



MAR – handleforbud, endringsforbud, brukskrav og misbruksreservasjon

PRIVATRETTSSYMPOSIET 2020

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Oversikt over mine tema

- ▶ 1. De to forbudene
- ▶ 2. Bruks- og misbruksvilkårene
- ▶ 3. Litt om tolking av MAR (og andre forordninger)

1. De to forbudene – direktivteksten

- ▶ *Article 8*
- ▶ **Insider dealing**
- ▶ 1. For the purposes of this Regulation, insider dealing arises where a **person possesses inside information and uses that information by acquiring or disposing of**, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates. **The use of inside information by cancelling or amending an order** concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information, shall **also** be considered to be insider dealing.

Handel og ikke-handel med bruk av innsideinformasjon

- ▶ Forbud mot misbruk av innsideinformasjon ved handel
- ▶ Forbud mot misbruk av innsideinformasjon ved å endre eller trekke ordre
 - ▶ Et forbud mot **å ikke handle** - i visse **fremskredne** handelssituasjoner
 - ▶ Nyhet i MAR
- ▶ Parallelt to-leddet rådgivningsforbud i artikkel 8.2
 - ▶ Tidligere norsk forbud i vphl § 3-7 om ethvert «råd om handel» blir her begrenset for den som gir om å ikke handle, til råd gitt til den som allerede har lagt inn en ordre.

2. Bruk og misbruk

- ▶ Bruksvilkåret gjentatt i MAR 8.1 – kodifiserte ECJs dom i Spector Photo-avgjørelsen
- ▶ «uses that information» - «use of inside information by cancelling..»
- ▶ Fortalens 23. The essential characteristic of insider dealing consists in an unfair advantage being obtained from inside information to the detriment of third parties who are unaware of such information and, consequently, the undermining of the integrity of financial markets and investor confidence. Consequently, the prohibition against insider dealing should apply where a person who is in possession of inside information takes unfair advantage of the benefit gained from that information by entering into market transactions in accordance with that information by acquiring or disposing of, by attempting to acquire or dispose of, by cancelling or amending, or by attempting to cancel or amend, an order to acquire or dispose of, for his own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates.

Presumsjon, forsvarsrett og presisering

- ▶ 24. Where a legal or natural person in possession of inside information acquires or disposes of, or attempts to acquire or dispose of, for his own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates, it should be implied that that person has used that information. That presumption is without prejudice to the rights of the defence. The question whether a person has infringed the prohibition on insider dealing or has attempted to commit insider dealing should be analysed in the light of the purpose of this Regulation, which is to protect the integrity of the financial market and to enhance investor confidence, which is based, in turn, on the assurance that investors will be placed on an equal footing and protected from the misuse of inside information
- ▶ 25. **Orders placed before a person possesses inside information should not be deemed to be insider dealing.** However, where a person comes into possession of inside information, there should be a presumption that any subsequent change relating that information to orders placed before possession of such information, including the cancellation or amendment of an order, or an attempt to cancel or amend an order, constitutes insider dealing. That presumption could, however, be rebutted if the person establishes that he or she did not use the inside information when carrying out the transaction

Tolkingen av brukskriteriet

- ▶ Tolkingen av hva som er «bruk» og «misbruk» er overlatt til domstolen
- ▶ Fortalen er supplerende rettskilde og ikke ment å tilsidesette teksten i artikkel 8
- ▶ Forhistorien viser at man forutsatte videreføring av rettstilstanden under MAD, men med en presisering i fortalens 25 første setning (rød tekst)
- ▶ Prinsipielt vilkår om «bruk» - presumsjonen som kan motbevises
- ▶ Finansdepartementets posisjon i Prop L 96: Gjelder ikke den handlendes subjektive motiv for handelen, skal kun baseres på objektive forhold
- ▶ Mangler støtte i Spector Photo-avgjørelsen (C-45/08)

ECJs talking otherwise:

- ▶ 1. On a proper interpretation of Article 2(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), the fact that a person as referred to in the second subparagraph of that provision, in possession of inside information, acquires or disposes of, or tries to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, the financial instruments to which that information relates implies that that person has 'used that information' within the meaning of that provision, but without prejudice to the rights of the defence and, in particular, to the right to be able to rebut that presumption. The question whether that person has infringed the prohibition on insider dealing must be analysed in the light of the purpose of that directive, which is to protect the integrity of the financial markets and to enhance investor confidence, which is based, in particular, on the assurance that investors will be placed on an equal footing and protected from the misuse of inside information.

Domstolens argumentasjon

- ▶ 31: Article 2(1) of Directive 2003/6 does not stipulate that prohibited transactions must be carried out 'with full knowledge of the facts' but merely prohibits primary insiders from using inside information when entering into market transactions. That article defines the constituent elements of such prohibited transactions by referring expressly to two such elements, namely, the persons likely to fall within its scope and the material actions which constitute that transaction.
- ▶ 32 By contrast, that provision does not expressly set out the subjective conditions in relation to the intention behind those material actions. Article 2(1) of Directive 2003/6 does not state whether the primary insider **must have been driven by a speculative intention**, must have had a fraudulent intention or must have acted either deliberately or negligently. That article does not expressly state whether it is necessary to establish that the inside information was **decisive in the decision** to enter into the market transaction at issue, or whether the primary insider had to be aware that the information in his possession was inside information.
- ▶ 33. In that regard, it should be noted that, in drafting Directive 2003/6, the Community legislature sought to fill in some of the gaps identified in Directive 89/592. Article 2(1) of Directive 89/592 sought to prohibit 'any person who ... possesses inside information' from entering into a market transaction in relation to the transferable securities concerned 'by taking advantage of that information with full knowledge of the facts'. The transposition of that provision into national law gave rise to variances in the interpretation by the Member States of the expression 'with full knowledge of the facts', which in certain national legal systems was assimilated to a requirement of a mental element.

- ▶ 34. In that regard, the Proposal for a Directive of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) (2001/0118 (COD)), submitted by the Commission of the European Communities on 30 May 2001, was based on the wording of Article 2(1) of Directive 89/592 while removing the expression 'with full knowledge of the facts', on the ground that 'by nature [primary insiders] may have access to inside information on a daily basis and are aware of the confidential nature of the information that they receive'. In addition, the subsequent preparatory work referred to in point 58 of the Advocate General's Opinion shows that the Parliament, in accordance with the objective approach of the notion of insider dealing favoured by the Commission, sought to replace the verb 'to take advantage of' with the verb 'to use' **in order to remove any element of purpose or intention** from the definition of insider dealing.
- ▶ 35. The above shows that Article 2(1) of Directive 2003/6 defines insider dealing objectively without the intention behind such dealing being referred to **explicitly** in its definition. This was done with a view to achieving uniform harmonisation of the law of the Member States.
- ▶ 36: The fact that Article 2(1) of Directive 2003/6 **does not expressly provide for a mental element** can be explained, first, by **the specific nature of insider dealing**, which **enables a presumption of that mental element** once the constituent elements referred to in that provision are present. To begin with, the relationship of confidence which links the primary insiders referred to in Article 2(1)(a) to (c) to the issuer of the financial instruments to which the inside information relates implies, on their part, a specific responsibility in that regard. Next, entering into a market transaction is necessarily the result of **a series of decisions** forming part of a complex context which, in principle, makes it possible to **exclude the possibility that the author of that transaction could have acted without being aware of his actions**. Finally, where such a market transaction is entered into while the author of that transaction is in possession of inside information, that information must, **in principle, be deemed to have played a role in his decision-making**.

Subjektivt försvar – snudd bevisbyrde

- ▶ 37: The fact that Article 2(1) of Directive 2003/6 does not expressly provide for a mental element among the constituent elements of insider dealing can be explained, second, by the purpose of Directive 2003/6, which, as is pointed out, inter alia, in the second and twelfth recitals in the preamble thereto, is to ensure the integrity of Community financial markets and to enhance investor confidence in those markets. The Community legislature opted for a preventative mechanism and for administrative sanctions for insider dealing, the effectiveness of which would be weakened if made subject to a systematic analysis of the existence of a mental element. As pointed out by the Advocate General in point 55 of her Opinion, only if the prohibition on insider dealing allows infringements to be **effectively sanctioned** does it prove to be powerful and encourage compliance with the rules by all market actors on a lasting basis. The effective implementation of the prohibition on market transactions is thus based on a **simple structure in which subjective grounds of defence are limited**, not only to enable sanctions to be imposed but also to prevent effectively infringements of that prohibition.
- ▶ 38 Once the constituent elements of insider dealing laid down in Article 2(1) of Directive 2003/6 are satisfied, it is thus possible to **assume an intention** on the part of the author of that transaction.

Rett til å motbevise presumsjon

- ▶ 44 This Court considers that the principle of the presumption of innocence does not preclude the presumption in Article 2(1) of Directive 2003/6 that **the intention of the author of insider dealing can be inferred implicitly** from the constituent material elements of that infringement, **provided that that presumption is open to rebuttal and the rights of the defence are guaranteed.**
- ▶ 52. Owing to its non-public and precise nature and its ability to influence the prices of financial instruments significantly, 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. It enables that insider, when he acts in accordance with that information in entering into a transaction on the market, to expect to derive an economic advantage from it without exposing himself to the same risks as the other investors on the market. The essential characteristic of insider dealing thus consists in an unfair advantage being obtained from information to the detriment of third parties who are unaware of it and, consequently, the undermining of the integrity of financial markets and investor confidence.
- ▶ 54 It follows that the fact that a primary insider who holds inside information trades on the market in financial instruments to which that information relates implies that that person 'used that information' within the meaning of Article 2(1) of Directive 2003/6, but without prejudice to the rights of the defence and, in particular, the right to be able to rebut that presumption.

Tilleggsreservasjon for misbruk (tillatt bruk)

- ▶ 55 However, in order not to extend the scope of the prohibition laid down in Article 2(1) of Directive 2003/6 beyond what is appropriate and necessary to attain the goals pursued by that directive, **certain situations may require a thorough examination of the factual circumstances enabling it to be ensured that the use of the inside information is actually unfair** so as to be prohibited by the directive in the name of the integrity of financial markets and investor confidence.
- ▶ 56 It should be noted, in that regard, that the preamble to Directive 2003/6 provides several examples of situations in which the fact that a primary insider in possession of inside information enters into a transaction on the market should not in itself constitute 'use of inside information' for the purposes of Article 2(1) of that directive.

Oppsummering

- ▶ Den dominerende forståelsen er dermed at MAD (og tilsvarende MAR) har et **brukskriterium** knyttet til den handlendes motivsituasjon (the «mental element») samt en **misbruksreservasjon** av mer objektiv karakter
- ▶ Man kan **presumere** at den som var i besittelse av innsideinformasjon også var motivert av denne. Men dette kan altså motbevise
- ▶ De vanskelige tilfellene er der aktøren hadde innsideinformasjon da han eller hun traff handelsbeslutningen, men ikke var motivert av denne, eksempelvis fordi innsideinformasjonen tilsa en kortvarig kursoppgang og investoren hadde en langsiktig investeringsformål
- ▶ De enkle tilfellene er der aktøren kan bevise at han fikk innsideinformasjon etter at han hadde besluttet å handle
 - ▶ Meg bekjent er det ingen seriøse europeiske kommentatorer som mener at dette er ulovlig innsidehandel

Generaladvokatens forslag i Spector Photo

- ▶ Generaladvokaten gikk inn for å bortfortolke brukskriteriet, men fikk ikke medhold i domstolen.
- ▶ Selv med Generaladvokatens forståelse ville det imidlertid ikke være straffbart å handle for den som får innsideinformasjon etter at handelsbeslutningen er truffet:
- ▶ 69: Article 2(1) of Directive 2003/6 should be interpreted as meaning that the fact that a person possesses inside information which he knows, or ought to have known, constitutes inside information and acquires or disposes of financial instruments to which that inside information relates as a rule signifies in itself that he 'makes use' of the information. **In situations where it is clear a priori that inside information does not influence the action of a person**, mere knowledge of inside information does not in itself imply use of that information.

Rettskildebildet under MAR

- ▶ Inkorporert EØS-rett skal tolkes etter ECJs rettskildelære
- ▶ Norske rettskilder er ikke relevante for tolkingen av forordninger
 - ▶ Gjelder også den norske oversettelsen av MAR
 - ▶ Norske forarbeider ikke en relevant rettskilde for fortolking av EU-rett
 - ▶ Dette kan ikke likestilles med juridisk teori som rettskilde i norsk rett - Mer enn et spørsmål om uavhengighet
- ▶ Prop 96 L og Borgarting lagmannsretts avgjørelser i 2019