure was made subjectively for non-professional or for personal reasons.

47 See, in this regard, point 89 et seq. of this Opinion.

48 See, in this regard, point 79 of this Opinion.

49 See, in particular, point 80 of this Opinion.

50 See judgment of 2 February 2021, *Consob* (C-481/19, EU:C:2021:84, paragraph 42).

51 See recital 11 of Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) (OJ 2014 L 173, p. 179).

(b) Examining the 'normal exercise [of the] profession' of journalist within the meaning of Article 21 of the MAR in conjunction with Article 10(1) thereof

89. Pursuant to Article 10(1) of the MAR, disclosure of inside information is not unlawful if the disclosure is made 'in the normal exercise of … a profession'. The question arises here as to whether the scope of Article 21 of the MAR only covers disclosure that is strictly necessary for the exercise of the journalistic profession within the meaning of the *Grøngaard and Bang* judgment and that complies with the principle of proportionality. [52]

90. The *Grøngaard and Bang* case-law, which was originally issued in relation to Article 3(a) of Directive 89/592, [53] can easily be applied to Article 10(1) of the MAR, because the provisions are drafted in broadly identical terms and the considerations which led the Court to interpret the 'normal exercise of the profession' criterion in that way remain relevant. In particular, disclosure of inside information continues to constitute a serious risk to the functioning of the capital markets and investor confidence in those markets, [54] which means that exceptions to the prohibition on disclosure must remain limited. The importance which the legislature attaches to protecting market integrity is even reinforced by the fact that the system of rules takes on the form of a regulation under the MAR. [55]

91. However, the referring court questions whether this case-law also applies within the framework of Article 21 of the MAR (in conjunction with Article 10(1) of the MAR). Since the primary function of the press is precisely that of imparting ideas and information on subjects of public interest, [56] the exercise of the journalistic profession is particularly limited by a strict application of the prohibition on disclosure.

92. However, contrary to the possibility considered by the referring court in the fourth question referred, it cannot be concluded from this that the strict conditions set out by the Court for an exception to the prohibition on disclosure do not generally apply to journalistic matters. Rather, Article 21 of the MAR shows only that this case-law must be applied in such a way that it does not infringe the freedom of the press and freedom of expression in the media.

93. In the field of financial journalism, a distinction must be drawn between journalistic activity carried out exclusively within the sphere of interest of the investing public and that which also touches on topics of general political or social interest. This is because, according to the case-law of the ECtHR, there is little scope for restrictions on the freedom of the press when it comes to social or political discussion, [57] whereas reports of limited public interest cannot carry the same weight. [58]

52 See, in this regard, point 62 of this Opinion.

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

54 This is the reasoning in the judgment of 22 November 2005, *Grøngaard and Bang* (C-384/02, EU:C:2005:708, paragraph 33). See, in that regard, recitals 2 and 5 of Directive 89/592, on the one hand, and recitals 1, 2 and 23 of the MAR, on the other hand.

55 See also, to that effect, recital 4 of the MAR. This is also borne out by the fact that Directive 2014/57, in particular Article 4 thereof, requires that criminal sanctions be imposed under Member State law for certain cases of insider dealing.

56 See, in this regard, point 76 and footnote 41 of this Opinion.

57 ECtHR, judgments of 7 June 2007, *Dupuis and Others v. France* (CE:ECHR:2007:0607JUD000191402, § 40); of 10 December 2007, *Stoll v. Switzerland* (CE:ECHR:2007:1210JUD006969801, § 117 et seq.); and of 29 March 2016, *Bédat v. Switzerland* (CE:ECHR:2016:0329JUD005692508, § 49).

58 See, in this regard, ECtHR, judgment of 23 June 2016, *Brambilla v. Italy* (CE:ECHR:2016:0623JUD002256709, § 59).

94. In line with those criteria, there is a greater need for information and thus an increased public interest in disclosure of corporate misconduct, which often goes hand in hand with a public discussion about economic regulation or possible failures on the part of the State authorities.[59] This is especially true because companies are more likely not to publish information that reflects badly on them, even if this might infringe the ad hoc disclosure obligation under Article 17(1) of the MAR. The press thus plays a role as 'public watchdog'.[60] In order to be able to perform that function effectively, however, it must be given a considerable degree of discretion to process and if necessary disclose inside information.

95. By contrast, restrictions on disclosing inside information may be more justifiable in the case of statements exclusively concerning a group of investors. It is true that such statements serve the market's interest in information, which can be considered an independent public interest in light of the objectives of ensuring information efficiency and transparency in capital market law.[61] However, that interest is already covered by the publicity mechanisms under capital market law.[62] In the case of company takeovers, as in the present case, publication of the takeover offer by the bidder is also provided for under Directive 2004/25, in addition to the ad hoc publication already mentioned.[63]

96. For the purposes of applying Article 21 in conjunction with Article 10(1) of the MAR and examining the criteria of strict necessity of disclosure, this means that: according to the case-law of the ECtHR, even when there is a lot of public interest in reporting, it must in any case be ascertained whether there were obvious alternative ways of achieving journalistic objectives.[64]

97. Moreover, in a case such as the present one, a stricter standard of review can be applied to examine whether the information had already been sufficiently verified, which is, in principle, a matter for the journalist to assess. In any case, it can be examined whether verification could have taken place without mentioning the forthcoming publication of the article. If the referring court were to find that, in notifying his contacts about the publication of the article, the applicant was not seeking verification,[65] it would have to be examined whether the disclosure for the performance of journalistic duties was strictly essential in another way, in particular whether this was the only way to ensure the flow of information for future articles.

[59] The article '*Is Enron Overpriced*?' by Bethany McLean (Fortune of 5 March 2001), which helped to uncover one of the biggest corporate scandals in American history, is a prominent example. Another example is Renate Daum's research, which uncovered the ComRoad accounting scandal in Germany. ('*Außer Kontrolle. Wie ComRoad & Co. durch das Finanzsystem in Deutschland schlüpfen*', (Out of Control: how ComRoad & Co outsmarted Germany's financial system, 2003). Similarly, journalists at the Financial Times expressed doubts about the integrity of Wirecard AG's financial reporting as early as 2015 (Dan McCrum, '*The House of Wirecard*', Financial Times of 27 April 2015).

[60] See, to that effect, most recently, ECtHR, judgment of 20 May 2021, *Amaghlobeli and Others v. Georgia* (CE:ECHR:2021:0520JUD004119211, § 36).

[61] See, in this regard, point 1 of this Opinion.

[62] However, the press can also assume a more important role in this sector if these mechanisms threaten to fail in relation to certain information. See, in that regard point 94 of this Opinion.

[63] Article 6 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ 2004 L 142, p. 12).

[64] For example, the ECtHR examines whether the information sought could also have been obtained by legal means, see, for example, judgments of 20 May 2021, *Amaghlobeli and Others v. Georgia* (CE:ECHR:2021:0520JUD004119211, § 39), and of 25 April 2006, *Dammann v. Switzerland* (CE:ECHR:2006:0425JUD007755101, §§ 53 and 56). See also judgment of 20 October 2015, *Pentikäinen v. Finland* (CE:ECHR:2015:1020JUD001188210, § 101), in which the ECtHR examined whether the applicant could have continued his reporting just as effectively if he had complied with the police order.

[65] See, on the various factual hypotheses, points 76 and 80 of this Opinion.

98. Against this background, it does not seem inconceivable that the referring court will conclude that providing information about the forthcoming publication was not strictly necessary in the present case.

99. Otherwise, when balancing the freedom of the press with market integrity as part of the proportionality test in the proper sense, on the one hand it would have to consider that insider dealing had taken place due to the disclosure of inside information. [66]

100. This is because, first of all, this causes real financial damage. Investors who are unaware of the information sell their securities under value or purchase them for more than their worth, depending on the nature of the information. This is detrimental to particularly attentive investors especially, because they react extremely quickly to price fluctuations caused by inside information that cannot be explained any other way. In the medium term, there is also a risk that investors will lose confidence in the market as a whole and will leave. And it is namely those (attentive) investors, who ensure that prices are formed quickly and accurately on the market, who move away. In addition, and as a consequence, there is a risk that the public in general will lose confidence in the functioning of the markets [67] – confidence that, according to the legislature, will not easily be rebuilt. [68]

101. On the other hand, when balancing the conflicting interests, the referring court must consider that the press must not generally be deterred from researching or publishing certain themes by the regulation in question or by the application thereof – specifically by the prohibition on disclosure. [69] The severity of the penalty incurred is particularly significant in that regard. [70]

102. However, whether the member of the press concerned is eligible for protection in the individual case depends on whether he or she has acted in line with his or her duties and responsibilities. [71] The question of whether or not he or she has acted lawfully is particularly relevant in this regard, although not decisive. [72] In a case such as the present one, it might thus be relevant to what extent a journalist – alongside his or her own potentially criminal actions – participated (knowingly) in a third party's criminal offence, such as insider dealing by a third party.

66 See, with regard to an infringement committed against third parties or in relation to a protected legal interest, ECtHR, judgment of 1 July 2014, *A.B. v. Switzerland* (CE:ECHR:2014:0701JUD005692508, § 55); with reference to judgment of 7 June 2007, *Dupuis and Others v. France* (CE:ECHR:2007:0607JUD000191402). See also judgment of 10 December 2007, *Stoll v. Switzerland* (CE:ECHR:2007:1210JUD006969801, § 130).

67 See, in this regard, recital 2 and Article 13(2)(a) of the MAR. See, also, point 1 of this Opinion.

68 See, for example, the Commission's proposal for the MAD of 19 November 2002 COM(2002) 625 final (OJ 2003 C 71 E, p. 62).

69 ECtHR, judgments of 25 April 2006, *Dammann v. Switzerland* (CE:ECHR:2006:0425JUD007755101, § 57), and of 10 December 2007, *Stoll v. Switzerland* (CE:ECHR:2007:1210JUD006969801, § 154).

70 For example, the ECtHR considered a fine of 800 Swiss francs (CHF) to be relatively small, see ECtHR, judgment of 10 December 2007, *Stoll v. Switzerland* (CE:ECHR:2007:1210JUD006969801, § 157).

71 See, on the concept of 'responsible journalism', ECtHR, judgments of 25 April 2006, *Dammann v. Switzerland* (CE:ECHR:2006:0425JUD007755101, § 55); of 7 June 2007, *Dupuis and Others v. France* (CE:ECHR:2007:0607JUD000191402, § 43); and of 20 October 2015, *Pentikäinen v. Finland* (CE:ECHR:2015:1020JUD001188210, § 90).

72 ECtHR, judgments of 20 October 2015, *Pentikäinen v. Finland* (CE:ECHR:2015:1020JUD001188210, § 90), and of 5 January 2016, *Erdtmann v. Germany* (CE:ECHR:2016:0105DEC005632810, § 20).

103. As regards the potentially deterrent effect [73] of insider dealing law on financial journalism, the applicant in the main proceedings emphasises that he did not infringe any professional rules which prohibited the disclosure of the forthcoming publication of an article under the given circumstances. [74] In that regard, however, the referring court must first ascertain whether this makes the applicant's conduct compliant with journalistic practices. Secondly, in the present context at least, compliance with journalistic codes of conduct does not necessarily allow the conclusion that the disclosure of information was lawful. This is because the professional standards applicable in the Member States only regulate the conflict between the freedom of the press and insider dealing law to some degree, [75] meaning that the balance between the freedom of the press and the market integrity sought by Article 21 of the MAR could not be achieved by merely complying with the professional codes of conduct governing journalistic activity. Thus, the fundamental guarantees of freedom of the press and freedom of expression remain the decisive factor, the content of which cannot, in any event, be freely determined merely by the legislature or by professional associations.

104. Accordingly, if conduct which a journalist could regard as lawful solely on the basis of the professional codes of conduct is nevertheless deemed to constitute an infringement of the prohibition on disclosure, this circumstance can be taken into account and no financial penalty imposed. [76] This contributes to guaranteeing a legally certain framework for journalistic activity in fields relating to the capital market. [77]

(c) Interim conclusion

105. In light of all of the above, the answer to the second to fourth questions must be that a disclosure is 'for the purpose of journalism' within the meaning of Article 21 of the MAR if that disclosure is made in a journalistic capacity. However, in that case, whether or not the disclosure is lawful also depends on whether it takes place in the normal exercise of a journalist's employment or profession within the meaning of Article 10(1) of the MAR. This assumes that the disclosure is strictly necessary and complies with the principle of proportionality. When assessing the strict necessity and proportionality of a disclosure for the purpose of journalistic activity, the requirements of freedom of the press and freedom of expression in the media must be weighed against the risks posed by disclosure to the integrity of the capital markets. When examining proportionality, it is necessary on the one hand to consider, in particular, the public interest in the subject matter of the journalism concerned, whether or not the journalist is eligible for protection and the severity of the penalty. On the other hand, it depends, inter alia, on whether the risk of insider dealing was manifest and has materialised in the specific case.

[73] In that regard, see, for example, ECtHR, judgments of 22 November 2007, *Voskuil v. the Netherlands* (CE:ECHR:2007:1122JUD006475201, § 65); of 14 September 2010, *Sanoma Uitgevers B.V. v. the Netherlands* (CE:ECHR:2010:0914JUD003822403, § 59); and of 25 October 2011, *Altuğ Taner Akçam v. Turkey* (CE:ECHR:2011:1025JUD002752007, § 75).

[74] On the significance of professional ethics in this context, see ECtHR, judgment of 10 December 2007, *Stoll v. Switzerland* (CE:ECHR:2007:1210JUD006969801, § 145 et seq.).

[75] For example, Clause 13 of the IPSO Editors' Code of Practice, relating to financial journalism, only covers the situation where a journalist's own financial interests are affected by inside information. The relevant codes of conduct of the deutscher Presserat (German Press Council) on economic and financial reporting only provide, in Point II(1)(a), that inside information must 'generally' not be passed on.

[76] The MAR does not require that penalties or administrative sanctions be imposed, but also provides the option of, for example, a cease and desist order for the future, see Article 30(2)(a) of the MAR.

[77] See ECtHR, judgment of 24 February 2015, *Haldimann and Others v. Switzerland* (CE:ECHR:2015:0224JUD002183009, § 61), according to which it must be considered whether journalists acted in good faith in accordance with the ethics of journalism.

VI. Conclusion

106. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Cour d'appel de Paris (Court of Appeal, Paris, France) as follows:

(1) Point 1 of Article 1 of 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) in conjunction with the second alternative in Article 1(1) of 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 must be interpreted as meaning that information from the author of a press article about the forthcoming publication of that article, the subject matter of which is a market rumour about a company takeover, meets the specificity requirement set out in point 1 of Article 1 of the MAD in conjunction with the second alternative in Article 1(1) of Directive 2003/124 if the subject matter of the article in its published form is sufficiently specific to draw the conclusion that there might be an effect on the prices of one or more financial instruments. This is the case if the publication of the article provides indications which make it possible to assess the reliability of the information contained therein and from which economic implications for the issuer can be inferred. The prominence and reputation of the journalist under whose byline the article appears, the reputation of the media outlet that publishes it and the fact that the article gives a specific price for the takeover bid concerned might also be relevant.

Any price fluctuation following publication of the information in question may be used, within the meaning of recital 2 of Directive 2003/124 to verify the assumption that the *ex ante* information was specific within the meaning of the second alternative of Article 1(1) of that directive.

(2) Article 21 in conjunction with Article 10(1) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC must be interpreted as meaning that a disclosure of inside information is 'for the purpose of journalism' when it is made in a journalistic capacity. However, in this case, whether or not the disclosure is lawful also depends on whether it takes place in the normal exercise of a journalist's employment or profession within the meaning of Article 10(1) of the MAR. This assumes that the disclosure is strictly necessary and complies with the principle of proportionality. When assessing the strict necessity and proportionality of a disclosure for the purpose of journalistic activity, the requirements of freedom of the press and freedom of expression in the media must be weighed against the risks posed by disclosure to the integrity of the capital markets. When examining proportionality, it is necessary on the one hand to consider, in particular, the public interest in the subject matter of the journalism concerned, whether or not the journalist is eligible for protection and the severity of the penalty. On the other hand, it is necessary to determine whether the risk of insider dealing was manifest and has materialised in the specific case.