

United States-European Union Convergence on Insider Trading Standard

By Michael D. Mann and Eva Marie Carney

While legal theorists have long debated the differences between U.S. insider trading law, as defined by the U.S. courts and the U.S. Securities and Exchange Commission (“SEC”), and the European Union (“EU”) Market Abuse Directive (“MAD”), a recent EU high court ruling suggests that those differences may be disappearing.

The EU high court, responding to a request from the Court of Appeal of Brussels for an interpretation of the phrase “use of insider information” in the MAD, recently ruled that when an insider who possesses inside information trades on the market in financial instruments to which that information relates, that transaction may be classed as prohibited insider dealing, and it is not necessary also to establish that the insider has “used” the information “with full knowledge.” The ruling points to, among other things, the omission from the MAD of an “express mental element,” and further explains that when “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.” See [*Spector Photo Group NV, Chris Van Raemdonck v. Commissie voor het Bank-, Financie- en Assurantieswezen \(CBFA\)*](#) (issued December 23, 2009).

This ruling effectively harmonizes the “use of insider information” concept in the MAD with the SEC’s “trading in possession” standard set out in Rule 10b5-1(b) under the Securities Exchange Act of 1934. That rule was adopted by the SEC in 2000, in an effort to end the debate in the courts and among legal commentators about whether

establishing that a trader was “aware” of material nonpublic information when making a trade is sufficient to impose insider trading liability, or whether it must be shown that the trader “used” the information in trading. In Rule 10b5-1(b), the SEC rejected a “use” requirement and specified that a purchase or sale of a security of an issuer violates the U.S. federal securities laws antifraud provisions if the person making the purchase or sale was aware of material nonpublic information about the security or the issuer when the person made the purchase or sale. Critics subsequently have argued unsuccessfully that the SEC rule sets too low a bar for instituting an insider trading action. Notably, in its recent ruling, the EU high court articulates a standard that sets the bar where the SEC set it with Rule 10b5-1(b).

With the EU high court’s ruling, and increasing cooperation among regulators charged with policing for insider trading, one can anticipate that a more uniform approach to evaluating whether trading is “insider trading” will be taken across markets. Advisory firms investing cross-border would be prudent to revisit their compliance manuals and training to assure that advisory personnel fully understand the boundaries of the law.

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Memorandum

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The European Union’s high court recently harmonized the “use of insider information” concept in the Market Abuse Directive with the Securities and Exchange Commission’s “trading in possession” standard.

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