ACTIVIST INVESTING UNDER THE EU MARKET ABUSE REGIME

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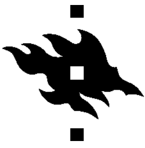

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Tiivistelmä / Referat – Abstract

Activist investing has become an established phenomenon on the regulated markets in Europe. The market abuse provisions have simultaneously been described as the Achilles' heel of activist investors. Nonetheless, specific legal research on the relationship between activist investing and market abuse under the current EU market abuse regime is very limited. This thesis examines the highly critical and unexplored question of *when activist investing may amount to market abuse under the EU market abuse regime*. In examining that question, this thesis also explores certain defences that would render activist engagements legitimate. This thesis does not only ambitiously restate the EU law in relation to activist investing; it also seeks to further identify, engage with and offer persuasive solutions to deeper underlying issues that relate to activist investing on the regulated markets.

The EU Market Abuse Regulation (No 596/2014, hereinafter 'MAR') established a directly applicable market abuse framework that is to be uniformly interpreted within the EU, which means that the market abuse regime is the same within all of the Union's Member States. As such, this thesis focuses on its uniform interpretation and systematization in relation to activist investing. The doctrinal analysis of when activist investing may amount to a contravention of the MAR forms the basis of this research, which also enables the thesis to offer useful hands-on advice on EU level compliance to activist investors, issuers, compliance officers, practitioners, supervisory authorities, prosecutors, and judges alike.

Moreover, this thesis examines both sides of the activist investing phenomenon: the activist long and the activist short. With this in mind, the thesis also proposes a definition of activist investing. Two types of activist investing, namely activist short-selling and offensive shareholder activism, are studied in closer detail. The thesis ultimately finds that a categorical view on activist investing is to be dismissed. Economic research suggests that lawful activist investing contributes to improving the operational and share price performance of targeted firms in Europe, enhances the price discovery mechanism on the market and increases long-term welfare by discouraging fraudulent behaviour; it further suggests that unlawful activism is likely to have the opposite effects and a negative overall impact on the markets. The topic of this thesis, namely the separation of lawful and unlawful activist investing, is thus of uttermost importance. The findings of this thesis further indicate that the merits of activist investing should be assessed on a case-by-case basis in accordance with the doctrinal methodology and legal framework systematized herein.

Further, this thesis discovers that the EU market abuse regime restricts the scope of both public and non-public forms of activist investing. Non-public (or 'publicity-shy') activist investors (i.e. activist investors who engage with public companies in private) must particularly consider the limitations instilled by the insider regime; in contrast, activist investors who engage in public campaigns must consider the prohibitions on unlawful disclosure of inside information and market manipulation in addition to certain disclosure obligations that producers and disseminators of investment recommendations are obliged to follow. The thesis further discovers that the EU market abuse regime also effectively hinders activist collaboration (wolf pack activism), as pursuing such collaboration would amount to market abuse provided that the criteria of inside information are met. The thesis additionally suggests that the renewed EU market abuse regime is likely a contributing factor in the recent upsurge of public activism, as activist investors may avoid the insider prohibitions by going public with their demands and agenda.

This thesis also finds that activist engagements that amount to market abuse are unlikely to enjoy constitutional protection under the so-called 'freedom of expression defence', which activist investors occasionally employ in courts. However, some exceptions to this exist. For example, the disclosure of inside information to the press may enjoy constitutional protection in some Member States but amount to unlawful disclosure in others (in which case constitutional provisions governing freedoms of expression and the press are likely to prevail and effectively limit the scope of the MAR). As such, comparative constitutional research on the relationship between market abuse and the freedoms of expression and the press in Member States is needed. Given that such an examination falls mainly beyond the scope of this thesis, some proposals for further research in the field are made.

Avainsanat – Nyckelord – Keywords
Activist investing, market abuse, EU capital markets law, EU Market Abuse Regulation (No 596/2014), public activism, hedge fund activism, activist short-selling, offensive shareholder activism, wolf pack activism

Säilytyspaikka – Förvaringställe – Where deposited

Muita tietoja – Övriga uppgifter – Additional information

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LIST OF ABBREVIATIONS[3]

Ala L Rev	*Alabama Law Review*
AP	*Academic Press*
AMF	L'Autorité des Marchés Financiers [The French Financial Markets Regulator]
BaFin	Bundesanstalt für Finanzdienstleistungsaufsicht [German Federal Financial Supervisory Authority]
Brook J Corp Fin & Com L	*Brooklyn Journal of Corporate, Financial and Commercial Law*
BUL Rev	*Boston University Law Review*
Bus Law	*Business Lawyer*
CAPM	Capital Asset Pricing Model
Cardozo L Rev	*Cardozo Law Review*
Colum L Rev	*Columbia Law Review*
CUP	*Cambridge University Press*
CDI 2392/2015	Commission Implementing Directive (EU) 2015/2392 of 17 December 2015 on Regulation (EU) No 596/2014 of the European Parliament and of the Council as regards reporting to competent authorities of actual or potential infringements of that Regulation [2015] OJ L 332/126
CDR 918/2012	Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps with regard to definitions, the calculation of net short positions, covered sovereign credit default swaps, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in the value of financial instruments and adverse events [2012] OJ L 274/1
CDR 522/2016	Commission Delegated Regulation (EU) 2016/522 of 17 December 2015 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council as regards an exemption for certain third countries public bodies and central banks, the indicators of market manipulation, the disclosure thresholds, the competent authority for notifications of delays, the permission for trading during closed periods and types of notifiable managers' transactions [2016] OJ L 88/1
CDR 958/2016	Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest [2016] OJ L 160/15
CJEU	Court of Justice of the European Union
CMLJ	*Capital Markets Law Journal*
Colum J Eur L	*Columbia Journal of European Law*

[3] Common abbreviations that are part of everyday legal usage have not been defined herein. For a complete list of such abbreviations, see the OSCOLA (n 1) appendix 4.2.

CSMAD	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) [2014] OJ L 173/179
DB	Deutsche Börse
EBLR	*European Business Law Review*
ECFR	*European Company and Financial Law Review*
ECJ	Court of Justice
ECL	*European Company Law*
EJL	*European Law Journal*
EJLE	*European Journal of Law and Economics*
ETF	Exchange-traded fund, as defined in Article 4(1)(46) of MiFID II
ESMA	European Securities and Markets Authority
EU	European Union
EC	European Commission
ECtHR	European Court of Human Rights
ECHR	European Convention of Human Rights
EU Charter	Charter of Fundamental Rights of the European Union [2012] OJ C 326/391
FI	Finansinspektionen [The Swedish Financial Supervisory Authority]
GBP	Pound sterling
GC	General Court
GCR	Gotham City Research LLC
Harv Bus L Rev	*Harvard Business Law Review*
Hastings LJ	*Hastings Law Journal*
HJIL	*Heidelberg Journal of International Law*
IJDG	*International Journal of Disclosure and Governance*
Int'l Org	*International Organization*
Int Rev Law & Econ	*International Review of Law and Economics*
IOSCO	International Organization of Securities Commissions
J Bus Ethics	*Journal of Business Ethics*
J Corp Fin	*Journal of Corporate Finance*
J Corp L	*Journal of Corporation Law*
JCLS	*Journal of Corporate Law Studies*
J Fin	*Journal of Finance*
JFT	*Tidskrift Utgiven av Juridiska Föreningen i Finland*
JIBLR	*Journal of International Banking Law and Regulation*
JOIC	*Journal of Investment Compliance*
LFMR	*Law and Financial Markets Review*
Lakimies	*LM*
LSE	London Stock Exchange
MAD	Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L 96/16 (repealed)
MAR	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 Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short

	selling and certain aspects of credit default swaps [2014] OJ L 173/1
MiFID I	Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2004] OJ L 145/1
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L 173/349
MTF	Multilateral Trading Facility, as defined in Article 4(1)(22) of Directive 2014/65/EU (MiFID II)
MWC	Muddy Waters Capital LLC
NCA	National Competent Authority
Nord J Intl L	*Nordic Journal of International Law*
NTS	*Nordisk Tidsskrift for Selskabsret*
OTF	Organised Trading Facility, as defined in Article 4(1)(23) of Directive 2014/65/EU (MiFID II)
OUP	*Oxford University Press*
PUP	*Princeton University Press*
Rev BFL	*Review of Banking and Financial Law*
Rev Fin Studies	*Review of Financial Studies*
SEK	Swedish Krona
SJT	Svensk Juristtidning
SRD	Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L 132/1
SSR	Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps [2012] OJ L 86/1
Stan JL Bus Fin	*Stanford Journal of Law, Business & Finance*
Ströer	Ströer SE & Co KGaA (public)
TEU	Consolidated version of the Treaty on European Union [2012] OJ C 326/13
TFEU	Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47
TD	Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC [2004] OJ L 390/38, as amended by Directive 2013/50/EU.
TF	Tryckfrihetsförordningen (1949:105) [The Swedish Freedom of the Press Act of 1949]
UC Davis L Rev	*UC Davis Law Review*
UPaJBL	*University of Pennsylvania Journal of Business Law*
UPaLRev	*University of Pennsylvania Law Review*
TCI	The Children's Investment Fund
Yale LJ	*Yale Law Journal*

YGL	Yttrandefrihetsgrundlagen (1991:1469) [The Swedish Freedom of Expression Act of 1991]
Wash UJL& Pol'y	*Washington University Journal of Law & Policy*
Wash ULR	*Washington University Law Review*
WMBLR	*William & Mary Business Law Review*
WpÜG	Das Wertpapiererwerbs- und Übernahmegesetz [German Securities Acquisition and Takeover Act]
ZIS	*Zeitschrift für Internationale Strafrechtsdogmatik*

I. INTRODUCTION AND BACKGROUND

Activist investing, in its many forms, has become an established phenomenon on the European markets.[4] This comes as no surprise, since a recent global study shows that offensive shareholder activism in Europe yields the highest returns on average (8.8%) in the world, measured from block disclosure to exit.[5] Moreover, activist short-sellers, too, have found the European markets a feasible hunting ground. An example is when Muddy Waters LLC, which is managed by the infamous activist investor Carson Block, shorted the shares of TeliaSonera Ab (now Telia Company Ab) in October 2015. Block simultaneously alleged in a 37-page open letter directed at TeliaSonera's management that the company was 'lacking transparency' and had made 'widespread corrupt payments' exceeding SEK 17 billion as a part of its Eurasian and Nepalese operations, with a possibility that 'necessary writedowns could reach SEK 20 billion'.[6] These allegations were in addition to those already publicly known that TeliaSonera had engaged in bribery in connection with its Uzbek operations. The share price of TeliaSonera fell 6% on the day Block's allegations were published,[7] even though TeliaSonera denied such allegations in a

[4] Marco Becht, Julian Franks, Jeremy Grant and Hannes Wagner, 'Returns to Hedge Fund Activism: An International Study' (2017) 30(9) *Rev Fin Studies* 2933, 2939; Katelouzuo Dionysia, 'Worldwide Hedge Fund Activism: Dimensions and Legal Determinants' (2015) 17(3) *UPaJBL* 789, 791–793 and citations mentioned therein; Yvan Allaire and Francois Dauphin, 'The game of "activist" hedge funds: *Cui bono*?' *IJDG* (2016) 13(4) 279, 279–308; Jukka Mähönen, *'Osakkeenomistaja-aktivismi – Siunaus vai kirous?* [Shareholder Activism – A Blessing or a Curse?]' in Ulla-Maija Mylly, Patrik Nystöm, Tuija Viinikka (eds), *Oikeuden ja talouden rajapinnassa: Juhlakirja Matti J. Sillanpää 60 vuotta* (Edita Publishing 2016) 150. See also Jyrki Tähtinen, 'Shareholder Activism on the Rise in Europe' [2015] 2–3 *Directors' Institute of Finland, Boardview* 40; Josh Black (ed), 'Activist Investing – 2017 Annual Review' 2017 *Activist Investing Review* 1, 23; Armand Grumberg, 'Activist Investing in Europe: A Special Report' (*Harvard Law School Forum on Corporate Governance and Financial Regulation*, 9 November 2016) <https://corpgov.law.harvard.edu/2016/11/09/activist-investing-in-europe-a-special-report/> accessed 30 October 2017.

[5] The respective figures in North America and Asia are 6.0% and 2.7%. See Becht and others (n 4) 2934–2935. The study analyses a total of 1,740 activist interventions during the years 2000–2010. During that time, the three largest markets for shareholder activism were the United States (1,125 interventions), Japan (184 interventions), and the United Kingdom (165 interventions). However, the authors find that *activism relative to the number of listed companies is more frequent in European non-common law legal systems*. The authors interpret the results to support a conclusion that companies in these countries, such as the Nordics, have a relatively weaker governance model and provide thus a greater potential from an activist point of view. Likewise, see Therese Strand, 'Short-Termism in the European Union' (2015) 22(1) *Colum J Eur L* 15, 22 fn 27 and citations mentioned therein.

[6] Daniel Thomas, 'Muddy Waters attacks TeliaSonera over transparency' *Financial Times* (London, 16 October 2015) <https://www.ft.com/content/b5b931da-7325-11e5-bdb1-e6e4767162cc?mhq5j=e2> accessed 30 October 2017.

[7] Thomas (n 6); Julia La Roche, 'Short-seller Carson Block Just Dropped a Blistering Letter Accusing a Company of Corrupt Payments' *Business Insider* (15 October 2015) <http://www.businessinsider.com/carson-blocks-shorts-teliasonera-2015-10?r=US&IR=T&IR=T> accessed 30 October 2017.

press release within a few hours after they were made public.[8] On 21 September 2017, Telia Company AB announced a SEK 7.7 billion settlement with the US Department of Justice, the Securities and Exchange Commission and the Dutch Public Prosecution Service relating to 'previously disclosed investigations regarding historical transactions in Uzbekistan'.[9]

The issue of whether activist investors are valiant crusaders of enhanced market efficiency and integrity, experts and whistleblowers who help markets uncover fraud and apprehend the 'true fundamental value' of target companies, or nothing but market manipulators has been the subject of much legal research and intensive academic debate in the US.[10] On the contrary, European legal research and discussion on the issue has been very limited, although *activist investing*[11] has recently become an established phenomenon in Europe, too. This thesis contributes to this topic by producing a doctrinal analysis of the relationship between activist investing and the EU market abuse regime. The focus is in particular on the two most typical forms of activist investing, namely *activist short-selling*[12] and *offensive shareholder activism* (which is also commonly referred to as *hedge*

[8] TeliaSonera Ab, 'Press Release: TeliaSonera Comments on Open Letter to the Board' (15 October 2015) <https://www.teliacompany.com/en/news/press-releases/2015/10/teliasonera-comments-on-open-letter-to-the-board/> accessed 30 October 2017.

[9] Telia Company Ab, 'Press Release: Telia Company Reaches a Global Settlement with the Authorities Regarding Uzbekistan Investigation' (21 September 2017) <https://www.teliacompany.com/en/news/press-releases/2017/9/telia-company-reaches-a-global-settlement-with-the-authorities-regarding-uzbekistan-investigation/> accessed 30 October 2017. The Swedish prosecutor's investigation into individuals is still ongoing and Telia Company Ab may still be subject to disgorgement proceedings resulting from that investigation.

[10] For an overview of the discussion, see, for example, Joanna Lee, 'Activist Short Sellers: Market Manipulators or Market Protectors?' (2013) 32 *Rev BFL* 277 (*pro et contra* discussion on activist short sellers) and John C Coffee and Darius Palia 'The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Gorvernance' (2016) Vol 43(3) *J Corp L* 546, 549–550, wherein the view that offensive shareholder activists would be market manipulators is dismissed.

[11] When interpreted broadly, activist investing can be separated from 'passive' investing in the sense that activist investors take certain actions and measures that seek to increase or decrease (depending on the strategy) the value of the target (typically in the short-term). This thesis suggests that *activist investing* is to be interpreted broadly, as to include *any action by an investor, other than trading, that intends to move the price of a financial instrument in which the activist holds or is to hold a position*. The suggested definition ought primarily to be read as a communicative definition which seeks to capture the basic essence of activist investing. The definition and relevant taxonomy is studied in closer detail in part III of this thesis.

[12] One way to define *activist short-selling* is to separate it from the *passive* form of short selling, which is a method of investing in short positions *hoping* that the prices will fall. *Activist* short-sellers take certain action or measures to accelerate or cause a decline in the price of the targeted instrument. It should be noted that in the context of this thesis, a *short sale* is to be interpreted broadly in accordance with the proper scope of MAR Article 2. Consequently, a *short sale* ought to be read to also include various derivate instruments, such as CFDs and warrants that result in a (net) short position in the targeted financial instruments. A closer analysis of the relevant definitions is made in section III.A.

fund activism).[13] The thesis states the law as it stands on 30 October 2017 and considers regulations and rulings enacted on or before that date.

A. *The Research Question, Scope, and Further Aims of the Study*

As noted above, this thesis examines the relationship between activist investing and the EU market abuse regime. In doing so, the thesis seeks to answer one critical research question: *When does activist investing amount to market abuse under the EU market abuse regime*?[14] A threefold approach is utilized in the doctrinal examination of this question. The thesis initially identifies the applicable EU regime and methods for interpreting it (part II), and subsequently, it defines activist investing as a phenomenon (part III). The thesis ultimately systematizes the applicable EU market abuse regime in relation to activist investing (parts IV and V), which entails inter alia exploring certain defences that would render activist engagement legitimate (sections IV.D. and V.E. in particular).

In addition to answering the above research question, the thesis has three aims. Firstly, beyond only seeking to ambitiously restate and systematize the EU law in relation to activist investing, the thesis also endeavours to further identify, engage with and offer solutions to deeper underlying issues. Secondly, it aims to examine activist investing as an emerging phenomenon in the EU (first and foremost in light of the applicable EU regime) and eventually to initiate further pan-European legal research and academic discussion on activist investing. Thirdly, based on an argument that the doctrinal assessment of activist investing under the EU market abuse regime is highly contextual, the thesis seeks to

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[13] *Offensive shareholder activism* can be best characterized as aggressive short-term, profit-seeking shareholder activism. See, for example, Iris Chiu, *The Foundations and Anatomy of Shareholder Activism* (OUP 2010) 71: '*Offensive shareholder activism* is characterized by the motivation of profit-seeking, and more often than not, is followed by prompt exit from the company when the returns have been generated, or if the campaign has not resulted in the expected returns. If the expected returns have not been generated, the exit is made to reduce any investment loss'. In the context of offensive shareholder activism, this thesis further adapts a broad definition of *shareholding* in the sense that also (synthetic) ownership amassed through derivative instruments is to be considered as relevant stakeholding for activist purposes. The phenomenon and relevant definitions are studied in closer detail in section III.B. below.

[14] Market abuse has in MAR Recital 7 been defined to include insider dealing, unlawful disclosure of inside information and market manipulation. The research question can thus further be split up into four subquestions: (i) when does an activist investing amount to unlawful insider dealing; (ii) when does an activist investment strategy disclose inside information unlawfully, (iii) when does an activist investing unlawfully manipulate the market; and (iv) what defences, if any, would render such activist engagements legitimate (that is, would limit or have an impact on the application of the EU market abuse regime). This thesis consequently takes a comprehensive approach to the systematization of activist investing under the EU market abuse regime, and in so doing, it will also provide useful hands-on advice on EU level compliance to activist investors, issuers, compliance officers, practitioners, supervisory authorities, prosecutors, and judges alike.

further contextualize the doctrinal assessment of market abuse in relation to activist investing.

The topic of this research is current and important for several reasons. Firstly, activist investors were in 2016 estimated to manage funds amounting to approximately 150 billion euros[15]—an amount nearly three times the Finnish central government's budget for the year 2018. This is a significant increase from 2003, when activist hedge funds managed less than 10.2 billion euros.[16] Europe has simultaneously seen a surging increase in activist engagements in recent years; for example, during 2016 alone a total of 97 public activist campaigns were conducted by activist investors in Europe (which represents a 35% increase from the previous year).[17] It thus does seem that activist investing is here to stay, whether we like it or not.

At the same time, practitioners and scholars alike have identified the relationship between the market abuse regime and activist investing as one of the most critical and important issues in activist stakebuilding;[18] the market abuse regime has even been described as the Achilles' heel of activist investors.[19] The Market Abuse Regulation (No 596/2014, hereinafter 'MAR') established a directly applicable market abuse framework that is to be uniformly interpreted within the EU. The introduction of the MAR entailed a shift from a directive-based regulation that afforded Member States some discretion concerning how they implemented the law in accordance with local customs and conditions to a directly

[15] Black (n 4) 8.
[16] David P Stowell, *Investment Banks, Hedge Funds and Private Equity* (3rd edn, AP 2017) 295.
[17] Black (n 4) 23. During 2016, the number of public activist engagements increased by 35 per cent in comparison with 2015 (from a total of 72 to 97).
[18] See, for example, Sean Geraghty and Harriet Smith, 'Shareholder Activism as a Strategy for Hedge Funds' in Frase Dick and Peter Astleford (eds), *Hedge Funds and the Law* (Sweet & Maxwell 2010) ch 8 para 28; Jeffery Roberts, Selina Sagaym & Garth Jones, 'Shareholder Activism in the UK – an Introduction' (2013) 17(5) *Wall Street Lawyer – Securities in the Electronic Age* 123; Martin Schockenhoff, Gabriele Rosskopf, Martin Hitzer and Gleiss Lutz, 'Germany' in David Pol & Wardwell LLP (eds), *Getting the Deal Through – Shareholder Activism and Engagement* (2017); Gavin and Mark Bardell, 'United Kingdom' (2016) 1 *The Shareholder Rights and Activism Review* 71; Eva Hägg and Patrik Marcelius, 'Sweden' (2016) 1 *The Shareholder Rights and Activism Review* 61; Jeffery Roberts, 'Shareholder Activism in the UK: An Introduction' (*Harvard Law School Forum on Corporate Governance and Financial Regulation*, 6 April 2013) <https://corpgov.law.harvard.edu/2013/04/06/shareholder-activism-in-the-uk-an-introduction/> accessed 30 October 2017. Roberts explicitly underpins the importance of the market abuse regime in connection with public activism: 'One of the most important questions to be considered prior to the acquisition of any shares is whether purchasing shares (in whatever quantity) will amount to an offence under the criminal insider dealing and market abuse legislation.'
[19] Cf. Bertrand Cardi, Benjamin Burman and Forrest Alogna, 'Activist Strategies and Defences in France' (2016) *XBMA: International Institute for the Study of Cross-Border Investment and M&A* (1 August 2016) 21 <http://xbma.org/forum/wp-content/uploads/2016/07/Activist-Strategies-and-Defenses-in-France....pdf> accessed accessed 30 October 2017. The authors point out that insider trading and market manipulation provisions may expose activists to liability depending on the employed strategy.

applicable EU instrument that only the CJEU can authoritatively construe.[20] As a consequence, much of the previous national guidance on market abuse—and even case law—became obsolete.[21] Yet, uncertainties exist as to the exact interpretation of the current regime as only limited case law that provides appropriate guidance is available.[22] Construing *de lege lata* analysis and well-founded *de sententia ferenda* conclusions that consider existing CJEU case law and systematize the EU market abuse regime in relation to activist investing in the EU is consequently of significant importance.[23]

The MAR has also extended the scope of EU market abuse regime to cover behaviour both within and outside of the EU that is related to financial instruments admitted for trading on an EU trading venue.[24] This extra-territorial extension has far-reaching consequences for activist investors who operate globally. For example, abusive conduct on behalf of a Cayman Islands-based activist hedge fund that affects a US-listed security is subject to the EU market abuse regime if the relevant US security is traded on a single European organised or mutual trading facility (O/MTF).[25] Likewise, public comments made by a US investment banker that indirectly affect the price of a commodity-based ETF traded on European markets are also within the scope of the EU market abuse regime.[26] It is

[20] See Giulio Itzhovich, 'The European Court of Justice' in András Jakab, Arthur Dyevre and Giulio Itzcovich Comparative Constitutional Reasoning (CUP 2017) 277–322 (generally on the competence of the CJEU) and Jesper Lau Hansen, 'Market Abuse Case Law – Where Do We Stand With MAR?' (2017) 14(2) *ECFR* 367, 368–369. Hansen criticizes the shift from directive-based regulation to a directly applicable regulation on the basis that the previous regime 'permitted NCAs to show more initiative', and that most NCAs have remained hesitant to provide their opinion on the newly adapted regulation. As a consequence, there exists currently a significant amount of uncertainty until authoritative rulings from the CJEU are available on how MAR is to be interpreted.

[21] Hansen (n 20) 368. See also Lars Teigelack, 'Market Manipulation' in Rüdiger Veil (ed), *European Capital Markets Law* (Hart Publishing 2017), § 15 para 5, who finds that the direct effect of the MAR has made most national law obsolete.

[22] Hansen (n 20) 367–390.

[23] *De lege lata* systematizations are descriptions of law as it is, whereas *de lege sententia* remarks are arguments of how a judge *should decide a specific case*. See, for example, Donal Nolan and Andrew Robertson, *Rights and Private Law* (Bloomsbury 2011) 174 and Ota Weinberger, *Law, Institution and Legal Politics. Fundamental Problems of Legal Theory and Social Philosophy* (Springer 1991) 71. On the importance of established CJEU case law in the interpretation of the MAR, see Hansen (n 20) 369.

[24] See MAR Recital 8 and Article 2. Cf. MAR Recital 46 'behaviour that occurs outside a[n] [EU] trading venue'. See also Rüdiger Veil 'Capital Markets' in Rüdiger Veil (ed), *European Capital Markets Law* (Hart Publishing 2017) § 7 para 19 and Teigelack (n 21) § 15 paras 6–10 on the scope of application of the MAR.

[25] Cf. MAR Article 2. See also Karen Anderson and Eleanor Vance, 'When Does the Market Abuse Regime Apply?' in Karen Anderson, Andrew Procter and Jonathan Goodlife (eds), *A Practitioner's Guide to the Law and Regulation of Market Abuse* 30. It should be noted that the EU market abuse regime has applied on OTFs as of 3 January 2017 in accordance with MAR Article 39(4).

[26] David Henry 'JPMorgan Handles Bitcoin-related Trades for Clients Despite CEO Warning' *Reuters* (18 September 2017) <https://www.reuters.com/article/us-jpmorgan-bitcoin/jpmorgan-handles-bitcoin-related-trades-for-clients-despite-ceo-warning-idUSKCN1BT2E3> accessed 30 October 2017. See also Lucinda Shen, 'Jamie Dimon Says the Whole Bitcoin Craze Will "End Badly"' *Fortune* (22 September 2017) <http://fortune.com/2017/09/22/jamie-dimon-bitcoin-price/> accessed 30 October 2017.

important to recognize this extension, as significant differences between the European and US market abuse regimes remain [27] despite the recording of some notions of approximation.[28]

Moreover, access to effective methods of mass communication and leveraged derivative instruments has created exceedingly perverse incentives for activist investors to falsify or exaggerate information, opinions, and recommendations relating to financial instruments, as even the slightest change in underlying financial instruments (e.g. various leveraged derivatives) may yield exponential earnings in a very short time span.[29] Modern methods of mass communication have simultaneously enabled the instantaneous and global dissemination of (price-sensitive) information at a low cost. For example, a single false or misleading tweet may erase hundreds of billions from public markets in a matter of minutes.[30] Equally so, activist investors can by a single presentation or tweet move billions of dollars in the markets.[31]

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[27] See, for example, Sergio Gilotta, 'The Regulation of Outsider Trading in EU and the US' (2016) 13(4) *ECFR* 632, 632–642 Cf. Thomas Lee Hazen, 'Identifying the Duty Prohibiting Outsider Trading on Material Non-public Information' (2010) 61 *Hastings LJ* 881, 884–887. It should be noted that the EU regime on insider trading does not, unlike the US one, require any breach of a fiduciary duty or relation of trust and confidence. Trading on the basis of material non-public information in the US is not *per se* prohibited, whereas the EU regime prohibits it.

[28] See Beth Simmons, The International Politics of Harmonization: The Case of Capital Market Regulation' (2001) 55(3) *Int'l Org.* 589, 595–598. Simmons argues that the US 'hegemonic' standing and concentration of financial power has had profound implications for regulatory harmonization in the field of capital markets law, globally, as it has been 'costlier to alter its preferred regulatory innovation than to try to change the policies of the rest of the world'. See also Veil Rüdiger, 'Dogmatics and Interdisciplinarity' in Rüdiger Veil (ed), *European Capital Markets Law* (2nd edn, Hart Publishing 2017) § 6 para 1, wherein Veil notes that the EU post-crisis regulatory efforts between 2008 and 2015 have been influenced by the regulatory developments in the United States. Cf. Anu Bradford, 'Exporting Standards: The Externalization of the EU's Regulatory Power via Markets', (2015) 42 *Int Rev Law & Econ* 158, 159–160. Bradford suggests that the EU has taken over US role as a regulatory hegemony.

[29] On these incentives, see, for example, Seralna Grünewald, Alexander Wagner and Rolf Weber, 'Short Selling Regulation After the Financial Crisis – First Principles Revisited' (2010) 7 *IJDG* 108, 115–116. For example, activist investors may utilize put warrants, contracts for difference (CFDs), credit default swaps (CDSs) and various other derivative instruments to gain a leveraged position in the target company. It should be noted that these instruments are, too, within the scope of application of the MAR. Cf. MAR Article 2. See also Alexander Kern and Vladimir Maly, 'The New EU Market Abuse Regime and the Derivatives Markets' 9(4) *LFMR* (2015) 243, 245–246 on derivative instruments and the scope of the MAR.

[30] Shriva Ovide,'False AP Twitter Message Sparks Stock-Market Selloff' *Wall Street Journal* (New York, 23 April 2013) <https://www.wsj.com/articles/SB10001424127887323735604578440971574897016> accessed 30 October 2017. The Associated Press Twitter account was hacked, and it sent out a false tweet about explosions at the White House that had injured the POTUS. As a result, the Dow Jones Index dropped 150 points, wiping out USD 136.5 billion of the S&P 500 index's value. However, the markets recovered quickly when it became evident that the tweet was false.

[31] Tom CW Lin, 'Reasonable Investor(s)' (2015) 95 *BUL Rev* 461, 472.

As mentioned above, practitioners and scholars alike have identified the relationship between the market abuse regime and activist stakebuilding as a significant issue.[32] Nonetheless, activist investing under the EU market abuse regime remains a highly critical and rather undiscovered field of legal research.[33] This is unwarranted given that activist investing raises delicate legal issues, as the following (typical) example demonstrates:

> Activist A obtains a (short or long) position in the publicly listed company C through a derivative instrument. The activist subsequently disseminates or instructs a third party B (e.g. a financial journalist or columnist) to distribute certain information or opinions[34] that directly or indirectly imply that circumstances XYZ do or will have a substantial impact on the market value of C. The market consequently reacts to this information, after which A disposes its position in C and retains the difference in market value as a profit.

Does A have to disclose its position in C before issuing information? What if B issues the information instead? What are the rights and obligations of parties that have an interest or holding in the target company? How should the exactness and nature of information issued by third parties be assessed? When and to what extent may third parties, such as activists and market commentators, assume liability for disclosure of (false or misleading) information, opinions, or recommendations? This matrix of questions becomes increasingly complex to navigate when we further include the consideration of underlying aims, policies and fundamental freedoms (e.g. the fact that the free exchange of ideas, opinions and information forms a fundamental part of the price discovery mechanism in regulated markets) that is somewhat typical of a contextual interpretation of EU securities

[32] See Roberts, Saygam and Jones (n 18); Schockenhoff and others (n 18); Gavin and Bardell (n 18); Hägg and Marcelius (n 18); Geraghty and Smith (n 18) ch 8 para 28. Geraghty and Astleford point out that an activist shareholder must always balance the desire to discuss issues with the board against the risk of the activist becoming an insider and thereby precluded from dealing in the company's shares. The authors further underline the fact that when an activist investor has been in discussion with the board and has potentially price-sensitive information, the investor must have regard of the market abuse regime.

[33] Activist investing and the effects thereof have been intensively debated by scholars across the world and much research has focused on the economic benefits, detriments, and behaviour of activists. Conversely, the legal aspects of this phenomenon have received much less attention and activist investing under the EU market abuse regime remains an unexplored and highly significant topic for legal research. However, some excellent general commentaries on the MAR regulation are available, of which can be mentioned Niamh Moloney, *EU Securities and Financial Markets Regulation* (3rd edn, OUP 2014); Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015); Anderson Karen, Andrew Procter and Jonathan Goodlife, *A Practitioner's Guide to the Law and Regulation of Market Abuse* (2nd edn, Sweet & Maxwell 2017); Rüdiger Veil (ed), *European Capital Markets Law* (2nd edn, Hart Publishing 2017); Gregor Bachmann, *Das Europäische Insiderhandelsverbot* [The European Ban on Insider Trading] (De Gruyter 2015).

[34] The nature of the information may be such that company C cannot directly verify it and/or believes it to be incorrect or misleading. This information may be in the form of a recommendation, bona fide opinion and/or a third-party analysis of the company based on, for example, publicly available information.

provisions and their increasingly principle-based nature.[35] Market participants on the regulated markets must nevertheless navigate this matrix daily, and the European courts must ultimately balance underlying interests in their interpretations and assessments of the EU market abuse regime. A comprehensive legal analysis of these questions is therefore urgently needed, as it may provide relevant guidance and criteria for the European courts and thereby also increase the integrity, certainty, and efficiency of the markets.

B. *Delimitations and Areas of Focus*

This study focuses on and is limited to the systematization of the EU market abuse regime in relation to activist investing. As such, it refers to national sources only to the extent that they add further depth and value to the analysis or are in some way necessary to understand how the EU regime operates and interrelates to activist investing. The reasons for this limitation are mainly twofold.

Firstly, the MAR has established a directly applicable market abuse framework that is to be interpreted uniformly within the EU.[36] As this regulation is the same within all of the Member States, it is appropriate to focus on its uniform interpretation. Teigelack argues that the direct effect of the MAR 'makes most national substantive law obsolete',[37] as only the sanctioning regime remains contingent on national law even though it, too, is to a large

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[35] See, for example, Malte Wundenberg, 'Compliance (Organisational Requirements)' in Veil Rüdiger (ed), *European Capital Markets Law* (2nd edn, Hart Publishing 2017) § 33 paras 6–13 and references mentioned therein on the increasing amount of principle-based EU securities regulation. Wundenberg points out that the increasingly principles-based approach has been deemed controversial in legal literature. Critics argue out that the approach leads to increased legal uncertainty and unpredictability for market participants. See also Julia Black, 'The rise, fall and fate of principles-based regulation' in Alexander Kern and Niamh Moloney (eds), *Law Reform and Financial Markets* (Elgar Publishing 2011) 3–34; Julia Black, 'Regulatory Styles and Supervisory Strategies' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *Oxford Handbook of Financial Regulation* (OUP 2015) 217–253; Janne Häyrynen, *Arvopaperimarkkinoiden väärinkäyttö* [Market Abuse on the Securities Markets] (Suomalainen Lakimiesyhdistys 2006) 400–408.

[36] Cf. MAR recital 5: 'In order to *remove the remaining obstacles* to trade and the significant distortions […] *resulting from divergences between national laws* and to prevent any further obstacles to trade and significant distortions of competition from arising, it is necessary to adopt a Regulation establishing a more *uniform interpretation of the Union market abuse framework, which more clearly defines rules applicable in all Member States.* Shaping market abuse requirements in the form of a regulation will ensure that those requirements are directly applicable. *This should ensure uniform conditions by preventing diverging national requirements as a result of the transposition of a directive. This Regulation will require that all persons follow the same rules in all the Union. It will also reduce regulatory complexity and firms' compliance costs, especially for firms operating on a cross-border basis, and it will contribute to eliminating distortions of competition*.' (Emphasis added). See also Rüdiger Veil, 'Sanctions' in Rüdiger Veil (ed), *European Capital Markets Law* (2nd edn, Hart Publishing 2017) § 12 para 15.

[37] Teigelack, 'Market Manipulation' (n 21) § 15 para 5.

extent harmonized.[38] It is therefore natural to limit the scope of this thesis to the (uniform) interpretation and systematization of the EU market abuse framework in relation to activist investing. Consequently, this thesis will deal with matters relating to national law only to the extent such references are necessary for the understanding of how the EU market abuse regime operates in relation to activist investing.

Secondly, this thesis does not seek to address plausible sanctions in detail, mainly for the same reason: Member States may provide for additional sanctioning powers and stricter sanctions than those included in the MAR and CSMAD.[39] For example, the MAR leaves for a national discretion to choose between criminal and administrative sanctions. The upper scales for such sanctions has further been left to the national regulators to decide, as the CSMAD and MAR only set out the minimum standards for sanctions.[40] Consequently, an analysis of whether certain conduct falls within the criminal or administrative sanctioning regime is still contingent on substantive national law. This thesis does consequently not provide extensive coverage or a detailed comparative analysis of plausible sanctions that may result from a contravention of the MAR, as doing so would not be appropriate or plausible given the scope of this thesis. As the research question implies, this thesis is ultimately mainly concerned with the question of *when* certain conduct may amount to a contravention of the EU market abuse regime and less concerned with the question of *what* sanctions or liabilities result from a contravention.[41]

These limitations are further motivated by a practical compliance point of view: a focus on the objective elements (actus reus) of market abuse is warranted, as market participants ought to avoid any liability by complying fully with the objective elements of the EU market abuse regime. Vis-á-vis, a breach of the market abuse prohibitions in MAR Article 14 or 15 will almost certainly result in civil liability and administrative or criminal

[38] Teigelack, 'Market Manipulation' (n 21) § 15 para 5. Teigelack points out that apart from the sanctioning regime, all market abuse law is now European law. Likewise, see Hansen 'Market Abuse Case Law – Where Do We Stand With MAR?' (n 20) 368–389.
[39] 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) [2014] OJ L 173/179.
[40] Cf. MAR Recital 72.
[41] For similar delimitations, see for example, Bachmann, *Das Europäische Insiderhandelsverbot* (n 33) 10–17; Mårten Knuts, *Kursmanipulation på värdepappersmarknaden* [Market Manipulation in the Securities Markets] (Suomalainen Lakimiesyhdistys 2010) 13–18; Moloney (n 33) VIII; Andri Bergþórsson, *What is market manipulation? An analysis of the concept in a European and Nordic context* (Doctoral dissertation, University of Copenhagen Faculty of Law 2017) 7–9.

sanctions, depending on the nature of the breach, culpability and the particular circumstances of the case.[42]

Furthermore, this thesis focuses only on certain forms of activist investing, namely activist short-selling and offensive shareholder activism (also commonly known as hedge fund activism). It does consequently not deal in any great detail with other forms of activist investing, such as socio-political activism.[43] Several reasons exist for the chosen emphasis. Firstly, practitioners across Europe have identified the two examined forms of activism as the most typical and significant forms of activist investing on the European markets.[44] Secondly, as public activism is constantly evolving and comes in many forms,[45] an exhaustive characterisation of the phenomenon may not be appropriate or even plausible for the purposes of this thesis. Thirdly, as this thesis examines the relationship between the EU rules governing regulated markets and activism, it is only appropriate to examine the *public* form of activist investing.[46] Any references to corporate bodies in this thesis should

[42] Serious and intentional breaches of the provisions will enliven the discretion to issue criminal or administrative sanctions, whereas less serious breaches may result in civil liability. Many Member States explicitly recognize the private enforcement of MAR provisions in their respective national laws, and even if they do not, private enforcement proceedings may be possible on the basis of EU law alone. See Vassilios Tountopoulos, 'Market Abuse and Private Enforcement' [2014] *ECFR* 297 and Veil (above n 36) § 12 para 26. Veil finds that on the basis on the CJEU's *Muñoz*-ruling (C-253/00 *Antonio Muñoz y Cia SA and Superior Fruiticola SA v Frumar Ltd* EU:C:2002:497 [2002] ECR I-7289), it may be necessary to recognize a private enforcement right for investors on the basis of EU law alone. However, it should be noted that there is yet no explicit precedent on private enforcement of MAR, and there is consequently no authority on the standard of liability for such cases, either. Veil sets the standard at intentional or grossly negligent, which would seem to be aligned with the tort laws of the Member States. Obviously, a clarifying CJEU precedent on the private enforcement of market abuse would be highly necessary. See also Rolf Holmquist, *Brotten i Näringsverksamhet* [Crimes in Business] (4th edn, Wolters Kluwer 2017) 307–336 on the scope and application of the criminal and administrative sanctioning regime in a national context.

[43] That is, shareholder activism with an environmental, non-discrimination, political or ethical aim. Such investing is often conducted by NGOs who want to pursue their aims through combining public pressure and corporate tools. On the different objectives of activism, see Yaron Nili, 'Missing the Forest for the Trees: A New Approach to Shareholder Activism' (2014) 4 *Harv Bus L Rev* 157, 171–172 and 176–177. For an overview of the goals, aims and tactics of socio-political shareholder activism, see Joakim Sandberg, 'Changing the World Through Shareholder Activism?' (2011) 5(1) *Nordic Journal of Applied Ethics* 51–78. However, even if this thesis focuses on certain forms of financially driven activist investing, namely activist short-selling and offensive shareholder activism, much of the analysis and conclusions herein will also provide overall guidance for the analysis of all forms of activism on the regulated markets.

[44] Schockenhoff and others (n 18); Black (n 4).

[45] Allaire and Dauphin (n 4) 279: 'There is the socially minded, issue-driven, form of activism, the 'soft' activism of institutional investors and the 'hard', financially driven, activism practiced principally by hedge funds. *Social activism* usually takes the form of pressures on corporations to change their social agenda and cope with environmental, moral, religious or other non-business issues. The soft activism of institutional investors usually involves shareholder proposals aimed at improving corporate governance […]' (Emphasis in original, citations omitted).

[46] Here, the term *public* refers to activism on the regulated markets, as they are defined in MiFID II Article 4(1)(21). In other words, this thesis does not cover activist investing in private companies that are *not* traded on regulated markets. This limitation should not be misconceived with the fact that activist investing on the regulated markets can take both *public* and *non-public* forms, in the sense that the activist engagement is

thus be read as references to listed entities whose shares are publicly traded on the regulated markets, unless expressly stated otherwise.

The two examined forms of activism are also a perfect match for the purposes of this research given that activist short-selling and offensive shareholder activism can be seen as directly opposite (activist) investing strategies. Activist short-selling seeks to reduce the target's value, whereas offensive shareholder activism seeks to increase it. A typical activist short-seller does not own any shares in the target company but lends them instead (or obtains a derivative short position) for the duration of the short. In contrast, a typical offensive activist shareholder strategy entails stakeholding and a short or medium-term maximalization of the target company's value and thereto related financial instruments for the duration of the engagement. Offensive shareholder activists will often also engage in private discussions with the target board or management to try to maximize the target's short-term value;[47] on the contrary, activist short-sellers typically avoid initiating any discussions with the target company's management, as seizing the target off-guard will likely result in increased short-term value depreciation.[48]

However, the above-mentioned delimitations should not be overemphasized. References to national and relevant jurisdictions overseas are made in the thesis to the extent that they add value to the analysis and understanding of issues that relate to activist investing in regulated markets. Relevant regulations, case law and legal literature from foreign jurisdictions with well-developed capital markets with a documented history of activist investing may offer persuasive perspectives to the issues at hand, as further examined in the section below.

C. *A Few Words on the Research Methods*

This thesis utilizes a doctrinal method to interpret and systematize the law.[49] The method principally aims to determine and systematize the law as it stands through references to

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either public or private. This thesis will also cover non-public forms of activist investing on the regulated markets.

[47] Such discussions are highly relevant for inside regulation considerations, as examined in part IV below.

[48] Cf. Walker C and Forbes C, 'SEC Enforcement Actions and Issuer Litigation in the Context of a "Short Attack"' (2013) 68 *Bus Law* 687. A commonly employed strategy by targeted issuers is to engage in extensive PR campaigns in order to combat the negative media coverage that follows an activist short attack.

[49] The doctrinal method is also commonly known and referred to as the legal 'dogmatic' method in German and Nordic jurisprudence (*rechtsdogmatik, rättsdogmatik, oikeusdogmaatiikka, retsdogmatik*). The method can be described to have an *internal point of view* as to the content of law. See Aulis Aarnio, *Reason and Authority: A Treatise on the Dynamic Paradigm of Legal Dogmatics* 2 and 49ff, wherein he agrees with Alf

legislation and other authoritative or valid sources; it employs binding, authoritative and accepted sources of law, in practice, the acts, regulations, case law, legislative history and the construing legal doctrine.[50] Moreover, the doctrinal method can be further portrayed to take the perspective of practitioners and the courts (in this thesis, particularly the CJEU) when describing, systematizing and interpreting the law.[51] The doctrinal method as applied in this thesis may best be characterised as phenomenon or problem oriented,[52] as the systematization revolves around a empirical phenomenon—activist investing. The fact that the EU market abuse regime comprises of directly applicable EU law has some implications for the doctrinal interpretation of the market abuse provisions, an issue which will be addressed in closer detail in part II of this thesis.[53]

Certain areas of law (e.g. company and securities law) are deeply intertwined with the economic realities that they seek to regulate.[54] Securities law in particular is an area of law where the economic context and underlying theories may be relevant to the doctrinal interpretation.[55] In short, the securities markets operate in an economic continuum of supply and demand, and the governing economic synthesis and theories, such as the

Ross it might be more appropriate to talk about the 'doctrinal study of law' instead of the *terminus technicus* 'legal dogmatics'. See also Lena Olsen, 'Rättsvetenskapliga perspektiv' [2004] 2 *SJT* 105, 106–144.

[50] Lena Olsen (n 49) 122. See also Aulis Aarnio 'The Sources of Law' in Aulis Aarnio (ed), *Essays on the Doctrinal Study of Law* (Springer, 2011) 148–162. Aarnio divides the accepted sources of law into *strongly binding sources* (which include norms external to national law, such as the binding parts of EU law), *weakly binding sources* (such as the intention of the legislator and precedents) and *permitted sources* (which include, inter alia, comparative, and economical arguments). See also Aleksander Peczenik, 'A Theory of Legal Doctrine' (2001) 14(1) *Ratio Juris* 75, 78ff.

[51] Olsen (n 49) 111. See also Jan M Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans-W Micklitz, Edward L Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (CUP 2017) 212. Smits quotes a statement by Council of Australian Law Deans, arguing that '[d]octrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials.'

[52] On the problem centered doctrinal research strategy, see, for example, Aulis Aarnio, *The Rational as Reasonable: A Treatise on Legal Justification* (Kluwer 1987) 47–51. Aarnio finds that, '[u]ltimately, [the] problem centered research leads to the same or to the same type of basic question as does text centered research. *In both, the scholar deals with the clarification of the unclear meaning content of law, or to be more precise, with the clarification of the formally valid law texts*.' (Emphasis added).

[53] Shortly put, the fact that both capital markets law and EU law are bodies of law where a teleological approach is paramount further underpins the importance of a holistic and contextual method of interpretation. See, for example, Veil 'Sources of Law and Principles of Interpretation' in Rüdiger Veil (ed), *European Capital Markets Law* (2nd edn, Hart Publishing 2017) § 5 para 47.

[54] See, for example, Jukka Mähönen, 'Taloustiede lain tulkinnassa' [Economics in legal interpretation] (2004) 102(1) Lakimies 49, 58–64.

[55] See Karin Eklund and Daniel Stattin, *Aktiebolagsrätt och Aktiemarknadsrätt* [Company and Securities Law] (2nd edn, Iustus Förlag 2016) 27–45; Veil, 'Dogmatics and Interdisciplinarity' (n 28) § 6 paras 19–31; Häyrynen, *Arvopaperimarkkinoiden väärinkäyttö* (n 35) 5–7; Geoffrey Miller (ed), *Economics of Securities Law* (Edward Elgar, 2016), paras 1–5; Sakari Huovinen, *Pörssiyhtiön tiedonantovelvollisuus, sijoittajan odotukset ja media* [The disclosure obligation of the issuer, investor expectations and the media] (Suomalainen Lakimiesyhditys 2005) 17–23.

efficient capital market hypothesis (ECMH), are highly relevant for understanding *how* and *why* access to information and information (e)quality is regulated under the EU market abuse regime. An understanding of the economic realities and the objectives of the regime is arguably necessary for a successful employment of the contextual and teleological methods of interpretation.[56] As such, this thesis also considers research within the field of *behavioural law and economics* when interpreting and contextualizing the EU market abuse regime in relation to activist investing—particularly to address the issue of whether *market irrationalities* (in connection with activist investing) can or ought to be considered as relevant by *the reasonable investor*.[57]

Moreover, this thesis also employs a comparative method to identify issues, arguments and solutions concerning activist investing and market abuse in an international context. The reasons for doing so are manifold. Firstly, activism in regulated markets is a truly global phenomenon. Activist investing is common and established in developed markets outside of Europe, including the largest capital markets of Asia and North America.[58] The post-crisis EU regulations and policies are partly based on, and heavily influenced by, regulatory efforts in other key capital markets—particularly by those in the US.[59]

[56] This thesis argues, as further explored in part II below, that any assessment in the context of market abuse must also consider the overall objectives of the MAR (Article 1; Recital 2), namely those of enhanced market integrity and efficiency, which themselves can be attributed a normative meaning. These elements incorporate some economic elements into the regime, which ought to be considered in the interpretation.

[57] More recently, studies in the field of *behavioural law and economics* (BLE) have established methods and models to analyse the 'interface between human psychology, markets, and regulation.' See Orly Lobel, 'A Behavioral Law and Economics Perspective: Between Methodology and Ideology when Behavioural Sciences Meet Law' in Rob Van Gestel, Hans-W Micklitz and Edward L Rubin (eds), *Rethinking Legal Scholarship* (CUP 2017) 476ff. BLE research questions the traditional perception of *homo economicus* as the rational actor. Lobel finds on the basis of recent BLE research that the assumption that market participants consistently behave rationally with the single goal of profit maximization fails too often. See also Paul Barnes, *Stock Market Efficiency, Insider Dealing and Market Abuse* (Taylor and Francis 2009) 63–85 and Lars Teigelack, *Finanzanalysen und Behavioral Finance* [Financial Analyses and Behavioural Finance] (Nomos 2009) 71–107 on the BLE criticism and its impact on the ECMH and Veil 'Dogmatics and Interdisciplinarity' (n 28) § 6 paras 29–30 on how the results of BLE research can be utilized in the interpretation of capital markets law, mainly for the purposes of interpreting standards such as the reasonable investor and for normative enquiries on behavioural anomalies on the markets. As an example, Veil mentions the German BGHZ 192 (2011) 90 (IKB Deutsche Industriebank AG) ruling that held that *a reasonable investor must take into account the fact that other market participants behave irrationally.* See BGHZ 192 (2011) 90 at para 44 'Ein verständiger Anleger - der auch irrationale Reaktionen anderer Marktteilnehmer zu berücksichtigen hat […]' (translation by the author).

[58] Cf. Becht and others (n 5).

[59] Veil 'Dogmatics and Interdisciplinarity' (n 28) § 6 para 1. Veil finds that many of the post crisis regulatory efforts in the EU are influenced by US regulatory action and scholarship and consequently argues that a comparative approach is *necessary* for legal research in the area of EU securities law. Likewise, see also Janne Häyrynen, *Pörssiväärinkäytökset* [Stock Exchange Abuses] (Lakimiesliiton kustannus 2009) 18–19, who similarly argues that as market abuse is an international phenomenon, a comparative method may be utilized to study it. Cf. Knuts, *Kursmanipulation på värdepappersmarknaden* (n 41) 23–25 on the general differences between some jurisdictions.

Likewise, much of the economic analysis relating to how modern capital markets operate and may be manipulated (by activist investors) stems from jurisdictions with well-developed capital markets, such as the US. The analysis of the price discovery mechanism and the relationship between genuine supply and demand on public markets is universal as well. Furthermore, the taxonomy and definitions that relate to activist investing on public markets have been subject to influential international research and rigorous academic debate.[60] This thesis recognizes and further develops the taxonomy on activist investing that has been established in international legal and economic literature, particularly in part III below.

Part III also utilizes (quantitative and qualitative) economic research to describe activist investing as a phenomenon and to establish its effects on the regulated markets at large. However, this thesis does not on a stand-alone basis engage in any quantitative or qualitative empirical research to describe and define activist investing as a phenomenon, but utilizes existing empirical studies instead in order to establish a true and fair description of activist investing as a phenomenon.[61] Nonetheless, the thesis also makes some references to publicly available European (and international) sources, such as issuer press releases and interviews with activist investors, to identify strategies, arguments, practices and procedures that activist investors and issuers have employed. The purpose of such references is mainly empirical and they should not be read to suggest any normative interpretation of the law.

As discussed above, international multidisciplinary research may be useful and offer a persuasive, empirical perspective on activist investing and market abuse, provided that it is relevant for the research question and the assessment of issues that arise under the EU market abuse regime.[62] However, it must be emphasized that such sources are not in a

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[60] For an overview, see, for example, Allaire and Dauphin (n 4); Strine LE, 'Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System' (2017) 126(2) *Yale LJ*, 1870; Nili (n 43) 157. Reportedly, the world's first activist investor was the Dutchman Isaac Le Maire, who sold short shares in the *Vereenigde Oostindische Compagnie* in 1609, whereafter the world's first ban on short selling was implemented in 1610. See Jonathan Koppel 'Shareholder Advocacy and the Develipment of the Corporation: The Timeless Dilemmas of an Age-old Solution' in Jonathan Koppel (ed), *Origins of Shareholder Advocacy* (Palgrave Macmillan 2011) 1–26.

[61] On the role, importance and limitations of empirical legal research concerning market abuse, see, Julia Black, 'Financial Markets' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 151–171.

[62] See Veil 'Dogmatics and Interdiscplinarity' (n 28) § 6 para 1. See also Justice John L Murray 'Methods of Interpretation – Comparative Law Method' in European Court of Justice (ed), *Actes Du Colloque Pour Le Cinquantième Anniversaire des Traités De Rome* (Office des publications officielles des Communautés européennes 2007) 39–47 on the importance of the comparative method in CJEU jurisprudence. Murray finds

doctrinal sense authoritative for the interpretation of the EU market abuse provisions, but merely supportive and persuasive to the extent that such sources are appropriate in the analysis of the underlying issues. From a doctrinal viewpoint, an appropriate economical, empirical or comparative analysis of the law is not possible without prior doctrinal consideration of whether such analysis is appropriate at all.[63] In the end, any comparative, economical, or empirical analysis needs to be justifiable using the doctrinal method.[64] Successful employment of the doctrinal method is consequently also a necessary prerequisite for undertaking other types of examination of the law,[65] if and where such further examination is appropriate and justified.

D. *Outline of the Study*

A holistic and true analysis of the research question requires a comprehensive overview of the relevant regulations and their objectives and the market abuse provisions' contextual nature; to this end, part II presents the relevant EU framework, methods for interpreting EU law, the overall objectives of the EU market abuse regime and the economic rationale behind the market abuse prohibitions. This enables a contextual and teleological assessment of the relevant provisions in relation to activist investing.[66]

To answer the research question, this thesis must also describe and define *activist investing* as a phenomenon. Part III consequently introduces the reader to the most typical activist strategies in closer detail and presents the communicative legal definition of activist investing that is employed in the doctrinal analysis. It also presents a brief overview of activist investing in Europe, with a particular focus on two forms of activist investing,

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that the comparative law method is of primary importance for the CJEU and is 'only second to its use of the teleological method even if the literal approach is invariably the starting point.' Cf. Pauliine Koskelo, 'Évaluation générale: le point de vue des différents systèmes de droit' in European Court of Justice (ed), *Actes Du Colloque Pour Le Cinquantième Anniversaire des Traités De Rome* (Office des publications officielles des Communautés européennes 2007) 25ff. Koskelo finds that the CJEU's use of the comparative method is 'pragmatic and instrumental rather than scientific. Even if a comparative analysis may be of interest for different reasons in different contexts, such an analysis nevertheless serves the same ultimate purpose, namely the search for an appropriate solution to a given problem of interpretation.'

[63] See Jan M Smits, 'Law and Interdisciplinarity: on the Inevitable Normativity of Legal Studies' (2014) 1(1) *Critical Analysis of Law*, 75ff. See also Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' (n 51) 217–218.

[64] Smits, 'Law and Interdisciplinarity: on the Inevitable Normativity of Legal Studies' (n 63) 75. See also Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' (n 51) 217–218.

[65] Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' (n 51) 209.

[66] An overview of the economic theories and ratios is necessary for a complete analysis and understanding of the research questions above, and why we even regulate and prohibit market abuse on the markets. On the contextual and teleological methods of interpretation in the context of market abuse, see, for example, Kai Kotiranta, *Sisäpiiritiedon syntyminen. Kontekstuaalinen tulkinta.* [Emergence of Inside Information. A Contextual Interpretation.] (Suomalainen Lakimiesyhdistys 2014) 132–139, 165–168.

namely activist short-selling and offensive shareholder activism. Ultimately, this part of the thesis argues that a categorical view on activist investing is to be dismissed.[67]

Part IV then systematizes the relevant EU insider regime in relation to activist investing. In doing so, it examines the EU insider regime, with appropriate references to legislative history, CJEU case law, and the national regimes of the Member States (where necessary) in order to establish a comprehensive analysis of the EU insider rules in relation to activist investing. Part IV also identifies and analyses some common issues that relate to establishing legitimate behaviour defences in connection with activist investing. Part IV finds that non-public activist investors (i.e. activist investors who engage with public companies in private) may face hurdles from the insider regime. Part IV consequently further finds that the renewed EU market abuse regime may contribute to an upsurge in public activism, since activist investors may prefer to avoid the insider prohibitions by going public with their demands and agenda.

Similarly, part V analyses and systematizes the relationship between activist investing and the EU market manipulation provisions. It also examines the key issues that need to be considered when activist investors disseminate information in the public sphere. Part V finds that public activist investors must be aware of the prohibitions related to the unlawful disclosure of inside information and market manipulation and certain disclosure obligations that producers and disseminators of *investment recommendations* or *information suggesting or recommending an investment strategy* must follow. Part V further explores what effect, if any, the freedoms of expression and the press have on the assessment of market abuse and activist investing. Finally, part VI summarizes the main findings and presents some concluding remarks.

[67] Some commentators have suggested that certain forms of activist investing, such as activist short-selling, would in practice amount to market manipulation. See, for example, the arguments brought forward (and dismissed) by James Angel and Douglas McCabe, 'The Business Ethics of Short Selling and Naked Short Selling' (2009) 85(1) *J Bus Ethics* 239, 241–249. See also Joel Slawotsky, 'Hedge Fund Activism in an Age of Global Collaboration and Financial Innovation: The Need for a Regulatory Update of United States Disclosure Rules' (2016) 35 *Rev BFL* 272, 279 and citations mentioned therein. The empirical research in part III suggests, however, that lawful activist investing on average contributes to improving the operational and share price performance of targeted firms in Europe, enhances the price discovery mechanism on the markets and increases long-term welfare by discouraging fraudulent behaviour.

II. THE EU MARKET ABUSE REGIME AND THE INTERPRETATION THEREOF

A doctrinal interpretation of the applicable *acquis communautaire* (that is, the body of European law) in relation to activist investing forms a central part of this thesis. The purpose of this section is to identify the relevant EU provisions applicable on activist investing. The section also provides guidance on how the EU market abuse provisions are likely to be interpreted by the CJEU (and national courts when they enforce the EU law *prima facie*) in light of the overarching objectives of the market abuse regime. The (normative) content of these objectives are analysed in the last part of this section as well.

A. *The Regulatory Framework*

The primary sources of law relating to activist investing under the EU market abuse regime are the EU Market Abuse Regulation (Regulation No. 596/2014/EU, including accompanying commission delegated regulations and various Lamfalussy level 2 and level 3 standards) and the EU Market Abuse Directive (Directive 2014/57/EU). The latter complements the MAR by harmonizing sanctions throughout the EU by setting minimum rules for criminal offences and criminal sanctions for persons who violate the market abuse prohibitions. A total of 13 delegated and implementing regulations and one implementing directive have been adopted on the basis of the MAR.[68] The EU Regulation on Short Selling (Regulation No. 236/2012/EU) is another key piece of regulation applicable to activist investing strategies that include short selling.

The Lamfalussy procedure forms a highly relevant part of the European securities regulation, and the MAR, in particular. The four-level legislative procedure was originally adopted with the aim of developing more flexible, effective and transparent EU securities regulation.[69] Today, the four levels of the Lamfalussy procedure consist of different means for regulating and steering the markets. The legislative acts (regulations and directives)

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[68] European Commission, 'Implementing and Delegated Acts for Regulation (EU) No 596/2014 on Market Abuse' <https://ec.europa.eu/info/sites/info/files/mar-level-2-measures-full_en.pdf> accessed 30 October 2017. See also Hansen (n 20) 367–370 for a general overview of the regulations. This thesis has considered the English, Swedish, Finnish and German language versions of the provisions examined in this thesis. Some influential discrepancies (as noted and discussed in n 270 below) in the other language versions may be relevant in the analysis, too, but such influence ought to be mitigated by the contextual and teleological methods of interpretation addressed in section III.B. below.

[69] Rüdiger Veil, 'History' in Rüdiger Veil (ed), *European Capital Markets Law* (2nd edn, Hart Publishing 2017) § 1 paras 16–18. See also Moloney, *EU Securities and Financial Markets Regulation* (n 33) 859–891; Alastair Hudson, *Securities Law* (2nd edn, Sweet & Maxwell 2013) 33–89 on the importance and implementation of the Lamfalussy model in EU law-making.

form the first level of the process; level two includes delegated powers and implementing measures; level three includes consultation and guidance by the relevant authorities; and level four consists of the supervision and enforcement mechanisms, principally of the competent authorities in each Member State.[70]

However, it should also be noted that certain forms of activist investing, such as offensive shareholder activism, are also governed the Member States laws that apply to shareholder rights. This includes national corporation acts, securities laws, and takeover acts and rules. For example, a common offensive shareholder activist strategy is to utilize various minority rights, such as the right to call special meetings, to drive pursued changes in company policy through. Many minority shareholder rights and the voting thresholds required to use them are still governed by the substantive national laws of each Member State.[71] Moreover, many of the regulations that are also relevant for analysing activist investing more generally are either directly applicable EU regulations or national regulations based on EU directives, such as the EU Transparency Directive (TD)[72] and the Shareholders' Rights Directive (SRD),[73] which aim to harmonize the capital market and company laws in the EU Member States.[74] The EU regulations and directives are further

[70] Cf. Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L 331/84, recital 2 and Lamfalussy follow-up — Future Structure of Supervision European Parliament resolution of 9 October 2008 with recommendations to the Commission on Lamfalussy follow-up: future structure of supervision (2008/2148(INI)) [2010] OJ C 9E/48. See also Fabian Walla, 'Process and Strategies of Capital Markets Regulation in Europe' in Rüdiger Veil (ed), *European Capital Markets Regulation* (Hart Publishing 2017) § 4 paras 9–11 and Jesper Lau Hansen, 'Coping with Emerging Federalism – Working with Securities Trading in the European Union' (2011) 80 *Nord J Intl L*, 355–365 on the importance of the Lamfalussy model in modern EU capital markets regulation.

[71] See Alessio M Pacces, 'Hedge Fund Activism and the Revision of the Shareholder Rights Directive' (2017) European *Corporate Governance Institute (ECGI) – ECGI Working Paper Series in Law – Law Working Paper No. 353/2017* <https://papers.ssrn.com/sol3/papers.cfm ?abstract_id=2953992> accessed 30 October 2017. Pacces estimates that some of the mandatory rules proposed in the SRD may curb activist investing.

[72] Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC [2013] OJ L 294/13.

[73] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L 132/1. Member States shall in accordance with Article 2 bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 10 June 2019.

[74] It should be further noted that substantive national law of the Member States is to be interpreted in conformity with EU directives. See, for example, Case C-106/89 *Marleasing SA v la Comercial Internacional de Alimentación SA* EU:C:1990:395 [1990] ECR I-4135, para 8; Case C-462/99 *Connect*

supplemented by the corporate governance rules in the Member States. These 'soft law' sources often contain recommendations and suggestions that aim at implementing internationally accepted standards of good corporate governance and such recommendations are often *de facto* widely accepted.[75]

Ultimately, supervision and enforcement of the EU market abuse regime is *prima facie* handled by the NCAs and the European Securities and Markets Authority (ESMA). The guidelines, handbooks, recommendations, and administrative decisions of these authorities are highly relevant for the analysis in this thesis, as they may be legally binding if they have a legal basis in an applicable EU instrument and as they present the opinion of the enforcement authority on these issues. It should be noted that opinions and recommendations that lack an explicit legal basis are legally non-binding.[76] However, even non-binding opinions (especially those of the ESMA) have been identified to have an indirect binding effect.[77] Nonetheless, the scarcity of existing CJEU case law further underpins the importance of guiding soft-law sources, in particular of those issued by the supervisory authorities.

As noted above, this thesis also makes some references to relevant rulings in the Member States. However, it should be noted in this context that interpretations by national courts or

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Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission EU:C:2003:297 [2003] ECR I-5197, para 38. Cf. Case C-212/04 *Adeneler v Ellinikos Organismos Galaktos* EU:C:2006:443 [2006] ECR I-6057, para 110; Case C-268/06 *Impact v Minister for Agriculture and Food* EU:C:2008:223 [2008] ECR I-2483, para 100; Case C-378/07 *Angelidaki v Organismos Nomarkhiaki Aftodiikisi Rethimnis* EU:C:2009:250 [2009] ECR I-3071, para 199 (a national court does, however, not need to adopt a *contra legem* interpretation).

[75] See, for example, Hansen 'Coping with Emerging Federalism – Working with Securities Trading in the European Union' (n 70).

[76] See Rüdiger Veil, 'Sources of Law and Principles of Interpretation' in Rüdiger Veil (ed), *European Capital Markets Law* (2nd edn, Hart Publishing 2017) § 5 para 37. Recommendations are non-binding suggestions on a particular issue. Similarly, an opinion is the (non-binding) view of the relevant authorities on the issue in question. Cf. Lau Hansen (n 70) 365: 'The problem is that many Member States […] consider a recommendation "morally" binding and will strive to implement it just as they would a directive. Although many recommendations are sensible, the reliance on recommendations as a surrogate for binding instruments of EU law risk to short cut the division of powers intended by the treaties.' See also Rob Van Gestel and Thomas van Golen, 'Enforcement by the New European Supervisory Agencies: Quis Custodiet Ipsos Custodes?' in Kai Purnhagen and Peter Rott (eds), *Varieties of European Economic Law and Regulation* (Springer 2014) 766–767 (who emphasize that the ESMA 'soft law' guidelines and recommendations are 'not so soft as one would perhaps expect').

[77] Lau Hansen (n 70) 361: 'it is important to note that even voluntary self-regulation and similar non-binding norms such as recommendations may have an indirect binding effect. It is well known that the law of tort often relies on an assessment of what constitutes proper behaviour and that this assessment is not limited to standards of law, but may rely on non-binding norms if generally observed or otherwise recognised as proper […] *there is the risk that non-observance may be regarded as reckless and may thus involve liability in a court of law*.' (Emphasis added). On the implementation of the Lamfalussy process and the binding nature of Lamfalussy level 2 and 3 guidance, see Hansen (n 70) 360–363 and Emilios Avgouleas, *Governance of Global Financial Markets: The Law, the Economics, the Politics* (CUP 2012) 213–258.

authorities do not bind the CJEU in its interpretation of EU law.[78] A national authority on the interpretation of an EU instrument is only authoritative in the Member State in question. Nonetheless, a national authority does create a presumption concerning how the EU law is interpreted,[79] as the Member States' courts ought to interpret the EU instruments in a uniform manner and request a preliminary ruling on the interpretation in the event of uncertainty or ambiguity.[80] Rulings by the CJEU constitute the ultimate authority on the interpretation of EU law, and it is the only court that can authoritatively construe EU law.[81]

B. *Methods for Interpreting the EU Market Abuse Provisions*

Various methods for interpreting EU law exist, but the CJEU has expressly referred to four principal methods of interpretation in its jurisprudence: literal (which is also commonly referred to as the textual method), historical, contextual and teleological.[82] However, it has

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[78] Cf. Koskelo (n 62) 25: 'the European level judge and the national judge are in similar positions: just as foreign law or comparative law are not binding sources of law for a national judge, national law or comparative law are not binding sources of law for the European judges.' It should be further noted that the CJEU is not bound by its own precedents, even if it is highly likely to follow them for the sake of consistency. See, for example, Marc Jacob, *Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business* (CUP 2014) 243–250. Jacob finds that the CJEU appears to follow its own precedents far more dutifully than many common law courts. Similarly, Gabriël Moens and John Trone, *Commercial Law of the European Union* (Springer 2010) 338–339. See also Case 112/76 *Renato Manzoni v Fonds National de Retraite des Ouvriers Mineurs* EU:C:1977:152 [1977] ECR 1647, Opinion of AG Warner, 1663.

[79] For example, a ruling based on EU law by the Supreme Court in Member State A (i) creates a presumption that the law is to be interpreted in a certain manner, and (ii) indicates that the Supreme Court in question did not consider the law to contain any uncertainty as to the interpretation thereof, as it would otherwise have been required to refer the matter to the CJEU under the *acte clair* doctrine. A deviating interpretation by a Supreme Court in Member State B would consequently require that the court would refer the decision to the CJEU, as there would be obvious uncertainty as to the interpretation of EU law. Cf. Murray (n 62) 40. Murray cites Case C-283/81 *SRL Cilfit v Ministry of Health* EU:C:1982:335, [1982] ECR 3415 and finds that a national Court which is relying on the notion of *acte claire* as a ground for declining to request a precedent pursuant to TFEU Article 267 (former Article 234) must do so only when the meaning of the EU law is obvious, not only to the national court itself, but also 'to the Courts of other Member States and [the CJEU]'.

[80] See, for example, Murray (n 62) 40. On the *acte clair* doctrine in good faith, see also, Xavier Groussot 'Constitutional Dialogues' in Matej Avbelj and Jan Komárek (eds) *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 313, 328–329 and 335.

[81] To date, the CJEU has not issued any rulings on the interpretation of the MAR. However, several rulings that have been given under the previous MAD regime, which to a large extent uses same or similar wording as the MAR, have either been implemented in the MAR or may otherwise be relevant for the interpretation of the EU market abuse provisions. Cf. Bergþórsson (n 41) 6–7; Rüdiger Veil 'Foundations' and 'Insider Dealing' in Rüdiger Veil, *European Capital Markets Law* (2nd edn, Hart Publishing 2017) § 13 para 1 and § 14 para 15. Veil emphasizes that an understanding of the CJEU's interpretative principles under the MAD 2003 regime is essential for an understanding of how the inside provisions operate under MAR regime.

[82] See Case T-23/02 *Sumitomo Chemical Co Ltd v Commission* EU:T:2005:349 [2005] ECR II-4065, para 102; Case T-374/04 *Germany v Commission* EU:T:2007:332 [2007] ECR II-4431, paras 92 and 149; Case T-349/06 *Germany v Commission* EU:T:2008:318 [2008] ECR II-2181, para 66. An additionally method of interpretation that is of importance for the CJEU is the comparative method, albeit not expressly referred to in case law. The importance of the comparative method has however been underpinned by 'insider accounts' from the CJEU. See, for example, Koskelo (n 25) 23–25 with reference to articles authored by the current and former judges of the CJEU. An excellent article on how the CJEU (and national courts) interprets EU

been argued that the literal and teleological forms of interpretation form the main methods of interpretation.[83] The literal method is invariably the starting point for legal interpretation, but the CJEU itself asserts that it is not a sufficient method.[84] One reason is that it may not be plausible to consider all equally binding language versions of a particular provision when it interprets EU law, as discrepancies between the different language versions exist.[85] The contextual and teleological methods of interpretation have consequently been established as complementary methods of interpretation to ensure the uniform interpretation of EU law.[86] The former President of the Supreme Court and Chief Justice of Ireland captures the essence of EU law interpretation as follows:

> [A]s the *Cilfit* case points out, national Courts must bear in mind several special factors when interpreting or applying [EU] law. These include the fact that '*[EU] law uses terminology which is peculiar to it. […] legal concepts do not necessarily have the same meaning in [EU] law and in the law of the various Member States. […] Every provision of [EU] law must be placed in its context and interpreted in the light of the provisions of [EU] law, [regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.]*' It seems evident that national Courts, in interpreting or applying [EU] norms[,] must adopt the same method of interpretation as the Court of Justice.[87]

Likewise, Veil argues that the contextual and teleological methods of interpretation are highly important in the interpretation of the directly applicable EU market abuse regime,

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law is 'To Say What the Law of the EU is: Methods of Interpretration and the European Court of Justice' by Koen Lenaerts and José A Gutiérrez-Fons, (2014) 20(2) *Colum J Eur L* 3.

[83] See Murray (n 62) 39. See also Lenaerts and Gutiérrez-Fons (n 82) 8–34 and Inger Johanne Sand, 'European Legal Method – A New Teleology, Law-in-context, a New Legal Realism or Hybrid Law?' in Ulla Neergaard and Ruth Nielsen, *European Legal Method* (Djøf forlag 2013) 211–237.

[84] See, for example, Case C-233/96 *Denmark v Commission* EU:C:1998:450 [1998] ECR I-5759, para 38 and Case C-245/97 *Germany v Commission* EU:C:2000:687 [2000] ECR I-11261, para 72 (it would not be appropriate to depart from the normal meaning of the words used). Cf. Case 6/60 *Jean-E. Humblet v Belgium* EU:C:1960:48 [1960] ECR 559, 575 and Case T-349/06 *Germany v Commission* EU:T:2008:318 [2008] ECR II-2181, para 67 (literal method of interpretation is not a sufficient method of interpretation). Cf. Case C-112/99 *Toshiba Europe GmbH v Katun Germany GmbH* EU:C:2001:566 [2001] ECR I-7945, para 35 (wherein the court dismissed a literal interpretation on the basis that it would result in inconsistency with another directive). Cf. Moens and Trone, *Commercial Law of the European Union* (n 78) 342: 'Where legal provisions are clear, the Court will usually not depart from their literal (or plain) meaning. The Court has described the plain meaning as the *normal meaning of the words used.*' See also Murray (n 62) 39.

[85] See Case C-283/81 SRL Cilfit v Ministry of Health EU:C:1982:335 [1982] ECR 3415, para 18; Case C-219/95 P *Ferriere Nord SpA v Commission* EU:C:1997:375 [1997] ECR I-4411, para 15; Case C-236/97 *Skatteministeriet v Aktieselskabet Forsikrinsselskabet Codan* EU:C:1998:617 [1998] ECR I-8679, para 25; Case C-455/05 *Velvet & Steel Immobilien und Handels GmbH v Finanzamt Hamburg-Eimsbüttel* EU:C:2007:232 [2007] ECR I-3225, para 16; Case C-261/08, *García v Delegado del Gobierno en la Región de Murcia* EU:C:2009:648 [2009] ECR I-10143, para 55. See also Moens and Trone (n 78) 345.

[86] See Moens and Trone (n 78) 341–346 and Veil, 'Sources of Law and Principles of Interpretation' (n 76) § 5 para 39. On the most notable lingual discrepancies in the field of this thesis, see n 270 below.

[87] Murray (n 62) 40, citing Case C-283/81 *SRL Cilfit v Ministry of Health* EU:C:1982:335 [1982] ECR 3415 (Citations omitted, emphasis added). See also Moens and Trone (n 78) 343–344.

and that national courts and supervisory authorities '*may not refer to national laws and methods of interpretation but must rather apply the European doctrine of interpretation*' in their interpretation of the MAR.[88] These two methods of interpretation will be shortly elaborated on below.

The teleological method of interpretation is used by courts when they interpret legislative provisions in light of the purpose, values, and legal, social and economic goals that the provisions aim to achieve.[89] It seems that the CJEU has traditionally preferred teleological interpretation in the context of market abuse.[90] The undertaken teleological approach underpins the importance of a holistic analysis that also considers the general aims of the EU market abuse regime, such as enhanced market integrity, efficiency, and increased protection for investors. As a result, behavioural law and economics analysis also becomes relevant for assessing how certain activist conduct affects the market, and consequently whether such conduct is and ought to be prohibited under the EU market abuse regime.

The contextual method of interpretation is closely intertwined with the teleological one, as the method deduces concepts and principles from the law itself and applies them in context.[91] As modern capital markets have become more complex, the regulation of securities markets has become increasingly principle-based.[92] Principle-based regulation entails moving away from detailed and prescriptive rules towards general principles and guidelines.[93] However, principle-based regulation has been heavily criticised on the basis

[88] Veil, 'Sources of Law and Principles of Interpretation' (n 76) § 5 para 35.

[89] Constance Grewe, 'A comparison of the Methods of Interpretation of Domestic Constitutional Courts and the European Court of Human Rights' (2001) 61 *HJIL* 459, 472; Lenaerts and Gutierrez-Fons (n 82) 6 fn 17.

[90] See, for example, Case C-45/08 *Spector Photo Group NV and Van Raemdonck* EU:C:2009:806 [2009] ECR I-12073, operative part: 'On a proper interpretation of Article 2(1) […] on insider dealing and market manipulation (market abuse) [… and] [t]he 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.*' (Emphasis added.) See also Veil (n 76) § 5 para 47. Veil cites the *Spector* case as one example where the CJEU has interpreted securities law provisions in light of the recitals of the directive.

[91] See Veil, 'Sources of Law and Principles of Interpretation' (n 76) § 5 paras 41–42.

[92] On this development, see, for example, Wundenberg (n 35) § 33 paras 6–13. See also Janne Häyrynen, *Pörssiväärinkäytökset* (n 59) 46–57 for a general discussion on the benefits and detriments of principle-based regulation.

[93] See Moloney, *EU Securities and Financial Markets Regulation* (n 33) 856 fn 15. Cf. Cristie Ford, 'Principle-Based Securities Regulation' *A Research Study Prepared for the Expert Panel on Securities Regulation* (12 December 2008) 3 <http://www.expertpanel.ca/documents/research-studies/Principles%20Based%20Securities%20Regulation%20-%20Ford.English.pdf> accessed 30 October 2017: 'Principles-based regulation is generally believed to be more flexible and more sensitive to context, but potentially less certain. […] In the context of statutory drafting, principles-based regulation means legislation that contains more directives that are cast at a high level of generality. […] A principles-based regulator focuses on defining broad themes, articulating them in a flexible and outcome-oriented way […]'. See also

that it may result in legal uncertainty and unpredictability for market participants.[94] The approach chosen in the EU market abuse prohibitions could arguably be described as a balanced compromise between flexibility and certainty on the one hand and the rules-based and principle-based approach on the other. The MAR itself takes a multifaceted approach by employing the Lamfalussy process: the core definitions of market abuse (e.g. of market manipulation) are left at a principal level, as they are deliberately worded in broad, general terms; in contrast, the delegated regulations and guidelines set out more specific and detailed indicative norms concerning prohibited behaviour.[95] The importance of contextual and teleological interpretation consequently increases, especially in situations in which detailed Lamfalussy level 2 or 3 guidance is not available or when a literal interpretation might not provide sufficient direction on the issue at hand.[96]

However, it must be noted that the teleological and contextual methods of interpretation adapted by the CJEU can in many ways be deemed to be in stark contrast with the defensive, more legalistic, textual method of interpretation that is representative for interpretation of criminal law in particular.[97] It is very likely that a literal reading of a

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Emilios Avgouleas, *Governance of Global Financial Markets: The Law, the Economics, the Politics* (n 77) 213–258.

[94] See Wundenberg (n 35) § 33 paras 6–13; Black, 'The rise, fall and fate of principles-based regulation' (n 35) 3–34; Black, 'Regulatory Styles and Supervisory Strategies' (n 35) 217–253 on uncertainty and lack of predictability and the detrimental effects thereof as a result of principle-based securities regulation. See also Mårten Knuts, *Kursmanipulation på värdepappersmarknaden* (n 41) 181–183. Cf. Andreas Martin Fleckner, 'Regulating Trading Practices' in Niamh Moloney, Eilís Ferran, and Jennifer Payne (eds), *Oxford Handbook of Financial Regulation* (OUP 2015) 611–612. Fleckner argues that the choice between principles-based and rules-based trading regulation should not be an either/or question. According to Fleckner, the best solution would be a set of core principles at the supranational level, whereas the specifics regarding the level of regulatory detail, the types of regulatory intervention, and surveillance and enforcement would be best left to local regulators to decide. There is clearly a stark contrast between preferences for subsidiarity and the aims of uniformity of the MAR (recitals 3–5, 45, 56 and 82–3). Arguably, the MAR and accompanying Lamfalussy level 2 and 3 regulations do not leave much room for local margin of appreciation in terms of regulatory intervention, and surveillance and enforcement. It could further be argued that a more uniform set of rules will increase legal certainty and predictability for the market participants.

[95] European Commission, 'Impact Assessment: Accompanying the document Proposal for a Regulation of The European Parliament and of the Council on insider dealing market manipulation (market abuse) and the Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation' SEC (2011) 1217 final (hereinafter 'MAR Impact Assessment) 11.

[96] The use of level 3 guidance has been described to be 'dubious' at best. See, for example, Hansen, 'Market Abuse Case Law – Where Do We Stand With MAR?' (n 20), who notes that the ESMA Q&A practices are highly useful but dubious from a legal certainty perspective.

[97] Knuts, *Kursmanipulation på värdepappersmarknaden* (n 41) 77–87; Veil 'Dogmatics and Interdisciplinarity' (n 28) § 6 para 9 and Murray (n 62) 39. Murray points out that there has always existed a tension between 'the search for the "true intent" of a legal norm and the desire for certainty and transparency in the application of the law' in interpretation of legal texts. The courts must strike an appropriate balance between these two criteria.

provision may result in a different outcome than a teleological reading.[98] Some national rulings and legal scholars have even suggested that a dual interpretation of the MAR provisions would be plausible, depending on the (criminal or civil) nature of the proceedings at hand.[99] This approach has been rejected in CJEU case law,[100] however, and many scholars agree that it has rightfully so been rejected.[101] This thesis also rejects the argument, as no authoritative support exists for the claim that the MAR would be intended to create two or more alternative standards of 'inside information' or 'misleading information' that could be dependent on the civil, administrative or criminal nature of the proceedings.[102] Moreover, such a reading of the MAR would certainly conflict with the regulation's aims of increased market certainty and efficiency.

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[98] See also Knuts (n 41) 150–154 on a practical example how the teleological approach in EU law ('offensive interpretation') may result in a different outcome than a literal ('defensive interpretation') reading.

[99] See Veil (n 59) § 6 paras 8–11: 'Some regard such a dual interpretation as possible, arguing that the interpretation of civil law rules follows civil law principles, which allow gaps to be filled by way of analogy. […] In cases in which violations of capital markets law are sanctioned both under administrative/ criminal law and under civil law, the supervisory authorities and the courts in some Member States may reach different results when interpreting these provisions. An example for this can be found in German legal practice in Daimler/Geltl. In the proceedings regarding an administrative fine, the OLG Frankfurt/ Main developed a different understanding of the term "inside information" than the courts responsible for the test case under civil law.' (Citations omitted). Cf. Ulrich Segna, 'Die sog. gespaltene Rechtsanwendung im Kapitalmarktrecht [The so-called Dual Application in Capital Market Law]' (2015) 44(1) *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 84–124.

[100] Case C-384/02 *Grøngaard and Bang* EU:C:2005:708 [2005] ECR I-9939, para 28: 'The criminal nature of the proceedings brought against Mr Grøngaard and Mr Bang and the principle that penalties must have a proper legal basis applicable in such proceedings does not affect the strict interpretation to be given to Article 3(a) of Directive 89/592. As the Advocate General maintains in point 24 of his Opinion, the interpretation of a directive's scope cannot be dependent upon the civil, administrative or criminal nature of the proceedings in which it is invoked.' Cf. Opinion of Poiraus Maduro at para 24: 'Whereas I agree that *the application of the principle of legality is required by the criminal nature of the case* [!], I think it has a different impact from that which Mr Grøngaard and Mr Bang have submitted. […] Penalties for infringement of provisions of the Directive are thus not necessarily of a criminal nature as in Paragraph 94(1)(1) of the Værdipapirhandelslov. The interpretation of the scope of a directive may not, however, be conditional upon the type of national proceedings (civil, criminal, administrative) in which that interpretation is relied on. […] Therefore, while the Court will limit itself to giving an interpretation of the Directive, the national court will be entrusted with the duty 'to ensure that [the legality] principle is observed when interpreting, in light of the wording and the purpose of the Directive, the national legislation adopted in order to implement it'. The legality principle does not, therefore, of itself require a specific interpretation of the disclosure prohibition included in Article 3(a) of the Directive.' (citations omitted).

[101] Veil (n 59) § 6 para 9.

[102] However, the nature of the proceedings may be significant in the determination of the applicable procedural standards and safeguards, such as the standard of proof, right to self-incrimination and presumption of innocence. The procedural principles in tort-like proceedings on the basis of an alleged breach of the MAR (e.g. Articles 12 and 15) are most likely to be very different from those applied in criminal or administrative proceedings *senso stricto*. The interpretation of the provision itself would however, as noted above, not differ. Additionally, the legal entity (i.e. whether the person is a legal or natural person) of the defendant may have significance as to which extent fundamental rights and constitutional rights apply in the EU and the Member States. These questions may become relevant in the context of activist investing. The EU Charter and the jurisprudence of the ECtHR ought to give guidance on this assessment. These issues do however fall beyond the scope of this thesis. For an overview of the relevant considerations,

When interpreting EU law, one must bear in mind that the *principle of legal certainty* is a generally accepted guiding principle in both EU law and the legal systems of the Member States.[103] For example, in *Société d'investissement pour l'agriculture tropicale SA (SIAT) v État belge*, the CJEU held that

> a [tax evasion prohibition] framed in such [imprecise] terms does not make it possible, at the outset, to determine its scope with sufficient precision and its applicability remains a matter of uncertainty. Such a rule does not, therefore, meet the requirements of the *principle of legal certainty, in accordance with which rules of law must be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals* […].[104]

Moreover, CJEU case law has established that the principle of legal certainty requires that EU law 'enable[s] those concerned to know *precisely the extent of the obligations which are imposed on them*'[105] and that '[i]*ndividuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly*'.[106] The CJEU has further held that the '*imperative of legal certainty must be observed all the more strictly in the case of rules liable to have financial consequences*'.[107] The final finding also holds most certainly true for cases that concern the interpretation of the EU market abuse provisions, which impose administrative and criminal sanctions on individuals. The CJEU has ultimately ruled that '*a rule which does not meet the requirements of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued*'.[108]

see, for example, Vasiliki Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart Publishing, 2015) 165–74 and references therein.

[103] On the principle of legal certainty in EU law in general, see, for example, Elina Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice* (Ashgate 2013) 51–97.

[104] Case C-318/10 *Société d'investissement pour l'agriculture tropicale SA (SIAT) v État belge* EU:C:2012:415 [2012], paras 57–58 (Emphasis added). See also Case C-17/03 *VEMW and Others* EU:C:2005:362 [2005] ECR I-4983, para 80; Joined Cases C-72/10 and C-77/10 *Costa and Cifone* EU:C:2012:80 [2012], para 74.

[105] Case C-158/06 *Stichting ROM-projecten v Staatssecretaris van Economische Zaken* EU:C:2007:370 [2007] ECR I-05103, para 25. See also Case C-209/96 *United Kingdom v Commission* EU:C:1998:448 [1998] ECR I-5655, para 35; Case C-108/01 *Consorzio del Prosciutto di Parma and Salumificio S. Rita* EU:C:2003:296 [2003] ECR I-5121, para 89; Case C-255/02 *Halifax and Others* EU:C:2006:121 [2006] ECR I-1609, para 72.

[106] Case C-158/06 *Stichting ROM-projecten v Staatssecretaris van Economische Zaken* EU:C:2007:370 [2007] ECR I-05103, para 25. See also Case C-143/93 *Van Es Douane Agenten* EU:C:1996:45 [1996] ECR I-431, para 27; Case C-248/04 *Koninklijke Coöperatie Cosun* EU:C:2006:666 [2006] ECR I-10211, para 79.

[107] Case C-158/06 *Stichting ROM-projecten v Staatssecretaris van Economische Zaken* EU:C:2007:370 [2007] ECR I-05103, para 26. See also Case C-94/05 *Emsland-Stärke* EU:C:2006:185 [2006] ECR I-2619, para 43; Case C-248/04 *Koninklijke Coöperatie Cosun* EU:C:2006:666 [2006] ECR I-10211, para 79.

[108] Case C-318/10 *Société d'investissement pour l'agriculture tropicale SA (SIAT) v État belge* EU:C:2012:415 [2012], para 59 (Emphasis added). See also MAR Recital 86 wherein it is set out that the

Moreover, it has further been pointed out that market certainty and efficiency require that *legal certainty* is the steering principle in the interpretation of the market abuse provisions.[109] Notwithstanding this, researchers such as Veil argue that the teleological approach has a central role to play in the interpretation of EU capital markets law.[110] Veil finds that while most legislation in this field simply summarizes the general aims of market efficiency and investor protection, in some cases the purpose of the regulation or act is actually described in detail—which makes it possible to formulate a clear (and certain) teleological answer to the question of interpretation.[111] Somewhat similarly, Paunio finds that the principle of legal certainty 'takes its specific form, in context, in connection with each case separately. This is so not least because of the contextuality of interpretation and the absence of pre-interpretive meaning.'[112]

In conclusion, the principle of legal certainty must be contextually considered, particularly in such situations where detailed Lamfalussy level 2 or 3 guidance is not available, or when the wording of the provisions or their objectives are ambiguous or uncertain. The contextual and teleological methods of interpretation further require that the assessment in each case also considers the general aims of the EU market abuse regime. Consequently, an adequate interpretation does also consider whether and what effects certain conduct may have in light of the aims of the EU market abuse regime. This issue is elaborated on in the following section.

MAR, in accordance with the principle of proportionality in TEU 5, 'does not go beyond what is necessary in order to achieve [its] objective[s].'

[109] See Knuts (n 41) 69–77 and 179–184. Knuts points out that foreseeable (and certain) legal rules are a fundamental prerequisite for efficient markets. See also Aurelien Portuese, Orla Gough and Joseph Tanega, 'The Principle of Legal Certainty as a Principle of Economic Efficiency' (2017) 44(1) *EJLE* 131 (who point out that the legal certainty principle has in CJEU case law also functioned as a principle of economic efficiency). Portuese and others suggest that the CJEU seems to pronounce an efficiency rationale in its application of the principle of legal certainty.

[110] Veil, 'Sources of Law and Principles of Interpretation' (n 76) § 5 para 47. See also Jesper Lau Hansen, 'Coping with Emerging Federalism – Working with Securities Trading in the European Union' (2011) 80 Nordic Journal of International Law 358: 'recitals of the preamble of a EU legislative instrument can be used as guidance to the proper interpretation of the articles of the instrument'. However, it could be argued that when market abuse provisions are interpreted, the interpreter ought to give weight to the literal method of interpretation, see, for example, Lenaerts and Gutiérrez-Fons (n 82) 9: 'the principle of legal certainty may require the [CJEU] to follow a textualist approach. […] [I]n the realm of criminal law, textualism and compliance with the principle of legality […] go hand-in-hand.' See, however, Soros v France App no 50425/06 (ECHR, 6 October 2011), wherein the ECtHR found that the principle does not preclude judicial interpretation.

[111] Veil (n 76) § 5 para 47.

[112] Paunio (n 103) 68. See also Elina Paunio and Susanna Lindroos-Hovinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law' (2010) 16(4) *EJL* 395, 416 wherein the authors argue that legal certainty cannot be assured by means of linguistic argumentation, and that a transparent purposive approach would better meet the requirements of legal certainty and uniformity.

C. *Market Integrity and Efficiency as Overarching Objectives of the EU Market Abuse Regime*

The fundamental aims of the EU market abuse regime are to prevent market abuse and thereby to enhance *market integrity*, *efficiency*, *investor protection* and *public confidence* in the markets.[113] These objectives are of paramount importance for a holistic interpretation of the law.[114] It has further been suggested that the objectives themselves may be attributed a normative meaning.[115] A contextual, teleological or even literal interpretation that attributes normative meaning to the overall objectives of the market abuse regime may have a decisive impact on the outcome of the assessment, as further examined below.

The objectives of the MAR are clearly significant in the interpretation of the market abuse provisions.[116] As such, an analysis of how the MAR is and would be interpreted by the CJEU requires an overview of its objectives. First and foremost, the MAR seeks to safeguard the *integrity* of regulated markets. Austin dissects two descriptions of market integrity and illustrates the interconnectivity between the objectives as follows:

> [Market integrity equals] *the ability of investors to transact in a fair and informed market where prices reflect information* […] and [*m*]*arket integrity exists when stock prices are set in a market free from misinformation.* Such narrow definitions of market integrity conceptually link it to *market efficiency*, in that a market of high integrity should also be efficient because prices will reflect their fundamental value.

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[113] The first article of the MAR sets out that it establishes measures to 'prevent market abuse to *ensure the integrity of financial markets* in the Union and to enhance investor protection and confidence in those markets.' (Emphasis added). The second recital of the MAR further provides that '[a]n integrated, *efficient* and *transparent* financial market *requires market integrity*. The *smooth functioning* of securities markets and *public confidence* in markets are prerequisites for economic growth and wealth. *Market abuse harms the integrity of financial markets and public confidence in securities and derivatives*.' (Emphasis added). For a general overview of the regulatory aims of the European Capital Markets regulation, see Rüdiger Veil, 'Concepts and Aims of Capital Markets Regulation' in Rüdiger Veil (ed), *European Capital Markets Law* (2nd edn, Hart Publishing 2017) 2 § paras 3–14. Market efficiency can further be divided into institutional, operational and allocational efficiency.

[114] See MAR Article 1 and Recital 3–4. Cf. Case C-45/08 *Spector Photo Group NV and Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA)* EU:C:2009:806, [2009] ECR I-12073, operative part 1: 'the prohibition […] 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 […].'

[115] See, for example, Janet Austin, 'What Exactly is Market Integrity? An Analysis of One of the Core Objectives of Securities Regulation' (2017) 8(2) *WMBLR* 215, 216–236 and the citations mentioned therein. *Austin* points out that, for example, market efficiency is metrically measurable. She further argues that a range of metrics should also be developed in terms to measure the other objectives of securities regulation.

[116] See, for example, Case C-45/08 *Spector Photo Group NV and Van Raemdonck* EU:C:2009:806 [2009] ECR I-12073, in particular paras 61–62 and para 1 of the operative part.

> [T]he Capital Asset Pricing Model (CAPM) and the Efficient Capital Market Hypothesis (ECMH) leads to 'a prediction that, in a[n] *informationally efficient* market, prices will reflect as closely as possible the asset's *fundamental value*.' If prices reflect an asset's fundamental value, this will result in the most efficient allocation of capital, as investors will pay no more for securities than their inherent value. As such, *market integrity seems to mean eliminating practices that may interfere with the ability of prices to reflect the asset's fundamental value*. If all material information in relation to a security has been publicly disclosed, prices should reflect the asset's fundamental value due to the incorporation of all this information.[117]

In a broad sense, enhanced market integrity can be understood to have two main objectives. Firstly, it seeks to protect the price-formation mechanism of the market; secondly, it aims to improve access to and the quality of information (in accordance with the ECMH).[118] It could consequently be further concluded that the objectives of the market abuse regime are interconnected, regardless of whether we adapt this broad interpretation of market integrity or its narrow definition of *freedom from misinformation*.[119] An interjunction of the MAR's objectives seems inevitable, as the most essential part of investor protection also includes protection from misinformation.[120]

Moreover, market efficiency is also contingent on how information affects the public markets. A generally accepted view of market efficiency builds on the ECMH, which was advanced by Nobel Laureate Eugene Fama. In his seminal paper 'Efficient Capital Markets: A Review of Theory and Empirical Work', Fama develops the idea that

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[117] Austin (n 115) 216–236 (Citations omitted, emphasis added).

[118] See IOSCO, 'Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation' International Organization of Securities Commissions (May 2017) 223 <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf> accessed 30 October 2017. IOSCO principles 35, 36 and 37 are specifically intended to promote market integrity, and according to which regulatory structures ought to promote '*transparency (defined in terms of the availability of pre-trade and post-trade information), which is important for the price discovery process*' and implement 'mechanisms that *prohibit, detect and deter manipulative (or attempts at manipulative) conduct, fraudulent or deceptive conduct, or other market abuses*.' (Emphasis added). See also Austin (n 115) 219–237.

[119] See Austin (n 115) 216–236. Cf. Bergþórsson (n 41) 233–234 who similarly argues that *misinformation* is basically an essential element in all types of (market) manipulation under the MAR regime.

[120] IOSCO, 'Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation' (n 118) 10, wherein it is held that the '[f]ull disclosure of [correct] information material to investors' decisions *is the most important means for ensuring investor protection*.' (Emphasis added).

information is automatically reflected in share prices when markets are efficient.[121] Provided that the ECMH holds true, all false and misleading information also has a direct impact on the price of the target.[122] As such, false or misleading information on the markets will result in a false market and ultimately severe public mistrust in the market—which is the main reason a rule against the dissemination of false and misleading information is needed. The relationship between information, value and efficiency is also the reason for why regulators have imposed positive disclosure obligations on issuers. Lack of information results in quality uncertainty and consequently *allocational inefficiency*, as Akerlof eloquently demonstrates via his metaphor of the market for used cars—which he refers to as 'lemons' and 'diamonds'.[123] If a buyer does not know the quality of a used car, s/he will not be able to distinguish between good and bad quality by looking at the price. As a result, buyer behaviour is determined by 'adverse selection' and 'moral hazard'. Sellers of good-quality products remain disadvantaged and are unable to obtain a price high enough to make selling their products worthwhile. Higher production costs cannot be passed on to the buyer, who due to the uncertainty is only willing to pay a low price. The uncertainty is only advantageous for sellers of low-quality products, which results in an increasing number of sellers of products of above-average quality being squeezed out of the market. Akerlof suggests that this may even result in a complete market collapse.[124]

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[121] Eugene Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work', (1970) 25(2) *J Fin* 383ff. Fama originally presented three models of efficiency. The *weak* form only reflected historic information, the *semi-strong* all information that were publicly available to the markets, and the *strong* even unpublished information. The semi-strong ECMH model has prevailed in jurisprudence and it forms the basis for modern capital markets regulation, even though it has been fiercely criticised lately, mainly by scholars within the field of *behavioural law and economics*. For an overview of the discussion, see, for example, Knuts, *Kursmanipulation på värdepappersmarknaden* (n 41) 39–48. See also Miller, Geoffrey P (ed), *Economics of Securities Law* (Edward Elgar, 2016), paras 1–5 and James D Cox, Robert W Hillman, Davis Donald C Langevoort, *Securities Regulation*: *Cases and Materials* (8th edn, Wolters Kluwer 2016) 89–94.

[122] See, for example, Cox, Hillman and Langevoort (n 121) 96–97 and Hendrick Brinckmann, 'Foundations' in Rüdiger Veil (ed), *European Capital Markets Law* (2nd edn, Hart Publishing 2017) § 16 para 27. The US Supreme Court was the first court to adapt the semi-strong form of the ECMH in 1988 in *Basic Inc. v Levinson*, 485 US 224 (1988), wherein the Court held that there was a presumption of reliance for misrepresentations as the share price reflects all public material information, even false and misleading information. Criticism of the ECMH has been posed by scholars mainly within the field of BLE, who have demonstrated behavioural anomalies on the markets. The legal literature, too, has recognized doubt on how often, and for what duration, stock prices might move out of line with fundamental values. See also Mark Schindler, *Rumors in Financial Markets* (Wiley 2007) 16–17 on the relationship between value of information and efficient markets.

[123] George Akerlof, 'On the Market for "Lemons". Quality Uncertainty and the Market Mechanism' (1970) 84(3) *The Quarterly Journal of Economics* 488.

[124] Akerlof (n 123) 490.

Overall, it could be argued that *freedom from misinformation* constitutes a core element in each objective of the EU market abuse regime. A juxtaposition of the regime's objectives and the *activist business model* exposes some tensions. The activist business model arguably builds on the activist's capacity to identify the 'lemons' and 'diamonds' on the market. The acquisition (and subsequent dissemination) of information that is yet to be reflected in the price of under- or overvalued financial instruments constitutes a recipe for success for many activist investors. Some activists even claim to improve the market by providing it with information (while they gain profits in the process).[125] If this is all that activists do, it could further be argued that they promote market efficiency and a fair price discovery mechanism by uncovering and disclosing deficiencies in publicly listed companies. Conversely, if activists trade on inside information or disseminate false or misleading information as a part of their business model, their actions will have detrimental effects on markets' integrity and efficiency.[126]

The activist investing model is itself very interesting from a theoretical point of view. As such, the reigning (semi-strong) form of market efficiency rejects the notion that securities in the market are under- or overpriced.[127] Consequently, investors can generally not 'beat

[125] Bob Bryan, '"I think we're helping people": Activist short seller Carson Block on making the market a better place' *Nordic Business Insider* (16 May 2016) <http://nordic.businessinsider.com/carson-block-on-activist-short-selling-2016-5> accessed 30 October 2017. Carson Block is quoted of saying 'I think we're helping people recognize companies that are not good companies.' The cited article continues to argue that short selling activists, such as Carson Block, 'typically [try] to expose fraud, lies, and corruption.' See also Barron Jesse, 'The Bounty Hunter of Wall Street: Andrew Left Sniffs Out Corporate Fraud – And Gets Rich Doing It' The New York Times Magazine (6 June 2017) <https://www.nytimes.com/2017/06/08/magazine/the-bounty-hunter-of-wall-street.html> accessed 30 October 2017. Mr. Left is quoted of saying 'I'm an investigative journalist who trades on his information […] The difference between this and journalism is you can make millions of dollars.'

[126] However, it could also be noted that insider dealing has been identified as 'mixed bag behaviour', i.e. it can have both negative and positive effects on the market (though the common perception is that the negative effects overweight the positive ones, hence a ban). For example, if an activist investor trades on inside information but uncovers large fraud scheme by doing so, it would be violating the rules on market abuse, but the factual effect on the market is not necessary detrimental (and might even be positive). See Thomas Lambert 'Decision Theory and the Case for an Optional Disclosure-based Regime for Regulating Insider Trading' in Stephen M Bainbridge (ed), *Research Handbook on Insider Trading* (Edward Elgar 2014) 130–132. Therefore, trading on inside information, and in particularly *outsider dealing* (discussed above in n 27), i.e. trading on material non-public information by a non-insider could be argued to have a positive effect on market efficiency, as such trading would arguably contribute in the price discovery process. does not automatically mean detrimental effects on market efficiency (integrity perhaps, yes), though forbidden. See, for example *Dirks v SEC,* 463 US 646 (1983) and Gilotta (n 27) 631–664, who eloquently demonstrates that the unconditional EU insider trading ban under the MAR regime is harmful to the market as it 'hinders investors' incentives in ferreting out new information, decreasing market efficiency and increasing agency costs of publicly traded firms.' Cf. Stuart Green, *Lying, Cheating, and Stealing: A Moral Theory of White Collar Crime* (OUP 2006) 235–242 and citations mentioned therein. See also Rasmus Østergreen, 'Forbuddet mod insiderhandel – et retsøkonomisk bidrag' [2014] 1 *NTS* 68, 70–104, who motivates the prohibition on insider trading on the basis of the ECMH and informational parity.

[127] Cox, Hillman and Langevoort (n 121) 97.

the market' by examining publicly available information for the purpose of determining which shares are undervalued or overpriced in light of this information.[128] Nonetheless, this is exactly what most public activists claim to do—and as empirical data demonstrates, at least some of them repeatedly succeed in beating the market by a significant margin.[129]

Three plausible explanations for this conflict between theory and reality exist: (a) a public activist de facto publishes new information that affects the target's price, in which case we might ask whether that information amounts to inside information; if it does, it is necessary to determine whether that information has been (i) unlawfully disclosed or (ii) used in insider dealings.[130] Two further options to consider are (b) is the published information is materially misleading or false or (c) does successful activist engagement (i) set in force a behavioural anomaly (e.g. a market overreaction based on fear or a buying craze) that causes a temporary failure in the semi-strong form of ECMH or (ii) prove that markets are, at least occasionally, practically inefficient.

Arguably, an activist would only be at fault if one or more of explanations (a)(i), a(ii) or (b) are at hand.[131] When an activist is alleged of abusing the markets, the claimant or prosecution has to essentially prove at least one of these three conditions. The activist would on the contrary avoid liability if the information is true and did not amount to inside information. Option (c) would also result in the activist being acquitted in most cases, provided that the information is lawfully disclosed. Option (c) may also be a very plausible explanation for the abnormal returns that activist investors achieve in the short term, since research in the field of behavioural finance demonstrates that markets routinely under- or overreact to corporate announcements.[132] Recent research proves that this also holds true for announcements made by activist investors.[133] The mere disclosure of activist stakebuilding may cause a significant market reaction in the short term.[134] This

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[128] Cox, Hillman and Langevoort (n 121) 97.
[129] Becht and others (n 4).
[130] It should further be noted that alternative (a)(ii) does not per se require any *publication* of inside information, but merely that such information is acquired and *used*.
[131] See generally Green (n 126) on the underlying theories behind criminalizing market abuse.
[132] Cox, Hillman and Langevoort (n 121) 96. See also Emilios Avgouleas, 'The Global Financial Crisis, Behavioural Finance and Financial Regulation: In Search of a New Orthodoxy' (2009) 9(1) *JCLS* 23, 29–35.
[133] Alon Brav, Wei Jiang, Frank Partnoy, and Randall Thomas, 'Hedge Fund Activism and Firm Performance' in William Bratton and Joseph A. McCahery (eds), *Institutional Investor Activism* (OUP 2015) 293.
[134] See, for example, Krishnan CNV, Frank Partnoy and Randall S Thomas, 'The Second Wave of Hedge Fund Activism: The Importance of Reputation, Clout, and Expertise' (2016) 40 *J Corp Fin* 296, 297. Krishnan et al. finds that hedge fund activism generated significantly higher announcement period abnormal share price returns than a control sample of passive block holders. Cf. Christopher Clifford, 'Value Creation

phenomenon has been documented and dubbed the 'Einhorn effect', after activist investor and hedge fund manager David Einhorn.[135] Arguably, an activist investor can hardly be held responsible under the MAR for a failure in the ECMH in the form of a *behavioural anomaly* (market irrationality), unless the activist colludes to exploit such anomalies (as further explored in sections IV and V below).

The latter option would be rather troubling news for the markets, as modern securities regulation is based on the theory of efficient markets. Pacces correspondingly argues that short-termism and activist investing only become issues if the ECMH fails, as the markets will accordingly fail to incorporate the long-term value into market prices.[136] However, he finds that reasonable minds have different opinions as to what term is right for profit maximization, as it has been shown that pursuing long-term shareholders' interests under certain circumstances may actually decrease shareholder value more than being guided by the interests of short-term shareholders.[137] Pacces ultimately seems to conclude that the appropriate horizon depends on the company-specific circumstances in each case.[138]

This thesis also argues that a categorical approach to the merits of activist investing should be dismissed, as recent research shows that lawful activism has positive effects on the

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or Desctruction? Hedge Funds as Shareholder Activists' (2008) 14(4) *J Corp Fin* 323ff; Alon Brav, Wei Jiang, Frank Partnoy and Randall Thomas, 'Hedge Fund Activism, Corporate Governance, and Firm Performance' (2008) 63(4) *J Fin* 1729ff. The findings made by Lucian Krishnan and others are in line with the ones made by Clifford; Brav and others (n 133); Alon Brav, Wei Jiang, Frank Partnoy and Randall Thomas, 'Hedge Fund Activism, Corporate Governance, and Firm Performance' (2008) 63 *J Fin* 1729ff; Lucian A Bebchuck, Alon Brav and Wei Jiang , 'The Long-Term Effects of Hedge Fund Activism' (2015) 115 *Colum L Rev* 1085; April Klein and Emanuel Zur, 'Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors' (2009) 64(1) *J Fin* 187. See also Bechts and others (n 5) for similar findings and conclusions.

[135] Nick Summers, 'The Einhorn Effect' *Bloomberg Businessweek* (25 March 2013) 57–58: 'When Einhorn makes a position public, the market rushes to follow him – a phenomenon that's measurable in real time'. Bloomberg documented the 'Greenlight Hit List' – an exposé of listed companies in which Greenlight Capital, the hedge fund founded by David Einhorn, has disclosed an interest and the market reaction that follows such disclosure. Einhorn is quoted saying 'Appratently now I'm a verb' – A reference to "Einhorning", i.e. going short whilst exposing the weaknesses of a company. A corresponding term, the 'Icahn Lift', has been coined to describe the rise in share price that follows when activist investor Carl Icahn purchases shares in a company. See also CBS, 'The Icahn Lift', *60 Minutes*, 10 August 2008 (Lesley Stahl) wherein the same phenomenon is discussed.

[136] Pacces (n 71) 11–12. Cf. Yvan Allaire, 'The Case for and Against Activist Hedge Funds' (2015) *Institute for Governance of Private and Public Organizations Research Article* 17 <https://igopp.org/en/the-case-for-and-against-activist-hedge-funds-2/> accessed 30 October 2017, who already finds short-termism as an issue, and proposes, *de lege ferenda,* that shareholder voting rights should be acquired only after a one-year holding period.

[137] Ibid, 12. See also Jesse Fried, 'The Uneasy Case for Favoring Long-Term Shareholders' (2014) 124(5) *Yale LJ* 1554.

[138] Pacces (n 71) 12–16.

value of publicly listed entities on average.[139] It could in such cases be further argued that activists promote market efficiency and a fair price discovery mechanism by uncovering and deficiencies in publicly listed companies and their disclosure. In other words, they contribute to the overarching objective of *freedom from misinformation*. Conversely, if activists trade on inside information or disseminate false or misleading information as a part of their business model, their actions are likely to have detrimental effects on market integrity. As a consequence, a contextual and teleological interpretation that considers the MAR's overall purposes and aims is also contingent on the application of the market abuse provisions. For example, information that is deemed 'false' or 'misleading' under the MAR would also contravene the MAR's overarching objectives if publicly disseminated. A breach of the market abuse provisions themselves will in most cases also result in the activist conduct in question being found to have a detrimental overall impact on the market, which will vis-á-vis support a contextual and teleological interpretation disapproving such conduct.

III. DEFINING ACTIVIST INVESTING IN REGULATED MARKETS

This section of the thesis takes a closer look at the two sides of the activist investing: the activist short and the activist long.[140] It provides a general overview of activism as a phenomenon and briefly describes the most commonly employed activist strategies. The focus is on two typical forms of activist investing, namely activist short-selling and offensive shareholder activism. The section also offers a communicative definition on activist investing that is later utilized in the doctrinal analysis.

A. *Activist Short-Selling*

The Latin maxim *nomen est omen* certainly holds true for the most infamous activist short-sellers, such as Citron Research, Muddy Waters LLC and Gotham City Research LLC. Activist short-selling commonly refers to the phenomenon of short sellers 'publicly talking

[139] Michel Albouy, Clément Decante, Aurélien Mauro and Pauline Studer, 'L´impact des actionnaires activistes sur les performances à court, moyen et long terme des entreprises européennes' (2017) 20(1) *Finance Contrôle Stratégie* 1. Cf. Martijn Cremers, Saura Masconale, and Simone Sepe, 'Activist Hedge Funds and the Corporation' (2017) 94 *Wash ULR* 261, who find that that 'the substantial private gains hedge funds realize through activism come at the expense of long-term firm value.'

[140] The latter is also more commonly known as (public) shareholder activism, since the person with a long position becomes a shareholder in the company.

down' securities to benefit from their short positions.[141] It is very different from 'classic' short-selling, which entails the investor 'passively waiting' for a decline in a targeted financial instrument (also known as passive short-selling). This thesis distinguishes between passive and active (i.e. activist) short-sellers. The former obtain a short position *hoping that prices will decline*, whereas the latter by their conduct seek to cause or accelerate a decline in the price of their targeted financial instrument.[142]

One way to define *activist short-selling* is that it is just like ordinary short selling but with one notable exception: instead of obtaining a short position and hoping and passively waiting for the underlying share price to fall, the activist takes some *action* to cause or accelerate a decline in the value of a targeted financial instrument.[143] For the purposes of this thesis, *short selling* should be understood broadly in accordance with the proper scope of MAR Article 2,[144] unless expressly stated otherwise. *Short sales* in a market abuse context do thus not only include a classic method of short selling (borrowing and selling of shares), but also leveraged shorting through various derivatives instruments such as options, warrants and contracts for difference (CFDs), where two or more parties typically agree to buy and sell securities at a specified price on a future date.[145]

However, it ought to be noted that no legal definition of what makes an activist investor an *activist* currently exists. This thesis argues that *activist investing* should be interpreted broadly, so as to include *any action by an investor, other than trading, that intends to move the price of a financial instrument in which the investor holds or is to hold a position*. This ought primarily to be read as a communicative definition that seeks to capture the basic essence of both long and short forms of activist investing. As such, it is not necessarily an

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[141] Alexander Ljungqvist and Wenlan Qian, 'How Constraining Are Limits to Arbitrage' (2016) 29(8) *Rev Fin Studies* 1975, 1976–1981. See also Wuyang Zhao, 'Activist Short-Selling' (2017) *Rotman School of Management Working Paper*, 4 <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2852041> accessed 30 October 2017.

[142] See, for example, Lee (n 10) 277ff.

[143] Or as Pooley et al. choose to describe it: 'They don't just bet on the race, they buy in to the horse itself.' Pooley Erin, Jeff Sanford and Thomas Watson, 'The New Barbarians?' (2006) 79(6) *Canadian Business* 61.

[144] It should be noted that the definition of a *short sale* in SSR Article 2(b) is narrower than the one in MAR Article 2. The SSR definition excludes, inter alia, (i) sales by parties under a repurchase agreement where one party has agreed to sell the other a security at a specified price with a commitment from the other party to sell the security back at a later date at another specified price; (ii) transfers of securities under securities lending agreements; and (iii) futures contracts and other derivative contracts where it is agreed to sell securities at a specified price at a future date. However, the net short position acquired through such instruments still needs to be disclosed in accordance with SSR Recitals 10 and 12. Conclusively, an activist short-seller who is shorting by way of derivatives instruments such as CFDs will also need to notify competent authorities and publicly disclose its short position when the relevant thresholds in SSR Articles 5(2) and 6(2) are met.

[145] Leveraged derivates may provide high-returns for an activist with less capital than unleveraged positions. Such instruments will often also include a higher risk. See, Kern and Maly (n 29) 243ff.

exhaustive definition of activist investing in a doctrinal sense—although it has still been intentionally designed to reflect an inclusive definition of activist investing.[146] For instance, as per this definition the individual who is suspected of bombing a bus full of Borussia Dortmund football players on 11 April 2017 just hours after having acquired a leveraged short position in Borussia Dortmund GmbH & Co. KG through put warrants, may be an *activist* short-seller, too.[147]

The actions taken by an activist investor do not need to be illegal, and all illegal activist actions do not necessarily amount to market abuse. An activist investor can take many lawful actions that may influence share prices. For example, an activist short-seller who becomes aware of auditing fraud, tax evasion, bribery or any other serious criminal activity in a publicly listed company may—and ought to—inform the public authorities thereof, for example within the lawful boundaries of a whistleblowing programme. Provided that the information does not amount to inside information (as further examined in section IV below), the investor may also trade (e.g. sell or hedge its position) in the underlying financial instruments. The reasonable investor will further do so if s/he estimates that the information will have a future impact on the target's share price. For example, the share price impact of allegations or rumours concerning criminal activities may increase as the related investigations and potential proceedings move forward. If the reasonable investor estimates that such allegations or rumours are true, s/he is likely to hedge or decrease the long position in the target; if this individual believes them to be false, s/he is likely to hold or increase the position in the target.

An activist short-seller typically acquires information through extensive due diligence on a publicly listed target entity.[148] This due diligence may be based on or supported by

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[146] However, it should be noted that the suggested definition operates back-to-back with the transaction-based forms of market manipulation. This thesis will consequently not cover the stand-alone trade-based forms of market manipulation in any great detail. This delimitation is also empirically motivated considering the area of focus presented herein, as offensive shareholder activists and activist short-sellers rarely employ stand-alone trade-based methods of market manipulation.

[147] The suspect had reportedly obtained 15,000 put warrants for 78,000 euros from his hotel room on the morning of the bomb attack. The warrants could have potentially yielded a total profit of 3.9 million euros following a significant drop in Dortmund's shares. Fortunately, no one was seriously injured in the attack. Philip Oltermann, 'Dortmund attack: man arrested on suspicion of share-dealing plot' *The Guardian* (Berlin, 21 April 2017) <https://www.theguardian.com/football/2017/apr/21/dortmund-bus-attack-suspect-arrested-as-police-allege-share-dealing-plot> accessed 30 October 2017.

[148] Or, in the words of one infamous activist short-seller himself: 'I'm an investigative journalist who trades on his information […] The difference between this and journalism is you can make millions of dollars' Quote by Mr Andrew Left in Barron (n 125). The same piece describes the business model of Citron Research: 'You don't need […] the validation of the press. If you build enough of a reputation, all you need

statements made by whistleblowers within the company. Once the activist has sufficient information on the company, s/he will obtain a short position prior to or in connection with the public dissemination of such information. The activist short-seller will subsequently be able to cover its short position at a lower price, provided that the information and the disclosure thereof has a negative effect on the share price. The most common activist short-selling strategies are summarized in the table below.

1. Research and shorting	2. Action[149]	3. Profit
Extensive research on the target (may include information acquired through third parties) Acquisition of a leveraged or non-leveraged short position (through derivatives and/or 'classic' shorting) Notification of the short position to competent authorities in accordance with SSR Art. 5 (when net position equals 0.2 % of issued capital and each 0.1 % above that) Public disclosure of the short position in accordance with SSR Art. 6 (when net position equals 0.5 % of issued capital and each 0.1 % above that) Coordination with other activist short-sellers (i.e. the 'wolf pack' phenomenon)	Aggressive dissemination of negative (price sensitive) information, e.g. allegations of fraud or other serious misconduct[150] Solicitation of whistleblowers Aggressive campaigns in the media, including leaked rumours[151] Public letters to the board threatening public action and calling for resignations Public demands for intervention by the authorities Rallying media, institutional investors and sell-side research analysts to support the activist's arguments[152] Predatory short-selling (i.e. excessive/aggressive shorting), momentum ignition (rarely) Litigation (rarely)[153]	Short positions are closed, with the activist investor retaining the (leveraged) difference in market value as a profit

Table 1. Commonly employed activist short-selling strategies.

are some Twitter followers and a website. […] [*H*]*e has found that others are willing to make it easier, by leaking documents to him and passing tips. In many cases, Left's dossiers against his targets are not wholly his own but built using information from a confidential source*.' (Emphasis added).

149 Ljungqvist and Qian (n 141) 1975–2028; Karessa Cain, Martin Lipton, Sabastian Niles, Sara Lewis and Steven Rosenblum, 'Dealing with Activist Hedge Funds and Other Activist Investors' (*Harvard Law School Forum on Corporate Governance and Financial Regulation*, 26 January 2017) <https://corpgov.law.harvard.edu/2017/01/26/dealing-with-activist-hedge-funds-and-other-activist-investors/> accessed 30 October 2017.

150 Ljungqvist and Qian (n 141) 1976. Ljungqvist and Qian have analysed data from 124 activist short-selling campaigns in the US and they find that '[t]he [activist] reports contain a wealth of new facts, often assembled with the help of forensic accountants and professional investigators, and tend to focus on questionable governance practices and aggressive accounting (sometimes bordering on fraud). They often include "smoking guns" in the form of recorded phone calls, video surveillance, and photographs.'

151 Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates, 'Activist Investing in Europe: A Special Report' (1 September 2016) 9 <https://www.skadden.com/insights/publications/2016/10/activist-investing-in-europe-a-special-report-sept> accessed 30 October 2017.

152 Black (n 4) 30–33.

153 Walker and Forbes (n 48) 689ff.

Empirical evidence seems to support the conclusion that short selling does de facto improve the efficiency of capital markets.[154] The price formation mechanism of the market is more efficient when overvalued shares are sold short.[155] Similarly, Knuts points out that short sellers are often 'informed traders', who have incurred significant information costs to retrieve information to carefully analyse the value of a short position.[156]

The general benefits of short selling have also been identified by the EU Commission. The SSR Impact Assessment report finds that (active) short selling (i) 'act[s] as a balance to *irrational overpricing of securities* and can mitigate price bubbles by allowing investors to act where they believe that a security is overvalued';[157] (ii) 'play[s] *an integral role in providing liquidity and maintaining market efficiency*. When short sellers' level of participation decreases, market[s] become less liquid, more expensive and more difficult to trade';[158] and (iii) '*leads to more efficient price discovery as it prevents prices from reflecting only the views of the most optimistic investors in the market and leads to faster integration of information into the price of securities*'.[159]

Many argue that the rise of activist shorts has been a good thing, as short selling is the only investment method that helps to counterbalance 'all kinds of forces [that] conspire to push share prices higher: investor overconfidence, corporate puffery and the Wall Street's inherent bullish bias'.[160] Activist short-selling arguably helps to counterbalance market

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[154] Mårten Knuts, 'Behövs ett förbud mot short selling på värdepappersmarknaden?' [Is a ban on short selling on the securities markets needed?] [2009] 1-2 *NTS* 59, citing Ekkehart Boehmer, Charles M Jones and Xiaoyan Zhang, 'Which Shorts are Informed?' 63(2) *J Fin* 491ff. See also Ekkehart Boehmer and Juan Wu, 'Short Selling and the Price Discovery Process' (2013) 26(2) *Rev Fin Studies* 287. Boehmer and Wu demonstrates that share prices are more accurate when short sellers are more *active*. The authors further point out that activist short-sellers change their trading around extreme return events in a way that *aids price discovery and reduces divergence from fundamental values*. Arguably, when efficient share prices more accurately reflect a firm's fundamentals and can guide firms in making better-informed investment and financing decisions.

[155] Knuts (n 154) 59.

[156] Knuts (n 154) 59. See also Boehmer, Jones and Zhang (n 154) and Joseph Engelberg, Matthew Ringgenberg and Adam Reed, 'How Are Shorts Informed? Short Sellers, News, and Information Processing' 105(2) *Journal of Financial Economics* 260. The empiric evidence seems to support a conclusion that the short sellers' trading advantages 'comes from their ability to analyse (publicly) available information.'

[157] European Commission, 'Impact Assessment: Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on Short Selling and certain aspects of Credit Default Swaps' SEC (2010) 1055 final ('SSR Impact Assessment') 16 (Emphasis added).

[158] SSR Impact Assessment (n 157) 16 (Emphasis added), citing Oliver Wyman 'The effects of short-selling public disclosure regimes on equity markets – A comparative analysis of US and European markets' (2010) 29.

[159] SSR Impact Assessment (n 157) 16 (Emphasis added).

[160] See James Surowiecki, 'In Praise of Short Sellers' *The New Yorker Financial Pages* (23 March 2013) 40. See also Veil, 'Dogmatics and Interdisciplinarity' (n 28) § 6 paras 21–22 and citations therein how investor overconfidence affects the markets. Cf. SSR Impact Assessment (n 157) 16.

overconfidence; it also contributes to the diversity of opinion that efficient and healthy markets require.[161] For example, some investigative auditors argue that auditors will never discover accounting fraud as effectively as activists do, simply because they do not have economic incentives to do so.[162] Many of the most serious corporate scandals of our time might have been discovered at a later date—or may not have been discovered or prosecuted at all—if it were not for the activist short-sellers.[163] Activist short-selling may consequently not only enhance the price discovery mechanism in the markets; it may also increase long-term benefits by discouraging fraudulent behaviour.[164] Activist investor and hedge fund manager Bill Ackman sums this up as follows:

> I think short selling, and in fact *public* short selling, where you share your concerns in a public way, is an incredibly healthy thing, not just for the capital markets but because the regulators do not have the resources to find these things. […] What short sellers do is identify the problem, because they're economically incentivized to do so. But if you don't tell anyone about it, you know, nothing necessarily is going to happen.[165]

However, while many activist short-sellers argue that they are whistleblowers who seek to expose fraud, lies and corruption, some authors assert that they are nothing short of market manipulators who seek to launch misinformation campaigns to drive asset prices down and thereby gouge profits.[166] Some scholars further suggest that public disclosure of short positions can be counterproductive, that the public disclosure of all short positions may in fact facilitate coordination among predatory short-sellers, and that excessive short sales can

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[161] See SSR Impact Assessment (n 157) 16 and citations mentioned therein. See also Boehmer and Wu (n 154) and Surowiecki (n 160).

[162] Nicholas Hodson, 'Why Auditors Don't Find Fraud' in O'Brien, Justin (eds.), *Private Equity, Corporate Governance and the Dynamics of Capital Market Regulation* (Imperial College Press 2007) 211. Hodson concludes that 'I do not believe, based on 20 years of experience in each case as auditor and forensic accountant, that auditors can be reasonably assured that financial statements are not materially misstated due to fraud, without revolutionary changes to the audit model whose cost and intrusiveness may be hard for corporations to accept.'

[163] Some of the greatest corporate scandals of our time have either been discovered or accelerated by activist short-sellers. See, for example, Lee (n 10), 278–280. Lee makes some *de lege ferenda* remarks in her article and, while identifying the risks of market manipulation, argues that activist short-sellers have a positive effect on the market that regulators ought to consider. She comes to the conclusion that a disclosure requirement on short positions could be detrimental to efficiency. Cf. Slawotsky (n 67) 272–333. Slawotsky reaches an opposite conclusion. See also Markus Brunnermeier and Martin Oehmke, 'Predatory Short Selling' (2014) 18(6) *Review of Finance* 2153. Oehmke and Brunnermeier finds that the public disclosure of short positions may encourage the 'wolf pack' phenomenon. The authors further point out that predatory short sales can cause a (short-term) drop in equity valuation, which may cause non-insured depositors and short-term creditors to withdraw funding from the target. Oehmke and Brunnermeier thus demonstrates that the disclosure of short sales can force target companies to liquidate long-term asset holdings at a discount.

[164] Surowiecki (n 160). See also Lee (n 10) 279.

[165] Kothalkar (n 125) 56 (Emphasis in original).

[166] Lee (n 10) 279 and citations mentioned therein. See also Angel and McCabe (n 67) 239–249.

force a financial institution to liquidate long-term asset holdings at a discount.[167] Surowiecki describes the potential downside of the activist short as follows:

> Many investors are unhappy about activist shorts and argue that they have an incentive to drive down a company's stock price with false allegations and then cash out at the bottom – a practice known as ‘short and distort.’ This is [the target company’s] current defence: it says that it is the victim of ‘a small group of short selling investors who are working together.’[168]

It is not only investors who might be unhappy with an activist short attack. In an interview concerningAckman’s Herbalife short,[169] Herbalife CEO Michael Johnson gives a chilling account of the company’s resource allocation and defence tactics during an activist campaign:

> ‘I have pretty good financial chops. But I did not know about activist investors.’ […] After Ackman made his presentation at the AXA Equitable Center, Johnson said, Herbalife’s top executives went into crisis mode. They divided into teams; one would continue running the business, while the other – including the chief financial officer, the legal and communications departments, and Johnson himself – formed a reaction unit. ‘That became, I don’t want to say a holy war, but it became a process that engulfed some of us for a while’, Johnson said. ‘We hired a ton of consultants. We were a full-employment act for every P.R. firm, law firm. We were spending a lot of money’ – around eighty-five million dollars, Herbalife says. […] ‘Then we went on the offense a bit. We said, we need the world to see what Bill Ackman is all about. We’ll see if his act is as wonderful as he thinks he is.’ A thousand-page dossier on Ackman was prepared, containing allegations of market manipulation, and Herbalife sought to generate news stories that reflected its point of view.[170]

European CEOs and investors have recently given similar accounts when activist short-sellers have targeted publicly listed European companies, such as TeliaSonera Abp, Bavarian Nordic A/S and Ströer SE & Co KGaA. In the latter case, Muddy Waters Capital LLC (MWC) targeted the German media company Ströer on 21 April 2016, alleging inter alia that ‘Ströer’s claimed digital organic growth rates are way off’ and that the company insiders would be ‘engaged in more highly questionable self-dealing than we’ve ever seen

[167] Brunnermeier and Oehmke (n 163) 2153–2195.
[168] Surowiecki (n 160) 40.
[169] See, Lee (n 10) 274–285 for an overview of Bill Ackman’s Herbalife campaign and the US discussion on activist short-sellers’ negative reputation as market manipulators.
[170] Kolhatkar (n 125) 66.

outside of a Chinese company'.[171] The allegations caused a sharp 26% drop in Ströer's share price during the same day.[172] On the following day, Ströer CEO Udo Müller provided the following public executive summary and issued a corrective statement to investors and media:

> The report published yesterday by [MWC] primarily *consists of the manipulation of facts* known and already published by Ströer, which *have been presented intentionally in a misleading fashion and with false claims, presumptions and assertions to deliberately distort the situation in order to cause damage for the shareholders of Ströer* in its own economic interest, short position. *The conclusions drawn by [MWC] are substantially incorrect.* […] [MWC] claims to hold a significant short position in Ströer and manages at least one private fund that also holds a short position in Ströer. *[MWC] therefore has a fundamental interest in damaging the reputation of Ströer by making false assertions and drawing incorrect conclusions in order to manipulate Ströer's share price and make significant speculative gains to the detriment of our shareholders when prices fall substantially*. In doing so, *[MWC] has overstepped ethical and legal lines*. We hope that this case will form the basis for such business practices constituting unfair trading being made more difficult in the future. We will therefore take various legal measures and are already in dialog with the [BaFin].[173]

The statement explicitly alleges that MWC intentionally manipulated Ströer's share price by issuing false and misleading information. Reportedly, BaFin has opened a market manipulation inquiry in relation to MWC's short campaign and an investigation into the matter is currently pending.[174]

The above-cited cases are good examples of the controversial nature of 'short attacks' and the clashing interests that exist during such campaigns. Moreover, the accounts further underpin the importance of the research question examined in this thesis, as *when* activist short-selling amounts to market abuse in many cases becomes crucial for determining *who*

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[171] Ibid. See also the MWC website <http://www.muddywatersresearch.com/research/> accessed 30 October 2017.

[172] Linette Lopez, 'Carson Block's new short is out, and the stock is getting blown out' (21 April 2016) *Business Insider* <http://www.businessinsider.com/carson-blocks-new-short-stroeer-2016-4?r=US&IR=T&IR=T> accessed 30 October 2017.

[173] Ströer Press Release 'Detailed statement by Ströer SE & Co KGaA on the short attack by Muddy Waters Capital and outlook on current business development' (22 April 2016) <http://ir.stroeer.com/websites/stroeer/English/222/news.html?newsID=1551023> accessed 30 October 2017 (Emphasis added).

[174] Kirchner, C, 'Ströer-Leerverkäufe: Staatsanwälte Ermitteln' [Ströer Short Selling: Prosecutor Investigates] *Capital* (22 June 2017) <http://www.capital.de/investment/leerverkaufsattacke-auf-stroeer-wird-fall-fuer-staatsanwaelte.html> accessed 30 October 2017. See also Josh Black (ed), 'Half-Year Review with Olshan' (2017) 6(6) *Activist Insight Monthly* 26. According to public sources, German prosecutors have opened a market manipulation inquiry into Muddy Water Capital LLC's Ströer short campaign.

is to blame.[175] A targeted company is an 'innocent victim' if the activist short-seller is nothing but a fraudulent market manipulator. On the contrary, a significant market reaction following an activist's lawful dissemination of true and correct facts may be an indication of the very mismanagement that such facts allege (or an irrational market overreaction).

B. *Going Long: Offensive Shareholder Activism*

Much like the activist short, the activist long comes in many shapes and sizes.[176] Activist investors who hold long positions in targeted companies are also generally referred to as *shareholder activists*, as going long typically involves having an equity stake in a target. As a noteworthy stake in a public target entity involves some capital, offensive shareholder activists tend to be institutional investors, hedge funds or (more rarely) wealthy individuals.[177] Shareholder activists may have various objectives with their stakeholding and they may employ numerous methods to reach them.[178] As discussed in section I.B., this thesis is mainly concerned with the offensive, public form of shareholder activism.

However, it should be noted that an activist investment strategy that seeks to maximize a target's short-term value does not, in the context of market abuse, necessarily need to involve explicit shareholding, as a net long position in the target also may be amassed through various derivative instruments. Nevertheless, an activist long strategy includes a certain degree of shareholding in most cases, as having some voting power is often a prerequisite for employing certain activist strategies and credible public pressure-

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[175] The doctrinal analysis of the issue of *when* activist investing amounts to market abuse will be dealt with below in parts IV and V.

[176] See, Nili (n 43) 157–165. Nili argues that shareholder activism as it is traditionally presented in legal literature is de facto a collection of different models that differ by motives, tools, and structures. Nili points out that 'the activist may be a combination of any of the following: (1) a private or a public player; (2) a for-profit or a non-profit organization; (3) a single investor or a group; (4) a sophisticated financial player with possible hidden agendas, a traditional institution or an individual with minimal means; (5) accountable for its actions, regulated by other laws, or operating in a regulatory void.' Nili further proposes comparative examination of different models and proposes a procedural framework per motive, type, and exogenous factors for further discussions on shareholder activism. Similarly, see Allaire and Dauphin (n 4) 279–280. This thesis acknowledges the framework proposed by Nili and consequently focuses on *financially driven, 'offensive' shareholder activism*. This thesis does however, not intend to limit the analysis to only certain activist types or legal bodies, such as hedge funds, but takes instead a more comprehensive approach that includes *financially offensive activism* regardless of the nature of the activist entity.

[177] Empirical evidence in the United States demonstrate that hedge fund activists typically disclose substantially less than 10% ownership, with a median stake of 6.3%. See Lucian Bebchuk, Alon Brav, Robert Jackson Jr, and Wei Jiang, 'Pre-Disclosure Accumulations by Activist Investors: Evidence and Policy' (2013) 39(1) *J Corp L* 1, 4–5.

[178] For example, Nili (n 43) differentiates socially minded, issue-driven, form of activism, the 'soft' activism of institutional investors and the 'hard', financially driven, activism practiced principally by hedge funds. Social activism usually takes the form of pressures on corporations to change their social agenda and cope with environmental, moral, religious or other non-business issues. The soft activism of institutional investors usually involves shareholder proposals aimed at 'improving corporate governance' (citations omitted).

building.[179] This thesis refers to offensive 'go long' activist investing as *offensive shareholder activism*[180] (with *shareholding* being read to also include synthetic ownership amassed through various financial instruments).[181] Offensive shareholder activism conducted by hedge funds has been identified as the most significant form of shareholder activism. Moreover, as noted previously in this thesis, public campaigns conducted by activist hedge funds have recently become common in Europe as well.[182] This section mainly describes the typical engagement of offensive shareholder activists (and what is commonly known as *hedge fund activism*), although the analysis is not limited to certain legal bodies (e.g. hedge funds).[183]

Offensive shareholder campaigns often disclose the activist's goals, which are typically a sale, spin-off or restructuring of the company or its assets; alterations to the governance structure or board (e.g. via the appointment of designated activist directors); changes in the pay-out policy; cost reductions; or a combination thereof.[184] An offensive shareholder activist commonly seeks value maximization in the short or medium term through proposed changes to the target company's expenditure and distribution policies. Essentially, an activist's 'goal is to make money as quickly as possible and it will stick around just long enough to achieve a good rate of return'.[185]

An offensive activist strategy may be non-public in the sense that the activist does not seek to build public pressure to achieve his/her aims. Such activist strategies are often described as publicity adverse or shy. Publicity adverse activists typically acquire shares without triggering any disclosure thresholds, whereafter they engage in private conversations with individuals such as the target CEO, chairperson and selected directors. They may also issue

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[179] An activist with voting power will presumably be more credible than one who has none.

[180] *Offensive* activism can be characterized as short-term, profit-seeking shareholder activism. See Chiu, *The Foundations and Anatomy of Shareholder Activism* (n 13) 71; Nili (n 43) 172ff; John Armour and Brian Cheffins, 'Origins of "Offensive" Shareholder Activism" in the United States' in Jonathan Koppel (ed), *Origins of Shareholder Advocacy* (Palgrave Macmillan 2011) 253–276 for an overview of the phenomenon.

[181] Any definition will be imperfect around the edges. An offensive *shareholding* strategy should also be interpreted to include (synthetic) ownership amassed through derivative instruments.

[182] See, for example, Becht and others (n 4); Dionysia (n 4); Albouy and others (n 139).

[183] The term 'hedge fund' has been found to be highly ambiguous. See, for example, Nabilou H, 'The Conundrum of Hedge Fund Definition' (2017) 14(1) *ECFR* 149–186 and Nili (n 43) Activist hedge funds are most typically structured as offshore investment funds in the form of private partnerships, that are oftenmost incorporated on e.g. the Cayman Islands. See, for example, Thomas Huertas, *Crisis: Cause, Containment and Cure* (2nd edn, Palgrave Macmillan 2011) 28. See also *Absolute Activist Value Master Fund Ltd. v Ficeto* [2012] US App. LEXIS 4258 (2d Cir. 2012).

[184] Allaire and Dauphin (n 4) 284. See also Chiu, *The Foundations and Anatomy of Shareholder Activism* (n 180) 71ff. See also Cain and others (n 149).

[185] Allaire and Dauphin (n 4) 294–295; Chiu (n 13) 71.

private letters to the target CEO or board members. A (unsuccessful) publicity adverse campaign may at a later stage be escalated into a public campaign to increase pressure on the target management. Offensive shareholder activists may also coordinate their stakebuilding and efforts, which is a phenomenon known as 'wolf pack' activism.[186] The below table summarises the aims and strategies most commonly employed by both 'publicity-shy' and public offensive shareholder activists.

1. Entry and stakebuilding	2. Action and pressure[187]	3. Exit and profit[188]
Entry and initial stakebuilding (through, for example, block trades); may also include synthetic ownership amassed through derivatives If the offensive strategy is non-public, the activist will maintain voting rights below disclosure thresholds Public disclosure of stakebuilding and holding when voting rights exceed the disclosure threshold (if and when the campaign is public)[189] Collaboration with other activist investors or institutional shareholders (i.e. the wolf pack phenomenon)[190]	Private meetings with management and/or the board Proposals for specific actions (e.g. share buybacks, cost reductions, special dividends, spin-offs, governance changes)[191] Board seat demands Private letters threatening public action Open letters to the board Calls for a special meeting (if and where available) Aggressive use of derivatives 'empty/riskless voting'[192] Aggressive PR, including leaked rumours Litigation (rarely)[193]	Optimal timing of exit after a successful engagement Options (derivatives) 'in the money' are exercised The activist retains any special dividends and the increase in market value of the financial instruments as a profit A takeover bid is launched (rarely)[194] If the campaign fails, the activist exits to mitigate its losses

Table 2. Common offensive shareholder activist strategies.

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[186] See, for example, Coffee Palia (n 10) 545; Lu Carmen XW, 'Unpacking Wolf Packs' [2016] 125 *Yale LJ* 773 and Anand Anita and Andrew Mihalik, 'Coordination and Monitoring in Changes of Control: The Controversial Role of "Wolf Packs" in Capital Markets' (2017) 54 *Osgoode Hall Law Journal* 377.

[187] See Cain and others (n 149); Alon Brav, Wei Jiang and Hyunseob Kim, 'Hedge Fund Activism: A Review' (2010) 4(3) *Foundations and Trends in Finance* 185; Allaire and Dauphin (n 4); Becht and others (n 4) 2933–2969. See also Armour and Cheffins (n 180) 267ff.

[188] See Allaire and Dauphin, 'The game of "activist" hedge funds: *Cui bono*?' (n 4) 296.

[189] Alexandros Seretakis, 'Hedge Fund Activism Coming to Europe: Lessons from the American Experience' (2014) 8 *Brook J Corp Fin & Com L* 439, 469–461. It should be noted that several Member States have implemented lower disclosure thresholds and shorter notification deadlines than those included in the TD, which is a minimum harmonization instrument.

[190] See Pacces, 'Hedge Fund Activism and the Revision of the Shareholder Rights Directive' (n 71) 9 and citations mentioned therein. Pacces finds that wolf packs account for about 22% of engagements observed internationally and that wolf pack activism is *associated with a higher success rate than individual engagements* (78% as opposed to 46%).

[191] See, for example, Allaire and Dauphin (n 4) 279ff.

[192] Wolf-Georg Ringe, *The Deconstruction of Equity: Activist Shareholders, Decoupled Risk and Corporate Governance* (OUP 2016) 26–80.

[193] Brav, Jiang and Kim (n 193) 199. Only in approximately 4.7% of the engagements. Based on a sample of 1,172 of US activist investor engagements during the years 2001–2007. The European figures for litigation are presumably even lower.

[194] Brav, Jiang and Kim (n 193) 199. Only in approximately 4.6% of the engagements.

Offensive shareholder activism is often associated with abnormal share price movement and significant short-term returns. Empirical data seems to support these associations, as the mere disclosure of activist stakebuilding may cause a significant market reaction in the short term.[195] Recent research further suggests that markets frequently (over)react to announcements made by activist investors.[196] Another recent study has similarly discovered abnormal announcement returns of 4.8% following activist engagements during a 40-day event window in European companies.[197] A study by Krishnan, Partnoy and Thomas found significant abnormal stock price returns during the announcement period following hedge fund activist engagement. For example, the average abnormal stock price return of activist interventions during a 21-day event window following the announcement of such interventions was over 10% in 2013 and 7% on average during the years 2008–2014.[198] The same study determined that the *most successful activist hedge funds also engage in aggressive media campaigns* to generate pressure on target boards.[199] Its findings are consistent with those of similar studies in the field.[200]

Perhaps more disturbingly, recent empirical data from the US seems to suggest that activist access to a target boardroom is followed by a short-term increase in information leakage into share prices.[201] The findings of the relevant study appear to suggest that activists' presence in corporate boardrooms may be associated with increased trading on non-public information.[202] Similarly, a 2005 Swedish study discovered that the majority of shareholder activism undertaken by large institutional investors in Sweden is *executed through informal discussions with the management* of the portfolio companies or *between*

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[195] See, for example, Krishnan and others (n 134) 296, who find, in line with similar research in the field, that hedge fund activism generated significantly higher announcement period abnormal returns than a control sample of passive block holders.
[196] Brav and others 'Hedge Fund Activism and Firm Performance' (n 133) 293.
[197] Becht and others (n 5) 2934. The same study found abnormal announcement returns in the US and Asia to be 7.0% and 6.4%, respectively. See also Alon Brav, Amil Dasgupta and Richmond D Mathews, 'Wolf Pack Activism' (2017) European Corporate Governance Institute (ECGI) – Finance Working Paper No. 501/2017 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2529230> accessed 30 October 2017, 31–33; Brav, Jiang and Kim (n 193) 185–246 and references mentioned therein for similar findings and conclusions.
[198] CNV Krishnan, Frank Partnoy and Randall S Thomas, 'The Second Wave of Hedge Fund Activism: The Importance of Reputation, Clout, and Expertise' (2016) 40 *J Corp Fin* 296.
[199] Krishnan, Partnoy and Thomas (n 198) 298.
[200] Krishnan, Partnoy and Thomas (n 198) 296 and citations mentioned therein.
[201] Robert E Bishop, Robert J Jackson, Jr and Joshua R Mitts, 'Activist Directors and Information Leakage' <http://www.law.nyu.edu/sites/default/files/upload_documents/20170303%20Activist%20Directors%20%28As%20Distributed%29.pdf> (forthcoming) accessed 30 October 2017.
[202] Ibid.

activist investors themselves (that is, via wolf packs).[203] Such informal discussions and collaboration may amount to inside information, as further explored in part IV below.

Most vicious critics and opponents of offensive shareholder activism argue that offensive shareholder activism with a short-term orientation is nothing short of a mere 'pump and dump' scheme in which an activist generates a short-term spike in a target's share price at the expense of diminished long-term returns.[204] Some argue that offensive shareholder activists simply maximize and reap the returns by timing their entry and exit.[205] A few US authors further suggest that share buy-back programmes instigated by offensive shareholder activists are effectively a form of share price manipulation.[206] Moreover, many commentators further associate short-termism and systemic risk with the way in which activist hedge funds operate, as such funds may also engage in speculation using credit or borrowed capital.[207]

Some contrary findings seem to exist concerning the overall impact that offensive shareholder activism has on the value of public companies.[208] Allaire and Dauphin finds that activists by timing their entry and exit and through the use of derivatives to enhance their yield, and by benefiting from the 'control' premium on getting companies sold off, may well achieve highly positive results in the short term.[209] They also continue to suggest that the real beneficiaries of activist engagements are the activist hedge fund managers and

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[203] Elias Bengtsson, *Shareholder Activism of Swedish Institutional Investors* (Doctoral dissertation, Företagsekonomiska institutionen – Stockholm Business School 2005).

[204] Coffee and Palia (n 186) 549–550; Yvan Allaire and François Dauphin, '"Activist" Hedge Funds: Creators of Lasting Wealth? What do the Empirical Studies Really Say?' (2014) *Institute for governance of private and public organizations* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2460920> accessed 30 October 2017; Martin Lipton and Steven A Rosenblum, 'Do Activist Funds Really Create Long Term Value?' (*Harvard Law School Forum on Corporate Governance and Financial Regulation*, 22 July 2014) <https://corpgov.law.harvard.edu/2014/07/22/do-activist-hedge-funds-really-create-long-term-value/> accessed 30 October 2017. Cf. Albouy and others (n 139) and Bebchuck, Brav and Jiang (n 134). See also Coffee and Palia (n 10) 549–550, wherein this argument is explicitly dismissed.

[205] Allaire and Dauphin, 'The game of "activist" hedge funds: *Cui bono*?' (n 4) 294.

[206] See William Lazonik, 'Profits Without Prosperity', *Harvard Business Review*, September 2014 Issue (who argues that trillions of dollars that could have been spent on innovation and job creation in the global economy over the past three decades have instead been used to buy back shares for what is effectively stock-price manipulation) and Steve Denning, 'The Seven Deadly Sins of Activist Hedge Funds' *Forbes* (15 February 2015) <https://www.forbes.com/sites/stevedenning/2015/02/15/the-seven-deadly-sins-of-activist-hedge-funds/#297a423e44d0> accessed 30 October 2017 (who suggest that share-buy backs may amount to market manipulation). Cf. Slawotsky (n 67) 279.

[207] See Dan Awrey 'The Limits of EU Hedge Fund Regulation' in William W Bratton and Joseph A McCahery, *Institutional Investor Activism: Hedge Funds and Private Equity, Economics and Regulation* (OUP 2015) 583–584 and references mentioned therein. See also Huertas (n 183).

[208] Albouy and others (n 139); Coffee and Palia (n 186). Cf. Cremers, Masconale and Sepe (n 139); Allaire and Dauphin, 'The game of "activist" hedge funds: *Cui bono*?' (n 4) 279ff.

[209] Allaire and Dauphin (n 4) 305.

their investors (who are largely institutional investors and pension funds).[210] However, Bebchuk et al. do not find any evidence that would support the conclusion that activist interventions are followed by short-term performance gains at the expense of long-term performance.[211] Empirical data does also not seem to support any categorical conclusions concerning 'pump and dump' patterns in which an activist's exit is followed by abnormal long-term negative returns.[212] On the contrary, recent European data seems to support the conclusions that offensive shareholder activism improves the performance of public companies and that activist interventions 'constitute an external mechanism of discipline on the management'.[213]

However, Allaire and Dauphin underline the complexity of assessing offensive shareholder activism's impact in the long term, noting that each scenario is different and that the interaction between the company's management and the activist consists of a unique set of moves and counter-moves.[214] The merits of activism should be assessed on a case-by-case basis, as an activist's objectives may be warranted in some cases and less so in others. This thesis thus takes the view that a categorical approach to the benefits and detriments of activism is unwarranted and a categorical approach to activism and market abuse is equally inappropriate. The argument that offensive shareholder activists are categorically engaged in manipulative schemes is dismissible on the basis of empirical data. However, certain commonly employed activist strategies and methods may well come under the scrutiny of the applicable market abuse provisions. A doctrinal systematization of the EU market abuse regime in relation to activist investing (as it has been defined in this section), is executed below utilizing the interpretive tools established in section II.

IV. THE USE OR DISCLOSURE OF INSIDE INFORMATION AS PART OF AN ACTIVIST ENGAGEMENT

This section provides a comprehensive doctrinal analysis of the key issues that need to be considered in the assessment of when activist investing may contravene the EU insider prohibitions. The section also identifies how activist investors may comply therewith. This

[210] Allaire and Dauphin (n 4) 305.
[211] Bebchuk, Brav and Jiang, 'The Long-term Effects of Hedge Fund Activism' (n 134) 1085–1155. Cf. Cremers, Masconale and Sepe (n 139); Allaire and Dauphin (n 4).
[212] Bebchuk and others (n 211).
[213] Albouy and others (n 139) para 87. However, the dataset of Albouy and others does only cover a total of 23 European interventions. As such, no absolute conclusions should be drawn on the basis of the study alone.
[214] Allaire and Dauphin (n 4) 294–295.

is a highly critical issue for activist investors, as even information about an activist engagement itself may amount to inside information.[215] The activist strategies presented in part III of this thesis are examined in light of the relevant EU insider provisions. These strategies include direct communication with the target company's management or board, wolf pack collaboration, the dissemination of whistleblower information or information that is otherwise leaked to the activist investor (e.g. via a current or former company employee or an activist representative on the board), and the use of such information. Consequently, one of the first questions that both activist investors and issuers need to raise is whether the information that an activist engagement is based on or information about the engagement itself may amount to inside information.[216]

A. *Does the Information Amount to Inside Information?*

The definition of inside information in relation to financial instruments has been included in Article 7(1)(a) of the MAR and it reads to include

> *information of a precise nature*, which *has not been made public*, *relating*, directly or indirectly, to one or more issuers 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*[217]

The term *financial instrument* is to be understood in accordance with MiFID I Section C until 2 January 2018 and in accordance with MiFID II Section C from 3 January 2018 onwards.[218] The EU insider regime also applies to activists who enter into over-the-counter (OTC) derivative agreements (e.g. CFDs) in accordance with the MiFID, when the information *relates* to such instruments, even though these individuals would not

[215] See, for example, SAN-2014-03, Décision de la Commission des sanctions à l'égard des sociétés Elliott Advisors UK Ltd et Elliott Management Corporation (25 April 2014) wherein the AMF found that Mr A of Elliot Advisors had knowledge of the Elliott fund strategy with regard to APRR capital. The AMF found that Elliot Advisors and Elliot Management had failed to set up a Chinese wall between them, and that the fund strategy amounted to inside information.

[216] Issuers in particular will also need to ask themselves *when* non-public activist engagement may amount to inside information and consequently lawfully disclose that information on an ad hoc basis or assess whether any grounds for delayed disclosure exist in accordance with MAR article 17(4) and the ESMA, 'MAR Guidelines – Delay in the Disclosure of Inside Information' ESMA (2016) 1478.

[217] MAR Article 7(1)(a). Emphasis added.

[218] The main difference for the purposes of this thesis is that forward contracts (a customized contract to buy or sell specified assets at an agreed price on a future date) have been expressly included as of 3 January 2018. See Karen Anderson and Eleanor Vance 'When Does the Market Abuse Regime Apply' in Karen Anderson, Andrew Protector and Jonathan Goodlife (eds), *A Practitioner's Guide to Market Abuse* (2nd edn, Sweet & Maxwell 2017), Appendix 1 at 42–43 and 32–41 for an overview of the trading venues that are within the scope of the MAR.

necessarily even trade in a target's financial instruments on a European stock exchange.[219] In other words, inside information needs to (i) directly or indirectly relate to an issuer or qualifying financial instrument, (ii) be sufficiently precise,[220] (iii) be non-public and (iv) likely have a significant effect on the prices of relevant financial instruments. Each criterion is to be assessed on a stand-alone basis; in other words, all criteria need to be met for the information to be considered as inside information.[221]

The first criterion, namely that the information relates directly or indirectly to the issuer or a qualifying financial instrument, is met in most activist engagements. This is because essentially all engagements that are relevant for the issuer's price development refer at least indirectly to the issuer and financial instruments related thereto.[222] For example, any activist engagements that are based on information implying that the securities related to an issuer are under- or overpriced would be sufficiently *relevant*. Furthermore, Nordic and German legal literature seems to take the view that information that has a *significant impact on financial instruments* and is *precise* will always at least indirectly relate to a financial instrument—which means that a separate systematization of the criterion is unwarranted.[223] The three main criteria for information being considered as inside information are each briefly analysed below, with due consideration being given to the key issues that arise in connection with activist investing.

1 *Is the Information Precise?*

The first main criterion of inside information is sufficient precision. Information that is *imprecise* will not amount to inside information. Article 7(2) of the MAR contains the test

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[219] For a similar conclusion, see Anderson and Vance (n 218) 30.

[220] Sufficient precision has been further defined in article 7(2): '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 […] 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.'

[221] For example, significant and precise information would not amount to inside information if the information is already publicly known. Correspondingly, nor would non-public information that is highly uncertain. Cf. Case C-19/11 *Markus Geltl v Daimler AG* EU:C:2012:397 [2012], paras 52–53 wherein the CJEU dismisses the view that the criteria would be co-dependent. See also Veil, 'Insider Dealing' (n 81) § 14 paras 26–28 and 35.

[222] Cf. MAR Article 7(1)(a). See also Veil (n 81), 'Insider Dealing' § 14 para 36.

[223] See Mårten Knuts, *Sisäpiirisääntely arvopaperimarkkinoilla* [Insider Regulation on the Securities Markets] (Talentum 2011) 27–28 and citations mentioned therein; Veil (n 81) § 14 para 31ff and citations therein.

for determining if information is sufficiently *precise* in accordance with the meaning of the MAR. According to this test, information shall be deemed precise 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* […] 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.[224]

Even information that relates to future events can thus be sufficiently precise to qualify as inside information. Procter and Thomas argue that such information 'does not have to be certain or highly probable that the circumstance or event will occur but there must be a realistic prospect that it will'.[225] This interpretation is based on the CJEU ruling in *Geltl v Daimler AG,* wherein the CJEU opted for a broad interpretation of 'may reasonably be expected' and ruled that it refers

> to future circumstances or events from which it appears, on the basis of an overall assessment of the factors existing at the relevant time, that there is a realistic prospect that they will come into existence or occur. However, that notion should not be interpreted as meaning that the magnitude of the effect of that set of circumstances or that event on the prices of the financial instruments concerned must be taken into consideration.[226]

The CJEU further held that in the case of a protracted process, even information concerning 'the intermediate steps of that process which are connected with bringing about that future circumstance or event' may be regarded as precise information.[227] As such, the CJEU clarified that in a multi-stage process each stage may itself amount to inside

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[224] MAR Article 7(2). Emphasis added.

[225] Procter and Thomas (n 233) 54. Cf. Hartmut Krause and Michael Brellochs, 'Insider Trading and the Disclosure of Inside Information After Geltl v Daimler—A Comparative Analysis of the ECJ Decision in the Geltl v Daimler Case with a View to the Future European Market Abuse Regulation' (2013) 8(3) *CMLJ* 283, 299: 'ECJ may be understood to be saying that a future event can only be inside information if it is more likely than not that it will occur.' See also Veil, 'Insider Dealing' (n 81) § 14 para 31.

[226] Case C-9/11 *Markus Geltl v Daimler AG* EU:C:2012:397 [2012], para 56. The Court also expressly dismissed the view that the criteria for certainty would be co-dependent of the 'significant impact' criterion. For a commentary on the case, see Veil, 'Insider Dealing' (n 81) § 14 paras 18–29; Krause and Brellochs (n 225) 285–299, wherein the authors come to the conclusions that a future event can only be inside information 'if there is a realistic prospect that it will occur, and that an anticipated high impact of the future event on the issuer cannot compensate for a low likelihood that the future event will occur.'

[227] Case C-9/11 *Markus Geltl v Daimler AG* EU:C:2012:397 [2012], para 56.

information of a precise nature and can therefore constitute inside information. This interpretation has since been codified in Article 7(3) of the MAR.[228] Moreover, the CJEU stated in the case of *Jean-Bernard Lafonta v AMF* that 'for information to be regarded as being of a precise nature […] it need not be possible to infer from that information, with a sufficient degree of probability, that, once it is made public, its potential effect on the prices of the financial instruments concerned *will be in a particular direction.*'[229]

Even early stage information concerning an activist engagement may meet the criterion for sufficient precision. For example, an offensive shareholder activist proposal on a divestment with a low success rate does not necessarily meet the criterion for sufficient precision. However, an intermediate step in pursuing that divestment would itself be sufficiently precise to amount to inside information if it is possible to infer that that information would allow a conclusion on the possible effect of that information. Each step of an on-going activist engagement must therefore be carefully assessed against the precision criterion. The mere fact that an activist shareholder initiates discussions with target management or board on significant changes in company policies or strategies may already be sufficiently precise and significant so as to constitute inside information, even if the execution and implementation of the proposed changes is still uncertain.[230] Situations in which the management responds (in private) to initial enquiries and expresses interest in or support for a particular proposal are likely to result in the activist being barred from trading in the target and the issuer being obliged to disclose these deliberations.[231] The disclosure of potential inside information during such discussions may itself also amount to unlawful disclosure, as examined more closely below. The risks associated with private

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[228] MAR Article 7(3) reads: 'An intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information as referred to in this Article.' See also Procter and Thomas (n 233) 54; Rüdiger Veil (ed), *European Capital Markets Law* (2nd edn, Hart Publishing 2017), § 14 paras 18–29 and 31. The 'information of a precise nature' criterion is defined in the same way as under the MAD 2003 regime. The *Geltl v Daimler AG* decision is thus also of authoritative standing under the MAR regime.

[229] Case C-628/13 *Jean-Bernard Lafonta v Autorité des marchés financiers* EU:C:2015:162 [2015], para 38 and operative part. See also Karen Anderson, Hannah Cassidy and Wendy Saunders, 'Overview of Market Manipulation' in Karen Anderson, Andrew Procter and Jonathan Goodlife, *A Practitioner's Guide to the Law and Regulation of Market Abuse* (2nd edn, Sweet & Maxwell 2017) 84.

[230] See, for example, Geraghty and Smith (n 18) 214 'Clearly, if a shareholder has been in discussion with the board and is party to price-sensitive information, he must have regard to the criminal offense of insider dealing and the civil offense of market abuse.'

[231] A response from the management is likely to indicate circumstances or events which may 'reasonably be expected to come about or occur'. The issuer may however delay disclosure if the criteria for delayed disclosure in MAR Article 17(4) are met. See Philipp Koch, 'Disclosure of Inside Information' in Rüdiger Veil (ed), *European Capital Markets Law* (2nd edn, Hart Publishing 2017) § 19 paras 53–99 for an extensive overview of the conditions for delayed disclosure.

discussions with a target company are consequently amongst the main reasons that activist investors may prefer to go public with their agenda and demands.[232]

2 *Is the Information Publicly Available?*

In addition to fulfilling the sufficient precision criterion, inside information also needs be *non-public*. Information that has been made public and is generally available to the market does not amount to inside information under the EU market abuse regime.[233] This follows from the very purpose of the insider prohibitions, which aim to prevent unfair dealings based on non-public information.[234] A key issue to be considered is *when* something has been made public. Veil points out that information that has been disclosed to a few analysts would not have been made public, whereas information that has been disclosed in accordance with MAR Article 17(1) would be.[235] Procter and Thomas take a somewhat more nuanced view:

> At one extreme, information that has been included in a formal announcement to the market […] will clearly have been made public. At the other extreme, information that has been passed on to only a handful of individuals may not be considered public information. Between these two extremes, a judgement needs to be made.[236]

Information that has been made public in accordance with MAR Article 17(1) and the regulatory information system is clearly considered public. Arguably, any material that has been made available on the issuer's website has also been made public, provided that this website is a recognized channel of distribution and the information is easily accessible. Moreover, the ESMA recognizes that information is '[l]ikely to become publicly available' when it is distributed to *a large number of persons* through recognized distribution channels, such as the producer's website, news agencies, news providers and

[232] On this notion, see Geraghty and Smith (n 18) 214–215.
[233] Cf. MAR article 7(1). See also *Geltl v Daimler*, para 25; Andrew Procter and Ian Thomas, 'Insider Trading' in Anderson Karen, Andrew Procter and Jonathan Goodlife, *A Practitioner's Guide to the Law and Regulation of Market Abuse* (2nd edn, Sweet & Maxwell 2017) 47.
[234] See MAR Recital 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.'
[235] Veil, 'Insider Dealing' (n 81) § 14 para 40.
[236] Procter and Thomas (n 233) 48. The authors find that information that has been provided to a number of analysts during an analyst conference call would possibly not be have been made sufficiently public. However, the authors further argue that if the company posts a full transcript of the call on its website, then at that point the information contained in the call will be available to anyone who accesses the website and so can be considered to have been made public. Cf. Veil, 'Insider Dealing' (n 81) § 14 para 40.

newspapers.[237] Many authors further argue that (all) information that is publicly attainable should be considered as publicly available.[238] However, situations in which information has been made public through more informal means require great care, as the distinction between non-public and public information is not clear-cut.[239] Any situation where an activist has an significant informational advantage over the rest of the market requires careful consideration, as further discussed below.

An additional concern for activist investors here is the question of whether refined, processed or extracted information that is *based on* public data has been made 'publicly available' if it is not easily 'accessible' to the public at large.[240] Recital 28 of the MAR provides some guidance on this issue:

> Research and estimates based on *publicly available data*, should not *per se* be regarded as inside information and the mere fact that a transaction is carried out on the basis of research or estimates should not therefore be deemed to constitute use of inside information. *However, for example, where the publication or distribution of information is routinely expected by the market and where such publication or distribution contributes to the price-formation process of financial instruments, or the information provides views from a recognised market commentator or institution*

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[237] ESMA, 'Final Report on Draft Technical Standard on the Market Abuse Regulation' (2015) 1455 at [338]–[342].

[238] Cf. Knuts, *Sisäpiirisääntely arvopaperimarkkinoilla* (n 223) 56–74. Knuts finds that information shall be deemed to be available to the market if market participants have had actual prospects to acquire such information. Publicly available information, even if it would not have been released [through officially available channels], would according to Knuts not amount to inside information. See also Vesa Annola, 'Internet, sisäpiiritieto, julkistaminen – Onko Internetissä esitetty aineisto menettänyt sisäpiirintiedon luonteensa?' [Internet, Inside Information and Disclosure – Is Information Published on the Internet No Longer Inside Information?] in Juha Tolonen, Vesa Annola and Brita Herler (eds), Talousoikeuden taitekohtia: Juhlajulkaisu Professori Asko Lehtoselle (Vaasan yliopistopaino 2005); Janne Häyrynen and Ville Kajala, *Uusi arvopaperimarkkinalaki* [The New Securities Markets Act] (Lakimiesliiton kustannus 2013) 401–405. Cf. Hansen, 'MAD in a Hurry: The Swift and Promising Adoption of the EU Market Abuse Directive' (2004) 15(2) *EBLR* 183, 196, wherein he, as an example, mentions a scenario where an British bio-tech CEO would publish price-sensitive non-public research results in Brazilian medical journal, would not be considered as being information legally available, 'because it was not reasonable to assume that even highly professional and resourceful players would know of the information' See also Clarke Sarah, *Insider Dealing: Law and Practice* (OUP 2013) 74–75; Edward Swan and John Virgo, *Market Abuse Regulation* (OUP 2010) 51–52.

[239] Procter and Thomas (n 233) 48. The authors mention that for example even widely disseminated rumours would not necessarily make the information public, as a primary source confirmation will often be more certain and precise than the rumour. See also KKO 2006:110 paras 20–28, wherein the Finnish Supreme Court held that even if the market had access to rumours relating to a merger, the more precise and certain information in possession of the accused amounted to the inside information (i.e. the accused was still in possession of significant information that the market did not have). See Knuts (n 223) 82; Häyrynen and Kajala (n 238) 417 for a commentary on the case.

[240] Veil, 'Insider Dealing' (n 81) § 14 para 40. Veil argues that '[i]nformation is considered to be non-public when the public at large could not have this knowledge. Thus, gathering public information is legal. It provides an incentive to create value via analysis, which is vital for the functioning of capital markets.' Cf. Procter and Thomas (n 233) 49.

> *which may inform the prices of related financial instruments, the information may constitute inside information.* Market actors must therefore consider the extent to which the information is non-public and the possible effect on financial instruments traded in advance of its publication or distribution, to establish whether they would be trading on the basis of inside information.[241]

An activist's own research or estimates could thus amount to (non-public) inside information in circumstances in which the activist is a frequent and recognized distributor of price-sensitive information (even if the research is solely based on publicly available information). Procter and Thomas argue that this is the case if the views or recommendations in the research contribute to the price-formation process or have such potential market significance that the fact that the research is to be published becomes potentially price-sensitive information.[242] For example, an activist who recurrently distributes research and (bearish or bullish) recommendations may become a prominent and recognized figure to the extent that the publication of the activist's research, views and opinions can cause a significant market reaction, as established in the sections above. A literal reading of MAR Recital 28 thus seems to suggest that trading based on such (non-public) information prior to its publication *may* amount to insider dealing.[243]

However, MAR Article 9(5) sets out that a person's knowledge of its own intention to deal in financial instruments *does not amount to inside information*. Recital 31 further provides that 'one's own *plans and strategies for trading* should not be considered as *using* inside information'.[244] Nonetheless, a literal reading of Article 9(5) in light of Recital 28 implies that one's own research does indeed amount to inside information if publication of the research is expected and it contributes to the price-formation process.[245] This results in a rather absurd situation in which activist investors and other market participants are barred from trading on the basis of their own research when it contributes to the price-formation

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[241] MAR Recital 28 (Emphasis added).
[242] Procter and Thomas (n 233) 50.
[243] See also Marika Salo, *Sijoitusneuvot ja -Suositukset Sijoittajan Päätöksenteossa* [Investment Advice and Recommendations in Investor Decision-making] (Alma Talent 2016) 159–160.
[244] Cf. MAR Recital 31 (Emphasis added).
[245] MAR Article 9(5) reads: '[…] *the mere fact that a person uses its own knowledge that it has decided to acquire or dispose of financial instruments* in the acquisition or disposal of those financial instruments *shall not of itself constitute use of inside information*.' (Emphasis added). Cf. Procter and Thomas (n 233) 60.

processes of financial instruments and is distributed on a regular basis in the meaning of Recital 28.[246]

Scenarios in which activist research combines (non-material) non-public information with public information also require consideration, as in-depth research and analysis that utilizes (non-material) non-public information could also constitute inside information.[247] Procter and Thomas argue that this would be the case if the research 'relies on a single piece of non-public information obtained from the company […] even though the single piece of non-public information would not, by itself, be regarded as price sensitive'.[248] However, it could be similarly argued that analysis that flows from that one piece of non-public information should not amount to inside information if it would on its own be regarded as non-material by the reasonable investor.[249] This thesis takes the view that the assessment ought to consider the non-material and non-public information's nature, significance and the particular circumstances of the case. Information that is close to the materiality threshold could arguably 'taint' research as a whole, whereas insignificant non-public information would not. Activists must therefore carefully consider the extent to which their research includes any *non-public* information and may itself amount to inside information.

3 *Is the Information Likely to Have a Significant Effect on the Market?*

The final criterion for determining if information amounts to inside information is whether it 'would be likely have a significant effect on the prices' of the relevant financial instruments.[250] Article 7(4) of the MAR sets further out that the criterion is to be interpreted to include 'information a reasonable investor would be likely to use as part of

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[246] Arguably, market participants ought to be incentivised to conduct their own research and analysis. See, for example, Veil, 'Insider Dealing' (n 81) § 14 para 40. Veil argues that the gathering and processing of public information is vital for the functioning of the capital markets. The price discovery mechanism on the regulated markets will not be efficient and precise without sophisticated market participants who spend resources on analysing publicly available information.

[247] See, for example, Vesa Annola, 'Analyytikko ja sisäpiiritieto' [The Analyst and Inside Information] in Ari-Matti Nuutila and Ari Saarnilehto (eds), *Arvopaperimarkkinat* (Turun Yliopisto 2001) 1–24.

[248] Procter and Thomas (n 233) 50. Cf. Annola (n 247) 7, wherein it is suggested that the information as whole should be assessed against the criteria of inside information. The test promulgated by Annola seems to be a sensible and comprehensive approach to this issue, as non-public information could arguably also be acquired from third parties.

[249] Similarly, see Procter and Thomas (n 233) 50. The US courts have adapted a 'Mosaic Theory' since *Dirks v. SEC* 463 US 646 (1983) to address this issue. The subsequent cases have established a safe harbour carve-out on outsider trading and disclosure. However, the US regime has also been criticised. See, for example, Aaron Davidowitz, 'Abandoning the 'Mosaic Theory': Why the 'Mosaic Theory' of Securities Analysis Constitutes Illegal Insider Trading and What to Do About It' (2015) 46 *Wash UJL & Pol'y* 281, 282–303. Davidowitz argues that the US mosaic theory in its current form should be abandoned and replaced with legitimate research techniques that properly give all investors fair access to information.

[250] MAR Article 7(1)(a).

the basis of his or her investment decisions'.[251] This reasonable investor test is the key element for assessing if information is price-sensitive.[252]

Recitals 14 and 15 of the MAR provide some additional guidance on what the reasonable investor is likely to consider as relevant. According to Recital 14, reasonable investors base their investment decisions on *ex ante* information that is available to them and the question of whether a certain piece of information is relevant should be *assessed in light of the information available to the market*. According to the CJEU ruling in *Markus Geltl v Daimler AG*, reasonable investors base their investment decisions on *all* available information.[253] Nonetheless, *ex post* information that infers the possibility that the information was price should not be used as a basis for concluding that the reasonable investor's test has been met.[254]

The materiality threshold is a key issue when considering whether information is likely to have a significant effect. The UK tribunal in *FCA v Hannam*, which was decided under the MAD regime, held that the reasonable investor takes *information that may have a non-trivial effect on price* into account.[255] However, Procter and Thomas argue that it is not safe to proceed on the basis of an assessment of the likely percentage impact that a piece of information would have on share price if that information were made public or a judgment as to whether that percentage is significant or not.[256] They assert that it is more appropriate to ask *how the reasonable investor in the market would likely react if they had the same information*. This test is arguably well aligned with CJEU case law and how MAR Article 7(4) should be read in light of the above-cited recitals, although it yet again raises the issue of *what* the reasonable investor is likely to consider relevant.

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[251] The view that the 'reasonable investor test' is a necessary 'but not sufficient' test has been subject to debate. See, for example, Gullifer Louise and Jennifer Payne, *Corporate Finance Law: Principles and Policy* (2nd edn, Hart Publishing 2015) 606. See also *FCA v Hannam* [2014] UKUT 233 (TCC) at 120. The Tribunal held that "likely to have a significant effect on" is not necessarily the same as the reasonable investors test, but that '[t]he test is an attempt to capture the essence of the concept.' (obiter dicta). Cf. Procter and Thomas (n 233) 51. Procter and Anderson argue that the implementation of the reasonable investors test in the MAR would close off the argument that the reasonable investors test would not be a sufficient test for examining the 'likely significant effect' element.

[252] See Veil, 'Insider Dealing' (n 81) § 14 para 42. Veil points out that a clear formation test is also of uttermost importance for a functioning price discovery mechanism.

[253] Case C-19/11 *Markus Geltl v Daimler AG* EU:C:2012:397 [2012] para 55.

[254] Cf. MAR Recital 15. See also Procter and Thomas (n 233) 51, who similarly argue that *ex ante* information 'should not be used as the basis for concluding that the reasonable investor test has been met in circumstances where an individual drew reasonable conclusions from the information available at the time.'

[255] *FCA v Hannam* [2014] UKUT (TCC) 233 at [102]. The Tribunal held that triviality will depend on the particular circumstances of each case: 'a 1p rise in a share worth £10 may be regarded as trivial but a 1p rise in a share worth 2p would not.'

[256] Procter and Thomas (n 233) 52. Similarly Knuts, *Sisäpiirisääntely arvopaperimarkkinoilla* (n 223) 105.

The reasonable investor's degree of sophistication is somewhat perplex and subject to judicial debate.[257] Veil argues that 'a reasonable investor knows the conditions and practices of the capital markets and can understand balance sheets, without necessarily being familiar with the details.'[258] However, he finds it controversial that German courts have asserted that the reasonable investor is also likely to consider *irrationalities and behavioural anomalies* in the capital markets (such as herd behaviour).[259] This issue has great implications for activist investors in particular. Does the reasonable investor consider the plausible herd effect (i.e. the Einhorn effect or Icahn lift) that activist engagement may instigate as relevant information? If so, the mere notion of the fact that an activist targets or acquires a holding in a company may be significant enough to constitute information that *would be likely have a significant effect* on the price of related financial instruments.

An interpretation in light of MAR Recitals 14 and 15 would further support an affirmative answer. The reasonable investor is arguably likely to consider the *ex ante* fact that a particular activist investor's reputation and strategies may have a significant impact on the share price of the company it is targeting.[260] On the other hand, *ex ante* information does not provide a definitive answer as to how the activist or markets are going to (re)act *ex post*.[261] If this were the case, *the reasonable investor* would also have to recognize that the

[257] See, for example, Veil, 'Insider Dealing' (n 81) § 14 paras 44–46. Cf. Vesa Annola, *Informaatio, sisäpiiri, markkinat: arvopaperimarkkinaoikeudellinen tutkimus informaatioepätasapainosta arvopaperikaupassa* [Information, Insiders, and Markets: A Legal Study on Informational Inbalancies in Securities Trading] (Turun yliopisto, 2005) 304–305. Annola finds it problematic if the reasonable investor criterion is set to include market psychology factors (*markkinapsykologiset seikat*) and even market irrationality (*irrationaaliseksi määritelty markkinapsykologinen vaikutus*), as the reasonable investor ought to be a 'sensible and knowledgeable' person. However, Annola seems to reach the conclusion that a reasonable investor is likely to consider the actions of other market participants, and thus accepts the conclusion that a reasonable investor is likely to consider the market psychology ('markkinapsykologia voidaan ottaa huomioon relevanssikriteerin määrittämisessä myös asiantuntevan sijoittajan osalta'). Cf. Emilios Avgouleas, *The Mechanics and Regulation of Market Abuse, a Legal and Economic Analysis* (OUP 2005) 70–72 and 257–259 (who argues that the key issue is whether the market impact was foreseeable at the moment when the information was not yet disclosed, i.e. if there exists *ex ante* information that indicates irrationalities, such as 'herding'). This thesis argues that the MAR adapts the latter view, as it does not require investors to predict *ex post* irrational behaviour on the basis of *ex ante* information. Cf. MAR Recital 14.

[258] Veil, 'Insider Dealing' (n 81) § 14 para 44.

[259] Veil, 'Insider Dealing' (n 81) § 14 paras 44–45. Veil cites the *IKB-Bank* ruling by the BGHZ 192 (2010) 90 and refers to the ongoing debate of the concept of the reasonable investor at § 14 para 44 and fn 88.

[260] See, for example, Becht and others (n 5) 2934ff above on the abnormal impact that activist strategies may have.

[261] For example, activist A is known for making companies more focused and efficient, and s/he has a track-record of 50 successful activist engagements that have all boosted the short and medium-term value of the target. A has previously only bought shares with the intention of initiating activist campaigns. A buys shares in company C, but A does not intend or employ any activist strategies in C. How will the market react when they receive the information that A owns shares in C?

ECMH, as it is classically defined, is flawed.[262] This may be too high a standard to set, as even the most sophisticated scholars do not seem to be in agreement on whether the ECMH holds true or not.[263] However, this does not hinder the CJEU in attributing a normative meaning to *likely significant effect* criterion, even if that meaning is imperfectly aligned with governing economic theories. Nonetheless, a contextual and teleological reading of the reasonable investor's test in light of the regime's overall objectives (see section II.C.) supports a conclusion that the reasonable investor may even consider behavioural anomalies as relevant—although such an interpretation based on economic analysis alone could be argued as unsatisfactory from a doctrinal legal certainty point of view. This thesis suggests a pragmatic solution based on a teleological and contextual reading of Recital 14: the reasonable investor considers market irrationality and behavioural anomalies relevant if *ex ante* available information validates such a conclusion. The practical implications of this interpretation are discussed in closer detail in the following section.

B. *Activist Investing and the Unlawful Use of Inside Information*

Having inside information is not unlawful per se, but dealings, recommendations or inducements to deal in related financial instrument(s) or the unlawful disclosure of such information result in a breach of MAR Article 14 provided that the inside information criteria set out above are met.[264] This section and sections IV.C. and IV.D. analyse, examine and systematize the inside information prohibitions in relation to activist investing.[265]

The insider dealing offense is set out in MAR Article 8(1), which states that 'where a person possesses inside information and *uses* that information by acquiring or disposing of,

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[262] See Avgouleas, *The Mechanics and Regulation of Market Abuse, a Legal and Economic Analysis* (n 257) 70–74. See also Dimity Kingsford-Smith and Olivia Dixon, 'The Consumer Interest and the Financial Markets' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015) on the concept of a 'financial citizen' and its limitations especially the insights of behavioural psychology and financial literacy. Placing the bar to high may increasingly cause significant information and transaction costs, not only to issuers, but other market participants as well.

[263] For example, the 2013 Nobel Prize in Economics was shared by men who disagree with each other: Eugene Fama (who argues that the markets are efficient) and Robert Shiller (who argues that markets are inefficient). See, for example, Robert Shiller, *Irrational Exuberance* (3rd edn, PUP 2015) and George Akerlof and Robert Shiller, *Phishing for Phools: The Economics of Manipulation and Deception* (PUP 2015). Cf. Fama (n 121) 383ff.

[264] The said provision prohibits persons from (i) engaging or attempting to engage in insider dealing; (ii) recommending that another person engage in insider dealing or inducing another person to engage in insider dealing; and (iii) unlawfully disclosing inside information.

[265] As described and defined in part III of this thesis.

for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates'.[266] Moreover, the *Spector* ruling and its implementation in Recitals 24 and 25 of the MAR imposes *a presumption of use* in circumstances in which a person in possession of inside information takes any action as defined in MAR Article 8(1).[267] However, that presumption may still be rebutted if the person establishes that the information was not used when a qualifying transaction was carried out.[268]

Activist investors based outside the EU should note that unlike its North American counterpart, the EU insider regime does not require any breach of confidentiality or fiduciary duties.[269] The EU insider dealing prohibition instead applies to *any* person who possesses inside information, if that person knows or ought to know that they have inside information.[270] The test in accordance with MAR Article 8(4) is even stricter for persons who have a *holding in the capital of the issuer* (e.g. shareholder activists) and others who obtain inside information through a representative in the issuer's administrative, management or supervisory bodies or have access to such information via their employment, profession, duties or involvement in criminal activities.[271] An activist who

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[266] MAR Article 8(1). The provision also continues to include any cancellation or amendments to existing orders on the basis of the inside information.

[267] See Jesper Lau Hansen, 'Insider Dealing Defined: The EU Court's Decision in Spector Photo Group' (2010) 7(3) *ECL* 98, 100–105. See also Mårten Knuts 'Insiderhandlingsförbudet i Norden – efter Spector-avgörandet. [The Prohibition on Insider Dealing in the Nordics – after the Spector-case]' [2011] 3 *JFT* 683 and 'Oikeustapauskommentaari ratkaisusta Spector Photo Group NV ym. – EUT asia C-45/08 (Spector-tapaus)' [2010] 5 *LM* 874ff.

[268] MAR recital 25. See also Procter and Thomas (n 233) 58. Procter and Thomas argue that this is in practice likely to require 'clear evidence that an intention to deal was formed before possession of the information or evidence of some prior legal or regulatory obligation that required the dealing.' Arguably, this presumption could also be rebutted if adduced evidence proves that the investor did not know of or intend to use the inside information at the relevant time.

[269] See Karen Anderson, 'Overview of Market Conduct Regulation in the UK' in Anderson Karen, Andrew Procter and Jonathan Goodlife, *A Practitioner's Guide to the Law and Regulation of Market Abuse* (2nd edn, Sweet & Maxwell 2017) 2–5; Procter and Thomas (n 233) 48; Sergio Gilotta, 'The Regulation of Outsider Trading in EU and the US' (2016) 13(4) *ECFR* 632 and Thomas Lee Hazen, 'Identifying the Duty Prohibiting Outsider Trading on Material Non-public Information' (n 27) 881.

[270] Cf. MAR Article 8(4). See also Veil, 'Insider Dealing' (n 81) § 14 para 11. It must be noted that the construction and scope of Swedish language version of 8(4)(b) is significantly narrower ('har *aktieinnehav* i emittenten') (!) than those of the English, Finnish and German language versions ('holding in the capital of the issuer', 'omistavat osuuden liikkeeseenlaskijan […] pääomasta', 'am Kapital des Emittenten […] beteiligt ist'). As such, the stricter test would only apply to *shareholders* according to the Swedish language version. The CJEU and a national court would have to consider the legal certainty implications of reconciliation upon interpreting the said provision. On the key issues that need to be considered, see Paunio (n 103) 119ff.

[271] Cf. Moloney, *EU Securities and Financial Markets Regulation* (n 33) 723. Moloney points out that Article 8(4) does not specify how significant a holding must be for the stricter test to apply, and she consequently argues that it is unlikely that it would apply on 'small shareholder who do not enjoy a close relationship with the company'. This thesis takes view that Article 8(4) applies equally to any persons with a

falls into one of these categories may be an insider for the purposes of MAR Article 8, even though the person *could not reasonably be expected to know that the information in its possession is inside information*.[272] These strict criteria further underline the importance of an objective assessment of when information may amount to inside information.

All on-going stages and discussions during an activist engagement must be objectively assessed against the criteria for inside information, even though the activist would decline to receive any inside information and refuse market soundings. For example, in the case of *FSA v Einhorn and Greenlight Capital Inc*,[273] David Einhorn, a famous activist investor, and Greenlight Capital Inc were fined GBP 7.2 million for engaging in insider dealing, even though Einhorn had expressly insisted on not being wall-crossed during a telephone call with a target company. However, the FSA found that although not one piece of information from the call amounted to inside information, the '[c]all as a whole and in context' did.[274] Moreover, it held that 'reasonable investors are expected to interpret comments made to them in an appropriate manner, which may sometimes mean understanding more than precise words spoken […] If it is sufficiently clear that a discussion is not, in fact, merely conceptual, even express words to the contrary will not prevent inside information from being given.'[275]

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holding in the issuer, as there exists no authoritative support for a view that would be in contrast with a literal reading of the said provision.

[272] Cf. MAR Article 8(4). For a similar conclusion, see Procter and Thomas (n 233) 58: '[a] person in such a position of trust may be an insider even though they could not reasonably be expected to know that the information is inside information. This would include shareholders, directors, and managers of the company.'

[273] FSA; 'Final Notice: David Einhorn', 15 February 2012 <http://www.fsa.gov.uk/static/pubs/final/david-einhorn.pdf> accessed 30 October 2017 (hereinafter 'FSA v Einhorn').

[274] See *FSA v Einhorn* (n 273) 8–16. The FSA found that even though the content of the discussions 'was not a certainty at the time of the disclosures', a conclusion of sufficient certainty could be drawn on the basis timeframe of the proposed NDA, (which Einhorn refused to sign) even if an 'NDA does not confirm that a transaction is definitely going to take place within a certain time scale, it does disclose anticipated timing and, in these circumstances, it informed Mr. Einhorn that the issuance was at an advanced stage.' See also Procter and Thomas 54–56 for a commentary on the case. Cf. Knuts, *Sisäpiirisääntely arvopaperimarkkinoilla* (n 223) 230–232 on *mala fides* tainting. Knuts argues that an exception to deal should under certain circumstances be recognized, if the investor has been 'forced' to receive inside information on the basis that the law should not protect actions in bad faith.

[275] It should be noted that the wall-crossing regulation has changed since *FSA v Einhorn* (n 274). MAR article 11 established a method for lawful market soundings. Further guidelines are provided in Commission Delegated Regulation (EU) 2016/960 of 17 May 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings. Commission Implementing Regulation (EU) 2016/959 of 17 May 2016 laying down implementing technical standards for market soundings with regard to the systems and notification templates to be used by disclosing market participants and the format of the records in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council and ESMA, 'MAR Guidelines – Persons receiving market soundings' ESMA (2016) 1477.

Consequently, even situations in which an activist investor refuses to receive market soundings and insists on not receiving any inside information are to be assessed on an objective basis. A mutual understanding of that no inside information is to be disclosed in discussions between an activist and the target company does not remove the possibility that inside information may be disclosed from an objective point of view during such discussions. Moreover, in its Market Watch Issue on activism the UK FSA has taken a rather strict view on activist stakebuilding and activist strategies being inside information:

> A market participant who identifies a possible strategy involving building upon or acquiring a stake in a target company *may consider the strategy to be inside information* and hence may question whether it can build or acquire the stake without disclosing the strategy to the market as a whole. In general, our approach would be not to view conduct as abusive of the market if the participant will merely carry out acquisitions of the target's securities *on the basis of its intentions and knowledge of its strategy*. […] However, we might reach different conclusions if other participants also come to trade on the basis of another [market] participant's strategy. […] We would also need to examine whether the behaviour of such other parties amounted to market abuse if they deal for their own account (or for the account of others) on the basis of their *knowledge of another participant's intentions and strategy, however obtained*.[276]

However, as the FSA notes, the activist may disclose its strategy to the market, whereafter it seizes to be inside information. The FSA's viewpoint seems to be in line with MAR Recital 31, as the FSA hints that trading on the basis of one's own plans and strategy would be permitted.[277] However, its view suggests that a publicity-shy offensive shareholder activist strategy may potentially be considered as inside information, and that dealings on the basis of such information would amount to market abuse. This is one of the main reasons that once they have acquired relevant shareholdings, activist investors often use public campaigns to drive their agenda as opposed to a subtler private approach that

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[276] UK FSA, 'Market Conduct and Transaction Reporting Issues' (FSA Market Watch Newsletter no. 20, May 2007) <http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter20.pdf> accessed 30 October 2017. Slaughter & May notes that there are broadly three scenarios where the pursuit of an activist strategy may amount to market abuse: '(1) an activist ("A1") dealing the securities of an issuer in order to further his own price-sensitive activist strategy in relation to that issuer; (2) an opportunist dealing with knowledge of A1's price sensitive activist strategy; or (3) a group of activists (A1 + A2, A3 etc) with common price sensitive proposals dealing to further their joint price sensitive activist strategy'. See, Slaughter & May, 'Shareholder Activism: A Call for More Extensive Guidance From the FSA' (August 2009) <https://www.slaughterandmay.com/media/848084/shareholder_activism_call_for_more_extensive_guidance_from_fsa.pdf> accessed 30 October 2017.

[277] UK FSA, 'Market Conduct and Transaction Reporting Issues' (n 276). See also Sean Geharty and Harriet Smith, 'Shareholder Activism as a Strategy for Hedge Funds' in Peter Astleford and Dick Frase (eds), *Hedge Funds and the Law* (Sweet & Maxwell 2010) 214. Cf. Knuts, *Sisäpiirisääntely arvopaperimarkkinoilla* (n 223) 33–35, 41–45.

could amount to inside information.[278] Once again, a key issue for activists going public is when a strategy will be considered as 'publicly disclosed'. A strict view on 'publicly available' (as discussed in section IV.A.2.) may encourage activists to publish their agenda through recognized distribution channels, such as news agencies and newspapers. Roberts argues that an activist investment strategy should be considered fully disclosed and cease to be price-sensitive 'once an activist's presence on a company's share register is publicly identified and its activist strategy is publicly known […]'.[279] This approach seems sensible and well-founded when the MAR's aims are further considered (the unfair informational advantage is lost at that point of time).[280]

An activist shareholder must thus always balance the benefits of private discussions with the target against the risk of becoming an insider and thereby being precluded from dealing with the company's shares.[281] Considering the outcome in *FSA v Einhorn*,[282] (activist) shareholders who have had discussions with a target's management or board must consider the market abuse prohibitions if such discussions even potentially included any price sensitive information, as such discussions 'taken as a whole' may be deemed to amount to inside information. Moreover, information about the activist engagement itself may satisfy the criteria of inside information if the engagement is non-public, as activist engagements are often connected with abnormal share price movement.[283]

However, as explored above, all forms of engagements do not necessarily amount to inside information on an objective basis, even if *ex post* share price movements suggest that the information was price sensitive.[284] The issue of whether the reasonable investor would consider *behavioural irrationalities on the markets* (e.g. the Einhorn effect or the Icahn lift) as relevant remains controversial as well.[285] This thesis argues that behavioural anomalies and irrationalities are likely to be considered as relevant on the basis of *ex ante*

[278] Cf. Jeffery Roberts, 'UK Shareholder Activism: A Toolbox for 2014' (*Harvard Law School Forum on Corporate Governance and Financial Regulation*, 2 March 2014) <https://corpgov.law.harvard.edu/2014/03/02/uk-shareholder-activism-a-toolbox-for-2014/> accessed 30 October 2017.See also Geraghty and Smith (n 18) 214.
[279] Roberts (n 278). See also Knuts, *Sisäpiirisääntely arvopaperimarkkinoilla* (n 223) 62–66. Cf. Häyrynen and Kajala (n 238) 405.
[280] See MAR Recital 23.
[281] Similarly, see Geraghty and Smith (n 18) 214.
[282] See *FSA v Einhorn* (n 273).
[283] Brav and others (n 133) 293; Krishnan, Partnoy and Thomas (n 134); Brav, Jiang and Thomas (n 134); Bebchuk, Brav and Jiang (n 134); Bechts and others (n 5).
[284] Cf. MAR Recitals 14–15.
[285] Veil, 'Insider Dealing' (n 81) § 14 paras 44–46.

available information if the activist investor has a significant track record of successful engagements and an established reputation (of affecting a target's prices) on the markets. The actions taken by such a market participant are likely to be highly relevant to *the reasonable investor*.[286] Likewise, the use of non-public information that has been acquired through extensive research (that combines nearly material non-public information, obtained e.g. through company whistleblowers) is likely to trigger a prohibition on insider dealing. Furthermore, the frequent distribution of price-sensitive research is also likely to bar the producer from trading on the basis of such research prior to its publication. The additional implications of research distribution are further discussed in part V below.

C. *Unlawful Disclosure*

The prohibition on insider dealing would be undermined if the persons who possess inside information could 'tip off' others.[287] As such, MAR Article 10 defines and Article 14 prohibits the unlawful disclosure of inside information. Article 10 sets out that disclosing inside information amounts to unlawful disclosure when a person (who possesses inside information) 'discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties'. As this is an exception to the general rule (that inside information, if not formally announced, must not be disclosed), it should be narrowly construed.[288]

Article 10 of the MAR applies to anyone *who knows or ought to know* that s/he is in possession of inside information. In accordance with Article 8(4), the test is again stricter for persons who have a holding in the issuer's capital (e.g., shareholder activists) and others who obtain inside information through a representative in the issuer's administrative, management or supervisory bodies or have access to such information via

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[286] Studies show that it is not only the activist investor, but also early followers of the activist investor who can profit from the abnormal returns on the short term. See, for example, Van Bommel, 'Rumors' (2003) 57(4) *J Fin* 1513ff.

[287] Karen Anderson, Gareth Sykes and Ian Thomas, 'Unlawful Disclosure of Inside Information' in Karen Anderson, Andrew Procter and Jonathan Goodlife (eds), *A Practitioner's Guide to the Law and Regulation of Market Abuse* (2nd edn, Sweet & Maxwell 2017) 75.

[288] This was also the view taken by the CJEU in its *Grøngaard and Bang* ruling, where materially identical provisions in the Insider Dealing Directive 1989 were under consideration. See case C-384/02 *Grøngaard and Bang* EU:C:2005:708, [2005] ECR I-9939 paras 34–35. The Court concluded that under that Directive, the disclosure of inside information is justified only if it is 'strictly necessary for the exercise of an employment, profession or duties and complies with the principle of proportionality'. Cf. *FCA v Hannam* [2014] UKUT 233 (TCC). See also Veil, 'Insider Dealing' (n 81) § 14 paras 70–73 and Anderson, Sykes and Thomas (287) 75–76.

employment, profession, duties or involvement in criminal activities.[289] Persons in such positions *may disclose inside information unlawfully even though they could not reasonably be expected to know that the information in their possession is inside information*.[290] However, it should be noted that the onward disclosure of recommendations or inducements referred to in Article 8(2) only amounts to unlawful disclosure when the disclosing person *knows or ought to know* that these recommendations or inducements were based on inside information.[291]

The MAR consequently seems to take a rather strict view on the (onward) disclosure of inside information. Disclosures by activists are also to be scrutinized in accordance with the above framework. As noted previously, different standards may apply, depending inter alia on how the information is acquired and whether the activist has a holding in the target. Activist short-sellers in particular ought to be conscious of the unlawful disclosure prohibition. If an activist further acquires any non-public information, this information alone or when combined with the activist's research may amount to inside information. The short-selling strategy itself could also amount to inside information. The onward disclosure of such information would consequently constitute market abuse. An interesting issue for activist investors is whether and how they may (lawfully) disclose an activist investment strategy to the market. For example, if and when an activist investment strategy amounts to inside information (as examined in sections IV.A. and IV.B. above), how may it be lawfully disclosed, if at all?

The view previously taken by the FSA seems to result in a catch-22 situation, as the FSA has expressed that an activist strategy is considered as inside information, and that the activist should consequently '*question whether it can build or acquire the stake without disclosing the strategy to the market as a whole*'. It has simultaneously suggested that '*any person who discloses such information to [other market participants] may also have engaged in behavior amounting to market abuse[!]*'.[292] In other words, although an activist is encouraged to disclose the activist investment strategy to the market, this disclosure may at the same time be seen as unlawful disclosure (presumably if it is not *disclosed to the*

[289] Cf. MAR Article 10(1) subsection 2. On the scope of the stricter test, see footnotes 270 and 271 above.
[290] For a similar finding, see Anderson, Sykes and Thomas (287) 71–72.
[291] Cf. MAR Article 10(2). An application of the provision would also have to consider rules governing the freedom of expression and freedom of the press. See, for example, Moloney, *EU Securities and Financial Markets Regulation* (n 33) 768.
[292] UK FSA, 'Market Conduct and Transaction Reporting Issues' (n 276) 1.

market as whole). However, this thesis argues that the MAR takes a somewhat more nuanced view, as further examined in the following section.

D. *Legitimate Behaviour That Would Not Amount to Insider Dealing or Unlawful Disclosure*

Article 9(1)–(5) of the MAR establishes certain exemptions that are to be considered as 'legitimate behaviour' in relation to the *use* of inside information.[293] Such conduct does not amount to *using* inside information even if a person is in possession of inside information, provided that the criteria set out in the provisions are met.[294] A person is, inter alia, not considered to have acted on the basis of inside information when s/he is acting under an obligation that results from an order placed or an agreement concluded before s/he possessed inside information or dealing in good faith to fulfil a pre-existing contractual or regulatory obligation in accordance with MAR Article 9(3).[295] Moreover, dutiful execution on behalf of third parties 'in the normal course of business' does not amount to market abuse in accordance with MAR Article 9(2)(b). The applicability of such exceptions depends on the activist's (corporate) structure and the employed strategy. However, an activist will presumably not enter into binding obligations to deal on behalf of third parties without any assurance of the pursued engagement's success rate.

The most significant exemption for activist investors is set out in MAR Article 9(5), which provides that a person's 'own knowledge that it has decided to acquire or dispose of financial instruments in the acquisition or disposal of those financial instruments shall not of itself constitute use of inside information'. The rationale of this rule is that a person cannot be prevented from carrying out their own intention to deal.[296] The main issue for activist investors is whether this exemption also applies to the activist strategy as a whole in addition to applying to the intention to deal. The FSA has previously taken a view that it does not, as noted above.[297] This thesis argues that the MAR takes a contrary position. The main support for this argument is found in Recital 31, which sets out that '[a]cting *on the*

[293] For example, Article 9(4) read with recital 30 of the MAR displaces the presumption that a person in possession of inside information has used that information and has thus engaged in insider dealing, where the inside information is obtained in the conduct of a public takeover or merger with a company and used solely for the purpose of proceeding with that merger or public takeover. See also Procter and Thomas, 'Insider Trading' (n 236) 62.
[294] Cf. Article 9(1)–(5) and recital 24. The exceptions are extended and refined implementations of the *Spector* case exemptions. Cf. *Spector* paras 60–62. See also Veil, 'Insider Dealing' (n 81) § 14 para 68.
[295] See also Procter and Thomas, 'Insider Trading' (n 236) 60.
[296] Cf. MAR recital 31. See also Spector and Thomas (n 236) 60.
[297] UK FSA, 'Market Conduct and Transaction Reporting Issues' (n 276).

basis of one's own plans and strategies for trading should not be considered as using inside information.'[298] Recital 19 further provides that the MAR 'is not intended to prohibit *discussions of a general nature regarding the business and market developments between shareholders and management* concerning an issuer. Such relationships are essential for the efficient functioning of markets and *should not be prohibited by [the MAR].*'[299] Activism may arguably have a beneficial impact on market integrity and efficiency, as established above. As such, the lawfulness of dealings on the basis of one's own activist strategy could also be supported by a contextual and teleological reading of Article 9(5) in light of Recitals 19 and 31.

However, issues arise in situations in which the activist investor initiates discussions with others, such as target management or other investors. In such circumstances, an activist investor may no longer be trading solely on the basis of its own plans. A practical issue is how one separates legitimate *general discussions* regarding business from more specific discussions that may amount to inside information. The most common activist objectives could arguably be pursued either as a 'general agenda' or at a more specific level.[300] For example, 'the company should focus on its core business' level discussions would clearly be a *general level* discussion on a sale of assets or restructuration agenda, whereas a proposal that 'the company should sell off assets XYZ' may already be specific enough to amount to inside information if it is further pursued. Likewise, a cost reduction discussion could be held at a general level, whereas a specific proposal being pursued to cut R&D costs for a certain project may satisfy the criteria of inside information. Considering the outcome in *FSA v Einhorn*, activist investors activist investors ought to continuously assess whether the totality of the information they possess may amount to inside information, even in cases where they have expressly refused to accept any inside information (as part of market soundings). It is simultaneously important for them to keep in mind that each intermediate step in a protracted process is to be assessed against the criteria of inside information,[301] as specific discussions intended to bring about a particular circumstance or

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[298] MAR Recital 31 (Emphasis added).
[299] MAR Recital 19 (Emphasis added). See also Häyrynen and Kajala (n 238) 460–463.
[300] Allaire and Dauphin, 'The game of "activist" hedge funds: *Cui bono*?' (n 4) 284. Dauphin and Allaire identify (i) sale of company assets or asset restructuration, (ii) governance structure or board change, (iii) change in payout policy (iv) cost reduction, and (v) omnibus as most common objectives among (public) activists. Private activists are presumed to pursue similar objectives.
[301] Case C-19/11 *Markus Geltl v Daimler AG* EU:C:2012:397 [2012], paras 27–40.

generate a specific event (e.g. a change in the governance structure or board) may amount to inside information—which would consequently also bar dealings in the target.

Discussions between several activist investors may also amount to market abuse, as the EU insider regime does not, unlike its North American counterpart, require any breach of confidentiality or fiduciary duties. Activist investors who share a common agenda would not be acting solely *on the basis of one's own plans and strategies* for trading. As such, the EU regime does effectively prevent activist investor collaboration (and formation of wolf packs) in situations where the activist agenda amounts to inside information. However, other activist investors may join suit after the activist strategy has been made publicly available (as the unfair informational advantage is lost at that point of time).[302]

A significant caveat related to relying on MAR Article 9 defences must also be noted. Article 9(6) clarifies that notwithstanding the exceptions set out in Article 9, an infringement of the insider dealing prohibition may still be deemed to have occurred 'if the competent authority establishes that there was an *illegitimate reason* for the orders to trade, transactions or behaviours concerned'.[303] The provision should be read in light of Recital 31, which states that '[persons] should only be protected *if they act in a fit and proper manner, meeting both the standards expected of their profession and of this Regulation namely market integrity and investor protection*.'[304] Veil contends that Article 9(6) causes significant legal uncertainty and may even be 'unconstitutional', as it *clearly lacks sufficient precision*.[305] Veil arguably has an important point; an NCA may establish behaviour that is legitimate within the scope of Article 9 as insider dealing if it at its own discretion considers the reasons for such conduct 'illegitimate'. The existence of this discretion further underpins the contextuality of the market abuse provisions. However, a situation in which the exemptions for legitimate behaviour operate by way of analogy is unfortunate and highly detrimental to both legal certainty and market efficiency. Consequently, activists who deal on the basis of Article 9(5) ought to do so with great care; in particular, they should seek to act in a fit and proper manner that meets both the

[302] As noted in n 280 above.
[303] MAR Article 9(6). Recital 31 sets further out that '[persons] should only be protected if they act in a fit and proper manner, meeting both the standards expected of their profession and of this Regulation namely market integrity and investor protection.'
[304] MAR Recital 31 (Emphasis added).
[305] Veil, 'Insider Dealing' (n 81) § 14 para 69. Veil further argues that the scope of Article 9 could be extended by way of analogy to include other conduct that may be considered as legitimate behaviour, as it is not apparent that the legislator intended the definition to be exhaustive.

standards of their profession and the regulation's objectives, namely market integrity and investor protection (as dissected in section II.C. above), to avoid liability for behaviour that may be established as illegitimate.[306]

As explored in section IV.C., the disclosure of inside information is currently strictly prohibited under the MAR—even if it would uncover serious fraud or misconduct. For example, imagine that activist investor A spends significant resources on independent research and learns that car manufacturer B is systematically manipulating emission test results. That information is precise, material and non-public; in other words, it amounts to inside information. As such, A may not use or disclose this information to the market without contravening the market abuse prohibitions.

This thesis argues that the European courts, and ultimately the CJEU, ought to recognize, *de sententia ferenda*, an exception for *outsider disclosure*, in particular when such disclosure uncovers fraud or other serious misconduct. The basis for recognizing this exception lies in the very aims of the MAR, which seek to enhance market integrity and public confidence and may be attributed an objective meaning in the sense that they guarantee the markets *freedom from misinformation*. The disclosure of material non-public information is justified in accordance with these aims if and when the information uncovers serious misconduct, which consequently guarantees the integrity of the markets. The recognition of such an exception could and should consider the outsider carve-outs that have been defined and refined in a US line of cases based on *Dirks v SEC*. Recognizing a similar exception would enhance the integrity and efficiency of European markets.

It seems that the EU legislature has failed to recognize the detrimental impact that the over-inclusive disclosure prohibition has on market integrity and efficiency, as the impact assessment report does not even consider the option.[307] Writing extrajudicially, the sitting

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[306] Cf. MAR Recital 31.

[307] On the contrary, it seems that the MAR impact assessment report seems to endorse a more stringent approach on outsider trading as 'the offence of improper disclosure of inside information by secondary insiders [… and] "tipping" by secondary insiders […] *can be expected to have negative effects on the single market and could encourage potential offenders to carry out market abuse* […]. See, MAR Impact Assessment (n 95) 27–28. The EU legislator does not seem recognize a scenario where an issuer would fail to disclose material (non-public) information concerning, e.g. fraud or other serious misconduct within or by the issuer (such as the emission test scandal example), as the disclosure of such information to the market has been prohibited. Such a prohibition may also have some implications from the perspective of freedom of expression, as guaranteed in the Member States, as the disclosure of such information may fall within the

president of CJEU, Koen Lenaerts, and a member of his cabinet have recognized that the CJEU may depart from the wording of an EU law provision with a view to reducing its scope of application (so-called 'teleological reduction') in cases where a 'textualist approach would excessively broaden the scope of that provision, thereby giving rise to unfair situations which were not foreseen by the EU legislator or are contrary to the objectives pursued by the latter'.[308] Recognizing the possibility that market participants can also uncover fraud and other serious misconduct in the market would not necessarily even require a teleologically reductional method of interpretation, as support for such an interpretation may found in the recitals and MAR Article 1, which specifies that the MAR 'establishes a common regulatory framework […] to ensure *the integrity* of financial markets in the Union and *to enhance investor protection and confidence in those markets*'.[309] These objectives could simply be given a textual precedence over the 'over-inclusive' wording of the disclosure prohibition in circumstances in which the over-inclusiveness results in *decreased market integrity* (contrary to the objectives of the EU legislature).

It is appropriate to note that if an activist investor or any other market participant uncovers infringements of the MAR, s/he may file an infringement report in accordance with the whistleblowing directive (CDI 2392/2015), as implemented in the Member States.[310] However, the whistleblowing rules seem to afford protection only to reports that concern *actual or potential infringements* of the MAR; other serious misconduct falls beyond the scope of the whistleblowing regime.[311] It would consequently be appropriate to broaden the scope for (lawful) disclosure, especially in such cases where the disclosed information does not necessarily amount to explicit contravention of the MAR. The recognition of such

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scope of application of the provisions governing freedoms of expression and the press, as further examined in section V.E. below.

[308] Lenaerts and Gutiérrez-Fons (n 82) 36 (Emphasis added).

[309] MAR Article 1 (Emphasis added). See also MAR Recitals 2–4. As discussed above in section II.C., *market integrity* may be attributed a normative meaning.

[310] Arguably, the scope of the whistleblowing regime could (and should) be interpreted broadly, as it even covers actual or *potential* infringements of MAR. Any material undisclosed non-public (i.e. inside) information that relates to an issuer would amount to a *potential* infringement of the MAR, as the issuer has failed to disclose such information (if the issuer is not legitimately delaying its disclosure). However, situations where the issuer itself is unaware of a material fraud that affects its business, for example, in such a scenario where the issuer is being defrauded, it would arguably not even be able to disclose that (material non-public) information market, as it would be unaware that it is subject to a fraud. This thesis takes, *de sententia ferenda,* the view that if an investor in such a scenario becomes aware of the fraud, it ought to be able to disclose that information *to the market as whole.*

[311] Cf. CDR 2392/2015 Article 2(3). However, the final scope of the whistleblower regime will be contingent on the implementation in national law.

an exception to the disclosure rules would be further supported by freedom of expression arguments. In fact, the freedom of expression regimes in some Member States do seemingly afford constitutional protection for such disclosure under certain circumstances, such as when inside information is disclosed to the press (as further examined in section V.E. below).

V. MANIPULATIVE ACTIVIST ENGAGEMENTS

This section systematically analyses the key issues that need to be considered in determining when activist investing may contravene the EU market manipulation prohibitions. As such, it mainly explores the relevant criteria that must be considered when information is publicly disseminated in connection with activist investing. The section also explores if and how the standards for presenting investment recommendations or other information that recommends or suggests an investment strategy affect the said assessment. Moreover, this section also explores the circumstances under which activist stakebuilding itself may be deceptive or manipulative.

A. *Activist Stakebuilding and Manipulative Devices*

The short-term nature of a typical activist engagement and the optimal timing of entry and exit may create economic incentives to manipulate the targeted financial instruments' prices. For example, an activist short-seller with a leveraged short position in a target company has an economic incentive to amplify negative information and even (intentionally) mislead the markets to believe that the targeted company is overpriced. On the contrary, an offensive shareholder activist will be incentivized to lead the markets to believe that the targeted company is undervalued. Certain forms of activist investing that involve aggressively disseminating information and running extended public campaigns, such as activist short-selling, have in particular been associated with information-based methods of market manipulation.[312]

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[312] Market manipulation has traditionally been categorized into *information-based* and *transaction-based* forms manipulation. See Franklin Allen and Douglas Gale, 'Stock-Price Manipulation' (1992) 5(3) *Rev Fin Studies* 505 and Marius-Christian Frunza, *Introduction to the Theories and Varieties of Modern Crime in Financial Markets* (AP 2015) 113. This subdivision is also notable in the MAR. Teigelack argues that Article 12(1) points (a) through (b) are explicitly designed to prohibit trade-based manipulation, whereas Article 12(1)(c) is designed to prohibit information-based manipulation. See, Teigelack, 'Market Manipulation' (n 21) § 15 para 1 fn 1 and Emilios Avgouleas, 'EC Securities Regulation, A Single Regime for an Integrated Securities Market: Harmonised We Stand, Harmonised We Fail? Part 2' (2007) 22(3) *JIBLR* 153, 155–156. This thesis adapts a similar approach in the systematization of the market manipulation prohibitions. Cf.

Ordinary activist stakebuilding, through for example block trades, does not itself amount to an abusive practice.[313] However, the FSA has underpinned the fact that activist stakebuilding may include *manipulative devices*, such as *spreading the stakebuilding activities between different purchasers with the aim of avoiding disclosure obligations relating to single stakes*.[314] Such (manipulative) conduct is also often referred to as *parking and warehousing*.[315] A typical scenario is a situation in which several activists act in concert to form a so-called wolf pack with the intention of circumventing disclosure obligations that flow from the TD or short position disclosure thresholds in the SSR.

A similar situation entails a wolf pack being formed to circumvent takeover obligations while pursuing an activist agenda. An illustrative example—and perhaps one of the most well-known activist interventions—is the blocking of Deutsche Börse's (DB) acquisition of the London Stock Exchange (LSE), when DB announced its LSE acquisition bid in December 2004. Shortly thereafter, The Children's Investment Fund Management (TCI) announced that it had acquired more than a 5 per cent stake in DB and that DB should recall the bid and initiate a share buy-back program instead. Even though the acquisition did not require shareholder approval, TCI called on an extraordinary general meeting to dismiss the DB supervisory board. Several other funds joined in on the campaign, and

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Knuts, *Kursmanipulation på värdepappersmarknaden* (n 41) who divides market manipulation into information-based and market power based forms of manipulation. See also Jesper Lau Hansen, 'The MAD In a Hurry: The Swift and Promising Adoption of the EU Market Abuse Directive' (n 238) 207–208 who divides the market manipulation into *non-verbal* (trading) and *verbal* (voicing an opinion) forms of misinformation. Similarly, Bergþórsson, (n 41) 5–6 and 67–193, wherein he argues that every form of manipulation is essentially based on (dissemination of) misinformation. Arguably, Article 12(1)(a) through (b) would also apply on information-based manipulation if such dissemination were likely to affect the price of a financial instrument or give misleading signals as to the supply, demand or price of the related financial instrument. The catch-all nature of the provisions will in some cases render several or all 'core definitions' of market manipulation in 12(1)(a)–(c) relevant and applicable. The separation of information-based and transaction-based forms of manipulation may thus in practice be somewhat artificial and unnecessary in cases wherein several definitions become applicable. An overall assessment against all the applicable criteria would be more appropriate in such cases, with due consideration of the lower level Lamfalussy guidance. However, it should be noted that only one of the 'core definitions' will need to be met for the conduct to amount to market manipulation. For example, deceptive transactions need only amount to market manipulation under 12(1)(b) and the dissemination of rumours need likewise only amount to manipulation under Article 12(1)(c). The most fundamental criteria of market manipulation seem inarguably to be *the prohibition against misinformation.* Such an interpretation is aligned with the findings made in section II.C., wherein it was concluded that *market integrity* ultimately constitutes a *freedom from misinformation*.

[313] UK FSA, 'Market Conduct and Transaction Reporting Issues' (n 276).

[314] UK FSA, 'Market Conduct and Transaction Reporting Issues' (n 276).

[315] Vivian Goldwasser, *Stock Market Manipulation and Short Selling* (CCH Australia Limited and the Centre for Corporate Law and Securities Regulation 1999) 162. Goldwasser points out that 'by concealing beneficial ownership, these practices are ideally suited to disguising a manipulator's control of a security. The manipulator avoids alerting the market to the fact that he or she holds more than five percent of the outstanding stock. This failure to disclose operates as a fraud on the market due to the concealment of a material fact.' See also Knuts, *Kursmanipulation på värdepappersmarknaden* (n 41) 318–322 and Häyrynen and Kajala (n 238) 512.

reportedly more than 40% and as much as 60% of the shareholders opposed the acquisition in March 2005, when DB decided to abandon its bid and sought to distribute the cash to its shareholders instead. The CEO of DB had to resign in May 2005, when the supervisory board ordered the DB chairman 'to change the composition of the Supervisory and Executive Boards in order to reflect the new ownership structure of the Company.'[316]

The German BaFin consequently investigated whether companies linked to TCI had 'acted in concert' in accordance with the German definition of the term.[317] In its investigation, BaFin found that despite 'several indications of acting in concert', it was 'unable to prove beyond reasonable doubt that the [activist funds] had conspired to exercise a permanent influence over DB.'[318] This assessment clearly boils down to a normative interpretation of the definition of 'acting in concert' (a definition that is governed by substantive national law) and whether that definition is met.[319] Such issues will ultimately be resolved on an evidentiary basis. It would usually be hard to adduce sufficient evidence that the activist shareholders have acted in concert if no explicit agreement among them exists.[320]

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[316] For a thorough commentary on the case, see Marcel Kahan and Edward B. Rock, 'Hedge Funds in Corporate Governance and Corporate Control' (2007) 155(5) *UPaLRev* 1021, 1034–1037 and Rüdiger Veil 'Mandatory Bid' in Rüdiger Veil (ed), *European Capital Markets Law* (2nd edn, Hart Publishing 2017) § 40 para 24.

[317] According to Veil, German takeover law defines acting in concert as any behaviour of the offeror concerning the target company that has been adjusted on the basis of an agreement or in any other way (Section 30(2) of the Wertpapiererwerbs- und Übernahmegesetz (WpÜG).

[318] German Federal Financial Supervisory Authority (BaFin), 'Annual Report 2005' (21 August 2006) <https://www.bafin.de/EN/PublikationenDaten/Jahresbericht/jahresbericht_node_en.html> accessed 30 October 2017.

[319] The definition of 'acting in concert' is (still) partly governed by the substantive laws of the Member States. A detailed analysis of the national rules on takeover law falls outside the scope of this thesis. For an overview of the key issues that needs to be considered, see Geraghty and Smith (n 18) § 8 paras 26–27; Martin Winner, 'Active Shareholders and European Takeover Regulation' (2017) 14(1) *ECFR* 364 and Rolf Skog and Erik Sjöman, 'Acting in concert – Närståendebegreppet i ny belysning' [2013] 4 *NTS* 1. Skog and Sjöman underlines that 'acting in concert' assessment will be contingent on the national implementation of the EU takeover directive, national takeover codes and case law.

[320] Arguably, activists would be able to engage in the same company without acting in concert (depending on the pursued objective). Or as the Phil Goldstein, CEO of Bulldog Investors, infamously put it: '[i]f you go to a Grateful Dead concert, you're going to find a lot of Grateful Dead fans. They're not a group. They just like the same music.' See Liz Hoffman, Aruna Viswanatha and David Benoit, 'SEC Probes Activist Funds Over Whether They Secretly Acted in Concert' *Wall Street Journal* (4 June 2015) <https://www.wsj.com/articles/sec-probes-activist-funds-over-whether-they-secretly-acted-in-concert-1433451205> accessed 30 October 2017. In the US, the similar issues arise under the 13(d)(3) of the Securities Exchange Act of 1934, which requires coordinated groups to notify joint stakes. For an overview of the US discussion, see Coffee and Palia 'The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Gorvernance' (n 10) 593. Coffee and Palia identifies the main issue under the US regime being that wolf packs are not caught under the 13(d)(3) acting in concert provision *nor the US insider trading rules*. As a result, the activist investor can tip of others of its intention to initiate an activist campaign because it breaches no fiduciary duty in doing so. Ultimately, Coffee and Palia finds that such campaigns yield 'relatively riskless profit that is divorced from the merits of the policy proposal concerns us because it may

In addition to employing deceptive measures that seek to hide a true holding, an activist may also engage in manipulative conduct that may fix or steer the target instrument's price in a beneficial direction. The core definitions of transaction-based forms of market manipulation are included in MAR Article 12(1)(a) and (b), which sets out that transactions, orders to trade and any other behaviour that

> *gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument* […] or (ii) secures, or is likely to secure, the price of one or several financial instruments […] at an abnormal or artificial level; […(b)(iii)] *employs a fictitious device or any other form of deception or contrivance* [(…) that] *affects or is likely to affect the price of one or several financial instruments* [amounts to market manipulation.][321]

Article 12(1)(b) seems to be a broadly worded catch-all clause that is intended to capture manipulative transactions and behaviour that is not covered by the definitions in 12(1)(a)(i)–(ii).[322] It could be further noted that the core definitions of different forms of manipulation have been so broadly worded that they overlap to the extent that all transaction-based forms of manipulation could also arguably be considered information-based manipulation and vice versa.[323] Consequently, most methods of manipulating the market could even fit within all three core definitions for market manipulation.

Activists may potentially also commit various trade-based forms of manipulation without disseminating any false information publicly or engaging in any other publicly observable non-transaction action designed to alter the security's value; this is particularly true during stakebuilding and exit.[324] The definition adapted for activist investing in this thesis would

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encourage ill-considered or even pretextual corporate governance campaigns, *based on the premise that noise generates profit*.' (Emphasis added).

[321] Cf. MAR Article 12(a)–(b) (Emphasis added).

[322] See, Teigelack, 'Market Manipulation' (n 21) § 15 paras 15 and 25–38. Further guidance on the interpretation of the trade-based forms of manipulation are set out in MAR Article 12(2), Annex I Section A and Annex II sections 1 and 2 of CDR 522/2016. Cf. Recital 46 which speaks of 'behaviour which occurs outside a trading venue'.

[323] Cf. MAR Article 12(a)–(c): '[(a)] *any other behaviour which* [...(b)] *any other activity or behaviour which is likely to affect the price* […(c)] *disseminating information through the media […] or by any other means, which gives, or is likely to give, false or misleading signals* […].'

[324] The stand-alone, purely *trade-based* forms of market manipulation, are not covered in detail this thesis. Mainly for two reasons. Firstly, and most crucially, such examination falls outside the definition for activist investing, as it is defined herein. This is motivated as activist investors rarely employ stand-alone trade-based methods of manipulation (and as such conduct would 'simply' amount to trade-based market manipulation), as discussed above. Secondly, there exists outstanding research on stand-alone forms of trade-based market manipulation, and this thesis would have nothing to contribute beyond existing research on trade-based market manipulation. See, for example, Bergþórsson, *What is Market Manipulation? An Analysis of the Concept in a European and Nordic Context* (n 41) and Teigelack, 'Market Manipulation' (n 21) § 15 paras 25–37 and Anderson Karen, Andrew Procter and Jonathan Goodlife, *A Practitioner's Guide to the Law and*

regard such conduct as simply manipulative, as such conduct would not amount to *activist investing*.[325] It should be underlined that this systemization is not only academic, even if it serves such a purpose in this thesis. It is uncommon for *activist investors* to engage in transaction-based market manipulation, as they often are sophisticated traders who are well aware of the trade-based prohibitions. Offensive shareholder activists who obtain stakes in public companies often do so via block trades, consulting an investment bank or high-end broker-dealer in the process. With regard to activist short-selling, (excessive) short selling per se only very rarely amounts to trade-based market manipulation.[326]

Crucially, MAR Annex I Section B interlinks the assessment of (manipulative) transactions, orders to trade and any other form of deception or contrivance in accordance with Article 12(1)(b) to the prohibition for information-based market-manipulation. Annex I sets out indicators of manipulative behaviour relating to the employment of the term '*any other form of deception or contrivance*', for which the following (non-exhaustive) indicators must be taken into account when determining whether the behaviour is considered manipulative:

> (a) whether orders to trade given or transactions undertaken by persons are preceded or followed by dissemination of *false* or *misleading information* by the same persons or *by persons linked to them*; and (b) whether orders to trade are given or transactions are undertaken by persons before or after the same persons or *persons linked to them produce or disseminate investment recommendations which are erroneous, biased, or demonstrably influenced by material interest.*[327]

The insertion above is of significant importance for assessing whether activist investing may amount to market manipulation, as the *dissemination of investment recommendations* or *false* or *misleading information* in connection with trading would amount to an indication of market manipulation. The exact nature of these elements is further analysed in sections IV.B (recommendations) and IV.C–D. (false or misleading information) below.

Regulation of Market Abuse (2nd edn, Sweet & Maxwell 2017) ch 6 'Market manipulation: manipulating transactions and other conduct' 99–136 on outstanding analysis on trade-based market manipulation.

[325] As defined in section III.A. above. However, it could also be argued information-based manipulation during activist engagements may in practice be combined with various forms of transaction-based manipulation, such as *momentum ignition*, for maximum effect. For a general overview of common transaction-based methods of manipulation, see Teigelack, 'Market Manipulation' (n 21) § 15 para 28ff.

[326] Knuts, 'Behövs ett förbud mot short selling på värdepappersmarknaden?' (n 154) 71–74 and Emilios Avgouleas, 'A New Framework for the Global Regulation of Short Sales: Why Prohibition is Inefficient and Disclosure Insufficient' (2010) 15(2) *Stan JL Bus Fin* 376, 408–410.

[327] Cf. MAR Annex I B, paras (a)–(b). (Emphasis added).

B. *Investment Recommendations and Appropriate Disclosure of (Conflicting) Interests*

Article 20(1) of the MAR provides that '[p]ersons who produce or disseminate *investment recommendations* or other *information recommending or suggesting an investment strategy* shall take *reasonable care to ensure that such information is objectively presented*, and to *disclose their interests or indicate conflicts of interest concerning the financial instruments to which that information relates.*'[328] A key issue that consequently needs to be considered in connection with activist investing is whether the public dissemination of information amounts to either an investment recommendation or information that recommends or suggests an investment strategy in accordance with the MAR, as complemented by CDR 958/2016.[329] Whenever this is the case , an activist investor must take reasonable care to present the disseminated information objectively and to disclose interests and conflicts of interests in a manner that is sufficient according to MAR Article 20 and CDR 958/2016. A failure to do so enlivens the relevant NCA's authority to issue administrative sanctions and take other administrative measures without prejudice to any plausible criminal sanctions.[330] Trading in connection with the dissemination of recommendations that are influenced by a material interest is indicative of market manipulation, as noted above. A breach of MAR Article 20(1), such as a failure to disclose conflicting interests sufficiently, may under certain circumstances also be deemed to amount to market manipulation, even if no false or misleading information is disseminated, as examined more closely below.

Consequently, a critical issue for activist investors in particular is whether *publicly disseminated* information may amount to an investment recommendation or information that recommends or suggests an investment strategy. The ESMA takes the view that these terms are to be interpreted autonomously, 'irrespective of the label attached' to the

[328] Cf. MAR Article 20(1) (Emphasis added).

[329] Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest [2016] OJ L 160/15 (CDR 958/2016). It should be noted that the CDR 958/2016 does not apply to journalists who are subject to equivalent appropriate regulation in a Member State, including equivalent appropriate self-regulation, provided that such regulation achieves similar effects as those technical arrangements. Cf. MAR Article 20(3).

[330] Cf. MAR Article 30(1)(a).

information.[331] Article 3(1)(34)–(35) of the MAR provides that *information recommending or suggesting an investment strategy* means

> information (i) produced by an *independent analyst, an investment firm* […], *any other person whose main business is to produce investment recommendations* or a natural person working for them under a contract of employment or otherwise, which, directly or indirectly, expresses a particular investment proposal in respect of a financial instrument or an issuer; or (ii) produced by persons other than those referred to in point (i), which directly proposes a particular investment decision in respect of a financial instrument

whereas *investment recommendations* include

> information recommending or suggesting an investment strategy, *explicitly or implicitly*, concerning one or several financial instruments or the issuers, *including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public.*[332]

A publicly disseminated investment strategy is likely to amount to an *investment recommendation* or *information that recommends or suggests an investment strategy* (also referred to together as simply '*recommendation*'[333] hereinafter) if the information's producer or disseminator qualifies as an independent analyst, an investment firm or any other person whose main business is to produce recommendations *or* if the strategy

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[331] ESMA, 'Final Report on Draft Technical Standard on the Market Abuse Regulation' (2015) 1455 at [337]. See also Jake Green and Emily Torrens, 'The European Market Abuse Regulation: MAR Ado About Everything' (2016) 17(2) *JOIC* 1, 2 and Lorezo Parila and Francesco Falco, 'Investment Recommendations under the Market Abuse Regulation (MAR) – Operative Guidelines Issued by the Italian Securities and Exchange Commission (CONSOB)' (2017) 18(3) *JOIC* 85, 87.

[332] MAR Recitals 34 and 35 (Emphasis added). A related issue is therefore whether particular information is intended to be distributed through recognized *distribution channels* or are otherwise intended to be distributed to the *public*. ESMA, 'Final Report on Draft Technical Standard on the Market Abuse Regulation' (2015) 1455 at [338]–[342] gives some fortunate guidance on this issue. According to ESMA, *distribution channels* are to be understood in accordance Article 1(7) of Implementing Directive 2003/125/EC, according which a distribution channel is 'a channel through which information is, or is likely to become, publicly available' [and] "[l]ikely to become publicly available information" shall mean information to which *a large number of persons have access*.' ESMA points out that illustrative distributions channels are, for example, news agencies, news providers, newspapers and the website of the producer. However, it should be noted that ESMA further dismisses, *a contrario*, a view that information that would only be given to few persons would not amount to *public* dissemination: 'ESMA holds the view that an investment recommendation is intended for distribution channels or for the public not only when it is intended or expected to be made available to the public in general, but also when it is intended or expected to be distributed to clients or to a specific segment of clients, *whatever their number* […] ESMA considers *that a too narrow definition of* "investment recommendation intended for distribution channels or for the public" would *entail the risk of leaving some investment recommendations provided to investors unregulated, without investors being in a position to know that the recommendation received is not regulated*.' Conclusively, a recommendation that an activist would distribute in the media or on the internet (if even to a few persons) is to be considered to amount to *public* dissemination of information.

[333] Cf. CDR 968/2016 recital 1:'[h]armonised standards on the *investment recommendations* or *other information recommending or suggesting an investment strategy* (hereinafter "recommendations").'

directly proposes a particular investment decision.[334] Ultimately, it is arguable that the definition of an *investment recommendation* would include most opinions and evaluations disseminated publicly by activist investors who (on a regular basis) take a view on whether a targeted company or instruments related thereto are under- or overpriced. The broad scope has been criticised in legal literature, as 'basically anybody' can be seen as spreading investment recommendations.[335]

It follows that when the produced or disseminated information amounts to a *recommendation*, an activist investor must take reasonable care to ensure that it is presented objectively and that interests and conflicts of interest are disclosed sufficiently. Detailed guidance on the appropriate presentation of recommendations and the disclosure of interests is provided in CDR 958/2016, which was adopted on the basis of MAR Article 20(3). Article 2 of CDR 958/2016 provides that a recommendation must identify its producers.[336] Moreover, persons who produce a recommendation shall ensure that

> (a) facts are clearly distinguished from interpretations, estimates, opinions and other types of non-factual information; (b) all substantially material sources of information are clearly and prominently indicated; (c) all sources of information are reliable or, where there is any doubt as to whether a source is reliable, this is clearly indicated; (d) all projections, forecasts and price targets are clearly and prominently labelled as such, and the material assumptions made in producing or using them are indicated; (e) the date and time when the production of the recommendation was completed is clearly and prominently indicated.[337]

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[334] Cf. CDR 956/2016 Recital 2. The term 'independent analyst' has not been defined by the MAR nor the CDR 956/2016. An 'investment firm' is however read to mean an investment firm as defined in point (1) of Article 4(1) of Directive 2014/65/EU. Cf. MAR Article 3(1)(2). Some further guidance on the categories of persons is provided in accordance with MAR Article 20(3) through CDR 958/2016, which additionally includes persons 'whose main business is to produce or disseminate recommendations […], as well as other persons proposing investment decisions in respect of financial instruments who present themselves as having financial experience or expertise, or are perceived as such by market participants.'

[335] See ESMA/2015/1455 (n 332) 72–73, wherein it is suggested that this implementation 'ensures a proportionate approach by imposing more stringent requirements on those persons posing higher risks in terms of market integrity'. ESMA further recognizes that 'an experienced or professional investor or an expert *assumed to regularly analyse* companies or markets their recommendations are likely to reach a large number of persons even when this information *is transmitted through short messages* [on the Internet] to their followers. In addition, *these messages are often likely to have an immediate impact on the market when they are disseminated* […]' See also Salo (n 243) 160–163 and citations mentioned therein. Salo argues that as the scope is (too) broad, a 'risk-based' principle of proportionality needs to be applied, so that *different standards will apply* to 'Twitter users' who only disseminate investment recommendations once and recognized 'gurus' who disseminate recommendations on a more regular basis.

[336] Cf. CDR 958/2016 Article 2.

[337] Cf. CDR Article 3.

The CDR 958/2016 further imposes some general obligations in relation to the disclosure of interest or conflicts of interest. For example, Article 5 provides that

> [p]ersons who produce recommendations shall *disclose in their recommendations all relationships and circumstances that may reasonably be expected to impair the objectivity* of the recommendation, including interests or conflicts of interest, on their part or on the part of any natural or legal person […] who was involved in producing the recommendation, *concerning any financial instrument or the issuer to which the recommendation directly or indirectly relates*.

When the person is a natural person, the disclosure must also include any interests or conflicts of interests of any person closely associated.[338] If the person is a legal person, the disclosure must also include any interests or conflicts of interest of any person belonging to the same group who is

> (a) known, or reasonably expected to be known, to the persons involved in the production of the recommendation; or (b) known to persons who, although not involved in the production of the recommendation, have or could reasonably be expected to have, access to the recommendation prior to its completion.[339]

Some additional and stricter obligations related to the objective presentation of recommendations and the disclosure of interests are also included in CDR 958/2016 Articles 4 and 6. They apply inter alia to analysts, investment firms and any other persons 'whose main business is to produce investment recommendations' or are 'experts', who CDR 958/2016 Article 1 defines as

> person[s] referred to in MAR Article 3(1)(34)(ii) who repeatedly proposes investment decisions in respect of financial instruments and who: (i) presents himself as having financial expertise or experience; *or* (ii) puts forward his recommendation in such a way that other persons would reasonably believe he has financial expertise or experience.

However, the CDR 958/2016 Recitals further suggest that an exhaustive definition of who is to be considered an *expert* does not exist; they instead set out further non-exhaustive indicators to be considered in relation to identifying experts, including the *frequency with which they produce recommendations*; the *number of followers* they have when they propose recommendations; their *personal work history*, including whether they have professionally produced recommendations in the past; and *whether their previous*

[338] Cf. CDR 958/2016 Article 5(3).
[339] Cf. CDR 958/2016 Article 5(2).

recommendations are or have been relayed by third parties (e.g. the media).[340] A well-known and media-covered activist investor with an established track record is very likely to fall into this category. As such, the activist investor would be subjected to the additional obligations in relation to the objective presentation and the disclosure of interests. The additional disclosure obligations included in CDR 958/2016 Article 6 impose a duty to disclose information on certain interests, inter alia if the person

> (a) owns a net long or short position exceeding the threshold of 0,5 % of the total issued share capital of the issuer, calculated in accordance with [Article 3 of the SSR and Chapters III and IV of CDR 918/2012], a statement to that effect specifying whether the net position is long or short; (b) if holdings exceeding 5 % of its total issued share capital are held by the issuer, a statement to that effect […].[341]

The additional obligations in CDR 958/2016 Article 4 includes an obligation to include information on, inter alia, whether a recommendation has been disclosed to the issuer, the valuation and methodology, the recommendation's length of time and meaning and any changes therein. Recital 7 of CDR 958/2016 further provides that even non-written recommendations must provide for the objective presentation and the disclosure of interest or conflicts of interest. This includes any recommendations made during meetings or road shows or via radio, TV or website interviews. Such recommendations may be adapted to the format being used to present them, although such adaptation does not preclude the obligations that follow from the act of their presentation. This is because in accordance with CDR 958/2016 Articles 3(2), 4(2) and 6(4), such non-written communications shall include information on 'where the required information can be directly and easily accessed by the persons receiving the recommendation free of charge'.

Given the above, reputed activist investors are apt to have stricter disclosure obligations imposed on them because they are likely to be considered 'experts' in accordance with CDR 958/2016.[342] Even if an activist investor does not fall into this category (e.g. has no prior reputation or is otherwise not recognized as an expert), s/he is to present the disseminated information objectively and disclose interests appropriately. This is because dissemination in connection with an activist investment strategy is likely to amount to an 'investment recommendation' in the meaning of the MAR. For example, this would be the

[340] Cf. CDR 958/2016 Recital 2.
[341] Cf. CDR 958/2016 Article 6.
[342] As mentioned above, a well-known and media covered activist investor with an established track record is very likely to fall within that category.

case if the activist investor publicly disseminates information that takes a view on the valuation of a targeted company or financial instruments related thereto.[343] As a result, activist investors have to comply with the rules set out in CDR 958/2016.

Activist investors will thus typically include lengthy disclaimers that seemingly consider (or try to avoid) some of these obligations in connection with the dissemination of information. For instance, recognized activist short-sellers often include extensive terms of access, limitations of liability and boilerplate disclaimers in their standard terms of access.[344] However, it is appropriate to note that even express words to the contrary do not limit the material scope of the EU market abuse regime,[345] as the nature of the information and its relation to financial instruments is to be assessed autonomously.[346] Limitation of liability clauses may limit the amount of damages possible in civil proceedings to the extent that such clauses are available and valid under Member States' substantive national

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[343] See also, ESMA, Q&A on the Market Abuse Regulation' ESMA (2017) 70-145-11, Q8.4 and A8.4, according to which 'material containing an estimated value such as a "quantitative fair value estimate" that is providing a projected price level or "price target", *or any other elements of opinion on the value of the financial instruments*, is also considered to be information implicitly recommending or suggesting an investment strategy pursuant to Article 3(1)(34) of MAR.' (Emphasis added).

[344] The disclaimer of Gotham City Research LLC (hereinafter 'GCR') gives a decent depiction of a typical disclaimer: 'You agree that use of [GCR]'s research is at your own risk. [...] *This report is not investment advice or a recommendation or solicitation to buy or sell any securities*. [GCR] is not registered as an investment advisor in any jurisdiction. [...] *You should assume that on the publication date of this report, [GCR] has a net short position with respect to the shares (and/or options, swaps, and other derivatives related to the shares) of the issuer discussed in this report.* Therefore, [GCR] stands to profit in the event the issuer's share price declines, and may incur investment losses if such issuer's share price increases, following the date of this report. *This report, therefore, specifically emphasizes negative aspects of the issuer that [GCR] believes have not been properly reflected in the share price of the issuer*. [GCR] may buy, sell, cover or otherwise change the form or substance of its position in the issuer in its sole discretion at any time. [GCR] disclaims any obligation to notify the market of any such changes in advance. [...] *This research and report expresses [GCR]'s opinions, which have been solely based upon publicly available information, as well as inferences and deductions through our research and analytical process.* [GCR] believes all factual information contained herein to be accurate and reliable, and has obtained such information from public sources believed to be accurate and reliable. However, the issuer may possess or have access to information that materially differs from the information presented herein.' Gotham City Research LLC, 'Terms of Service' <https://gothamcityresearch.com/> accessed 30 October 2017. The most renowned activist short-sellers, such as Citron Research and Muddy Waters LLC have similar disclaimers or terms of access on their websites.

[345] Since the MAR has been adapted as a EU regulation, even conflicting national laws would not limit its scope, as the EU regulation would prevail over a conflicting national law. On the scope of application of the EU market abuse regime, see Teigelack, 'Market Manipulation' (n 21) § 15 paras 6–10. On the extraterritoriality of the EU market abuse regime, see Elaine Fahey, *The Global Reach of EU Law* (Routledge 2017) 45. See also ESMA/2015/1455 (n 332) at [384]–[385], wherein ESMA 'has observed that disclaimers in analysts' report[s] can be ineffective […] and deem appropriate to clarify that *the content of such disclaimers should be clear, precise and comprehensive*.' (Emphasis added). Cf. Salo (n 243) 170–171, who similarly argues that disclaimers may be invalid. Conclusively, disclaimers may not displace the provisions of the MAR.

[346] ESMA, 'Final Report on Draft Technical Standard on the Market Abuse Regulation' (2015) 1455 at [337].

(contract) laws; however, these laws may also deem such clauses invalid.[347] Ultimately, the validity of contractual limitations of liability has to be assessed under national law on a case-by-case basis with consideration of the exact wording of the clause and the particular circumstances of each case.

The objective presentation of recommendations in accordance with CDR 958/2016 Articles 3 and 4 would not per se preclude the production of recommendations that deliberately emphasize a certain negative or positive aspect of a target, provided that the objectivity criteria are met. However, trading by the same persons or persons linked to the production or dissemination of such recommendations, would be a non-exhaustive indicator of manipulative behaviour relating to the employment of a fictitious devices and deception in accordance with MAR Annex I B(b). As such, activist investors must ensure the objectivity of their recommendations and sufficiently disclose their own interests. The latter ought to be of particular concern for activist investors who disseminate information that expresses any view on a financial instrument's price or value, as *even recommendations that do not contain any false or misleading information may amount to market manipulation if they fail to disclose conflicting interests sufficiently*.[348]

The Danish High Court rendered a significant decision in relation to sufficient disclosure in 2012 (UfR 2013.196 H).[349] The case concerned financial journalist T, who had been writing monthly articles for a financial magazine in Denmark. In these articles, T recommended certain shares, claiming that they had an 'expected significant potential'.[350] T had disclosed that he held a position in the companies that he recommended in his articles. The issue that the High Court had to deal with was whether T had sufficiently *disclosed his interests* in accordance with Danish law, and ultimately, in the meaning of

[347] See, for example, *Taberna Europe CDO II Plc v Selskabet AF 1* (In Bankruptcy) [2016] EWCA Civ 1262, [2016] WLRD 660 in particular at [120] (Justice Elder), wherein a 'no reliance should be placed on any information' was held invalid on the basis 'the mere declaration of non-liability by the representor cannot have the effect of prevent a representor from incurring liability for misrepresentation' and that an exclusion clause with the wording 'no liability whatsoever is accepted as to any errors, omissions or misstatements contained herein' was insufficiently clear to exclude liability for damages under UK law. Cf. *IFE Fund v Goldman Sachs* [2007] 1 Lloyd's Rep 264 (wherein a disclaimer precluded representations from being made) and *JP Morgan v Springwell* [2010] 2 CLC 705 (wherein a limitation of liability clause contractually estopped the claimant from relying on any representations in an information memorandum).

[348] See also Teigelack 'Market Manipulation' (n 21) § 15 para 49; Bergþórsson (n 41) 149–150.

[349] UfR 2013.196 H. For a comment on the case, see Bergþórsson (n 41) 149–150.

[350] UfR 2013.196 H. '*forventeligt betydeligt kurspotentiale'* (Translation by the author). The prices in the touted shares saw a price surge when the articles were published, and T consequently sold his position, hence profiting from the touting in his own column.

MAD article 6(5)[351], through the disclosure of his ownership. The prosecution requested the issue to be tried by the CJEU, but the High Court held that a CJEU ruling on the directive's meaning was unnecessary *as no doubt existed as to the meaning of the relevant provision*.[352] It further held that the provisions on freedoms of the press and expression in the media did not need to be considered, as T had derived a direct benefit from promoting the companies in which he held a position.[353] The High Court ultimately held that T's systematic and *significant purchase and sale of illiquid shares in smaller companies did occur with a significant self-interest* during the time that the share prices increased and found that his articles at least partly contributed to that increase. The court further held that *that significant self-interest had not been sufficiently disclosed by the mere disclosure of ownership in the promoted companies*. T was found guilty of market manipulation and sentenced to eight months in prison.[354]

The Danish High Court's ruling in this case (UfR 2013.196 H) does not address the issue of when the disclosure would have been sufficient, as it only found that T had not disclosed his interest sufficiently. However, an *a contrario* reading of the decision implies that T would have had to disclose his future investment horizon and investing strategies for

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[351] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L 96/16. The relevant provision read: 'persons who produce or disseminate research concerning financial instruments or issuers of financial instruments and persons who produce or disseminate other information recommending or suggesting investment strategy, intended for distribution channels or for the public, take reasonable care to ensure that such information is fairly presented *and disclose their interests or indicate conflicts of interest concerning the financial instruments to which that information relates. Details of such regulation shall be notified to the Commission*.' (Emphasis added). The meaning of MAR Article 21 is similar to the meaning of MAD article 1(2)(c). See MAR Annex II, correlation table. A comparable outcome under the MAR rules would be likely, as the relevant MAD provisions were even to some extent a bit more lenient than the equivalent provisions in the MAR and CDR 958/2016.

[352] Arguably, an CJEU precedent would have clarified the contextual meaning of sufficient disclosure of interests. An *e contrario* reading of the Danish decision will result in that a disclosure of a short (or long) position will not amount sufficient disclosure of interests. It remains unclear in which detail an 'investment horizon' needs to be described, and for which future time period, for a disclosure of interests to be sufficient. Cf. CDR 958/2016 Article 6, wherein a duty to disclose net positions is imposed on investment firms, independent analysts and experts who disseminate recommendations. Arguably, it seems that the Danish Supreme Court has extended this disclosure obligation. On the *acte clair* doctrine in good faith, see Murray (n 62) 40 (who finds that a TFEU Article 267 request may only be declined when the meaning of the EU law is obvious, not only to the national court itself, but also 'to the Courts of other Member States and [the CJEU]'. See also Groussot (n 80) 313–329 and 335.

[353] UfR 2013.196 H 7.

[354] Cf. BGHSt 48 (2003) 373 (Neuer Markt Scalping), wherein a similar case was also pursued as an insider trading case, but wherein the court ruled (at para 28) that 'scalping' (i.e. information-based manipulation) should not be regarded being insider trading, but market manipulation instead. However, in that case, the journalist had not disclosed that he had a holding in the recommended companies. For a commentary on the case, see Teigelack, 'Market Manipulation' (n 21) § 15 paras 47–50. See also Veil, 'Insider Dealing' (n 81) § 14 para 32. Cf. RCH Alexander, *Insider Dealing and Money Laundering in the EU: Law and Regulation* (Routledge 2007) 41–42 (wherein it is argued that such conduct shall be regarded as insider dealing).

the disclosure to be sufficient. In other words, it is not sufficient to disclose a (long or short) position in a target in connection with disseminating recommendations: activist investors also have to disclose their strategy and approximate investment horizon. The critical issue of when an investment strategy is sufficiently disclosed remains unclear on the basis of the cited decision alone. This thesis takes the view that full compliance with MAR Article 20(1) and the above-examined obligations of CDR 958/2016 must be deemed to amount to sufficient disclosure.

C. *Dissemination of False or Misleading Information*

As explored above, many activist strategies involve the direct or indirect dissemination of information. In addition to ensuring the objective presentation of information and the appropriate disclosure of interests, activist investors who disseminate or produce information must ensure that such information does not give any *false* or *misleading* signals concerning a target. The dissemination of false or misleading information is banned in MAR Article 12(1)(c), which prohibits

> disseminating information through the media, including the internet, or by any other means, which gives, or is likely to give, *false or misleading signals* as to the supply of, demand for, or price of, a financial instrument [...] or is likely to secure, the price of one or several financial instruments [...] at an abnormal or artificial level, including the dissemination of rumours, where the person who made the dissemination knew, or ought to have known, that the *information was false or misleading*.[355]

As such, it should be noted that the mere dissemination of false or misleading information itself, without any accompanying transactions, may be sufficient to institute a market manipulation offence under the MAR regime. The MAR speaks of both (misleading or false) signals and information. This thesis does not entertain a sematic discussion on

[355] Teigelack argues that Article 12(1) points (a) through (b) are explicitly designed to prohibit trade-based manipulation, whereas Article 12(1)(c) is designed to prohibit information-based manipulation. See Teigelack, 'Market Manipulation' (n 21) § 15 para 1 fn 1. Arguably, Article 12(1)(a) through (b) would also apply on information-based manipulation if such dissemination were likely to affect the price of a financial instrument or give misleading signals as to the supply, demand or price of the related financial instrument. The catch-all nature of the provisions will in some cases render several or all 'core definitions' of market manipulation in 12(1)(a)–(c) relevant and applicable. The separation of information-based and transaction-based forms of manipulation may thus in practice be somewhat artificial and unnecessary in cases wherein several definitions become applicable. Sophisticated and modern methods of manipulation do also combine both transactional and informational methods of manipulation. An overall assessment against all the applicable criteria would be more appropriate in such cases. However, only one of the 'core definitions' will need to be met for the conduct to amount to market manipulation. For example, deceptive transactions need only amount to market manipulation under 12(1)(b) and the dissemination of rumours need similarly only amount to manipulation under Article 12(1)(c) for the conduct to be unlawful.

whether a normative difference exists between these two terms, as a person who disseminates signals must—or ought to—know that the disseminated information was false or misleading.[356] As such, it seems that the MAR uses 'signals' and 'information' interchangeably. This thesis consequently accepts the same view.

The definition of market manipulation is intentionally defined as a flexible, broadly worded 'catch-all' clause,[357] which inevitably results in some uncertainty as to its exact interpretation. However, this uncertainty is counterbalanced to some extent by further examples of *indicative of manipulation*, as set out in MAR Annex I, the Commission Delegated Regulation (CDR 522/2016)[358] and relevant ESMA guidance.[359] As examined above in section V.A., Annex I specifies that transactions and orders to trade in connection with the dissemination of false or misleading information *or* biased recommendations influenced by a material interest shall amount to amount to an indication of market manipulation. The CDR 522/2016 set out some Lamfalussy level 2 guidance that further identifies the indicators of market manipulation in MAR Annex I.[360] The CDR 522/2016 sets out the detailed descriptions of conduct that are to be seen as indicators of market manipulation. Such manipulative conduct would include the

> [t]aking of a [long/short] position in a financial instrument [...] and then undertaking further [buying/selling] activity and/or disseminating misleading [positive/negative] information about the financial instrument [...] with a view to [increasing/decreasing] the price of the financial instrument [...] by the attraction of other [buyers/sellers]. When the price [is at an artificial high level, the long position held is sold out/has fallen, the position held is closed] — usually known as ['pump and dump'/'trash and cash'].[361]

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[356] Cf. Pierre Hauck, 'Europe's Commitment to Countering Insider Dealing and Market Manipulation on the Basis of Art. 83 para 2 TFEU' [2015] *ZIS* 345 (who argues that term 'signal' is an unfortunate choice 'since it is too specific').

[357] Cf. MAR Recital 38, which sets out that the MAR 'should provide measures regarding market manipulation that are capable of being adapted to new forms of trading or new strategies that may be abusive.' This aim, and the choice of flexible wording is understandable, as EU regulations are highly static and unalterable. A revision of the MAR would require an amending EU regulation. See also Matthias Haentjens and Pierre de Gioia Carabellese, *European Banking and Financial Law* (Routledge 2015) 48–50.

[358] Commission Delegated Regulation (EU) 2016/522 of 17 December 2015 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council as regards an exemption for certain third countries public bodies and central banks, the indicators of market manipulation, the disclosure thresholds, the competent authority for notifications of delays, the permission for trading during closed periods and types of notifiable managers' transactions [2016] OJ L 88/1 (CDR 522/2016).

[359] Cf. MAR Recital 38.

[360] CDR 522/2016 Article 1(2).

[361] CDR 522/2016 Annex II Section 1(4)(c)–(d).

In CDR 522/2016, points 1(c)(i) and 1(d) of section 2 also provide that the above-mentioned practices may be further illustrated by the 'dissemination of news through the media related to the increasing (or decreasing) of a qualified holding before or shortly after an unusual movement of the price of a financial instrument'. Finally, the CDR 522/2016 also sets out that entering orders or transactions before or shortly after a market participant or persons publicly known to be linked to that market participant produce or publicly disseminate contrary research or investment recommendations is illustrative of the manipulative practice of the

> dissemination of false or misleading market information through the media, including the internet, or by any other means, which results or is likely to result in the moving of the price of a financial instrument [...] in a direction favourable to the position held or to a transaction planned by the person or persons interested in the dissemination of the information.[362]

However, it should be noted that the MAR itself expressly states that the indicators are non-exhaustive and shall not necessarily be deemed to constitute market manipulation themselves.[363] The examples of practices included in CDR 522/2016 should not be considered to constitute market manipulation per se, although they should be taken into account when market participants or competent authorities are examining the conduct.[364] Nevertheless, the practical issue of how to determine when something amounts to an *exhaustive* indication of market manipulation remains. In CDR 522/2016, it is underlined that a 'proportionate approach should be followed, taking into consideration the nature and specific characteristics of the financial instruments and markets concerned'.[365] As such, it seems that even the 'technical' delegated regulation CDR 522/2016 accentuates a contextual interpretation of the indicators for market manipulation.

This thesis argues that the assessment will ultimately have to consider the overall objectives of the MAR (as established in sections II.B. and II.C.). In this context, one objective clearly becomes paramount: market integrity. When we further recall that

[362] Point 1(a) of Section 2 of the CDR 522/2016.
[363] MAR Annex I A and CDR 522/2016 Recitals 5 and 6.
[364] CDR 522/2016 Recital 6.
[365] CDR 522/2016, Recital 7 continues '[t]he examples may be linked to and illustrate one or more indicators of market manipulation as provided in Annex I to [MAR]. As a result, a specific practice may involve more than one indicator of market manipulation laid down in Annex I to [MAR] depending on how it is used, and there can be some overlap. Similarly, although not specifically referenced in this Regulation, certain other practices may illustrate each of the indicators set out in this Regulation. Therefore, *market participants and competent authorities should take into account other unspecified circumstances that could be considered to be potential market manipulation in accordance with the definition set out in [MAR].*' (Emphasis added).

integrity may be attributed a normative meaning in the sense that it guarantees the markets *freedom from misinformation*, the issue of when the dissemination of information amounts to market manipulation truly boils down to when it is *false* or *misleading* in nature. As such, the nature of the information (in context) determines whether the conduct is manipulative. These two elements are examined in the following section.

D. *When is Information False or Misleading?*

The MAR itself does not provide any explicit guidance on the issue of when information is considered as *false* or *misleading*. Such an assessment is ultimately a question of fact, which is to be assessed on an objective basis.[366] The relevant time for this examination is the point of time at which the statement was made.[367] The public dissemination of information that has been proven false or misleading will most likely amount to market manipulation in accordance with MAR Article 12, if the disseminator knew or ought to have known that the information was false or misleading.

1 *The Nature of False Information*

False means something being objectively incorrect. A view that is generally accepted in European legal literature and case law is that information is false when it includes facts that are not real or true, such as incorrect economic circumstances or figures concerning a financial instrument.[368] The FSA has taken a view that activist conduct that 'set[s] out to generate a *false* rumour or *expectation of some future corporate action knowing* that it, or others associated with it, *may be able to take advantage of a short term movement in the price of the target's securities*' will obviously amount to market abuse.[369] As such, activist

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[366] See, for example, Bergþórsson (n 41) 134–146; Knuts, *Kursmanipulation på värdepappersmarknaden* (n 41) 269; Jarmo Parkkonen and Mårten Knuts, *Arvopaperimarkkinalaki* [Securities law] (5th edn, Talentum 2014) 61.

[367] Cf. MAR recital 15. See Parkkonen and Knuts (n 366) 61.

[368] Hauck (n 356) 345 and citations mentioned therein. Cf. Bergþórsson (n 41) 145 'Giving false information essentially means that there is discrepancy between what is communicated and what the person who disseminated the information believes to be true.' Arguably, no such discrepancy is necessary, as even information that a person believes to be true may be objectively false. For example, A may genuinely believe that company C is engaged in accounting fraud and is practically insolvent. However, C is engaged in no such thing and A's beliefs are unfounded. A communicates his this 'genuine' opinion to the markets, and the market reacts accordingly. Has A manipulated the markets? Arguably, yes. However, see also Hansen, 'The MAD In a Hurry: The Swift and Promising Adoption of the EU Market Abuse Directive' (n 238) 205–206, who argues that the *knows or ought to know* standard is a 'very subjective exercise, although it is possible to rely on more objective, elements, for example, whether the communicator could reasonably have believed what she communicated or whether she must have understood that her actions were likely to mislead the general public.' See also Häyrynen and Kajala (n 238) 513.

[369] UK FSA, 'Market Conduct and Transaction Reporting Issues' (n 276). See also Geraghty and Smith (n 18) 214.

investors who create a *false expectation* of future corporate action (e.g. a merger) or a rumour could also be held accountable for *false* information. Likewise, negative false rumours (or facts) about a target or thereto related financial instruments under a short selling campaign would also amount to false information.

It has also been held in legal literature that even information that *omits something material* may be false, regardless if it includes pieces of information that are true. Jenkins et al. argue that this is the case, for example, when a prospectus for a share issue is 'composed of statements which in themselves are perfectly true' but '*omits* information about the company's results *with the consequence that the prospectus, taken as a whole, gives a false impression of the company*'.[370] Activist investors could arguably also present seemingly truthful information in a *falsifying manner* as well. This could for example be the case when negative information about a target company is excessively disseminated and exaggerated while positive information is simultaneously being deceitfully omitted.

Arguably, the test for determining whether a particular fact is false or not is somewhat more straightforward than the test for determining whether it is misleading. Statements about current facts may be proven against existing facts; if they are shown to omit material facts or are objectively untrue in comparison with existing facts, the statements would be objectively false.[371] For example, in the classic case of *R v De Berenger*, the statement that Napoleon was dead could be established false with ease as he still was alive at the time it was made.[372] Likewise, an activist investor's statement that a company is fraudulently 'insolvent' is false if it is de facto solvent.[373] However, information and statements

[370] Jenkins and others (n 374) 144 (Emphasis added).
[371] Hauck (n 356) 345.
[372] *R v. De Berenger* (1814) 3 M&S 67. On 20 June 1814, a high ranking British officer, *Charles Random de Berenger* and seven other co-conspirators, including Lord Cochrane, a Member of the British Parliament, were sentenced for a conspiracy to spread false rumours about Napoleons death in order to affect the prices on the London Stock Exchange. De Berenger disguised himself as a French officer and circulated rumours that Napoleon had been killed. The news had a significant impact on the London Stock Exchange. The Court ultimately held that 'the defendants were possessed of certain shares in the funds, and intended to sell them, and thereby, by raising the price, to cheat the particular persons who should become purchasers'.
[373] Cf. Securities and Futures Commission v Andrew Left, unreported, The Report of the Market Misconduct Tribunal into Dealings in the Shares of Evergrande Real Estate Group Limited (HK Market Misconduct Tribunal, 25 August 2016) <http://www.mmt.gov.hk/eng/reports/Evergrande_Report.pdf>, accessed 30 October 2017 (appealed, proceedings pending) para 243, wherein the Hong Kong Market Misconduct Tribunal found statements alleging a target company to be 'insolvent' and 'essentially insolvent' to be false and misleading when the target company was solvent. It is interesting to note that the Tribunal seems to accept the argument that these were words were not to be interpreted in a narrow sense, and consequently held that 'the words employed in the Citron Report were not intended to be read in a narrow legal sense, their everyday meaning […] is that a company is 'insolvent' is to say, in everyday language, that it is unable to pay its debts; put another way, that it is under grave financial stress.' Nevertheless, even the ordinary,

concerning future events are significantly harder to disprove. If reasonable grounds for making a statement existed (ex ante), it would not be false or misleading at the time it was made. When statements are assessed *ex post*, care should be taken to consider the hindsight bias.[374] The assessment is objective. For example, if a person has reasonable grounds to believe that XYZ will occur and provides a related statement that later proves to be false, the person would not be held liable for issuing false or misleading information (as at the time the person issued the statement, the information was true or at least reasonable grounds for it to be true existed).[375] On the contrary, if a person did not have *objective* reasonable grounds for making and disseminating a statement but did indeed have a *bona fide* perception that it was true, the person may still be held liable under the objective assessment of the MAR.[376]

As the CDR 522/2016 underlines, the assessment of whether something is false (or misleading, for that matter) is contextual. This assessment also has to consider the nature and specific characteristics of the financial instruments and markets concerned. The threshold for deeming information false (or misleading) may be lower if the information concerns sensitive financial instruments, such as illiquid shares (which are also commonly referred to as 'penny stocks'), leveraged derivatives or other instruments that may be manipulated with less effort or misinformation. The disseminator's role and standing may also have an impact on the assessment. If the disseminated information amounts to a 'recommendation' (see section V.B. above), obligations to present it objectively apply. If the person disseminating the recommendation is perceived to be an expert in accordance with CDR 958/2016, additional obligations also apply. Persons disseminating recommendations consequently have an obligation to present information *objectively*; in such circumstances, the omission of material facts may be assessed with greater scrutiny. However, it has also been argued in legal literature that a fully unbiased, objective

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everyday meaning of the statements given was misleading, when the company was demonstrably not insolvent.

[374] See Hansen, 'MAD in a Hurry: The Swift and Promising Adoption of the EU Market Abuse Directive' (n 238) 194 fn 49, wherein in Hansen argues that it is 'important to stress the *ex ante*-perspective to avoid hindsight bias.' Cf. MAR recital 15: 'Ex post information can be used to check the presumption that the *ex ante* information was price sensitive, but should not be used to take action against persons who drew reasonable conclusions from *ex ante* information available to them.' See also Hywel Jenkins, Harry Edwards, Ross McCartney and Hanne Gundersrud,'Market Manipulation: Misleading Statements' in Karen Anderson, Andrew Procter and Jonathan Goodlife, *A Practitioner's Guide to the Law and Regulation of Market Abuse* (2nd edn, Sweet & Maxwell 2017) 137–138.

[375] Jenkins and others (n 374) 137–138.

[376] Jenkins and others (n 374) 138.

statement of *all relevant facts in a case* is not possible and that, for example, journalists' work should be assessed with some leeway.[377]

As it is, disseminated information can be deemed to be both false *and* misleading.[378] It is arguable that most information that is false is also misleading, although all misleading information is not necessarily false. The nature of misleading information is examined in the following section, with some general concluding remarks on the assessment of whether information is false or misleading being presented at the end of the section.

2 *The Nature of Misleading Information*

The 'misleading' element in the market abuse regulation has been described in legal literature as *indefinable*.[379] If this were truly the case, the market abuse regulation would arguably have failed in a material respect. Even if only one CJEU precedent on market manipulation exists (the ruling omitted an interpretation of the elements of 'false' and 'misleading'), some guidance is extractable from the MAR itself.[380] A literal interpretation of MAR Article 12(1)(c) suggests that the markets need to be *likely misled* for information to be misleading. However, this interpretation raises follow-up questions: Does the conduct have to de facto mislead an investor, several investors or the market as a whole? Has the market as whole been misled if a single investor is misled? Do we apply a hypothetical standard, such as the standard for a typical or reasonable investor? The interpretation of 'misleading' is certainly challenging from a strictly textual perspective, even when it is read in combination with the market manipulation indicators in the MAR and the CDR 522/2016. However, a contextual and teleological method of interpretation that considers

[377] See Sakari Huovinen, 'Toimittaja, tieto ja arvopaperimarkkinat' [Journalists, information and capital markets] in Pia-Letto Vanamo (ed), *Viestintäoikeuden vuosikirja 2005* (University of Helsinki 2006) 6–7 and Häyrynen and Kajala (n 238) 521.

[378] The MAR Article 12 construction 'false *or* misleading' and the choice of words has been criticised in legal literature. See, for example, Hauck (n 356) 345, fn 88 and references mentioned therein. Hauck finds that conduct that '*deceives about facts [...] shall be seen as misleading*' would be a better choice of words instead. Arguably, adding a *deception* element would concretize the manipulation prohibition. Cf. Bergþórsson (n 41) 67–90.

[379] Rebecca Söderström, 'Regulating Market Manipulation: An Approach to Designing Regulatory Principles' (2011) *Uppsala Faculty of Law Working Paper No 1*, 60: 'Despite various examples, descriptions and forms laid down in the securities regulations, the definition of manipulation still halts at the indefinable *misleading* element. The phenomenon of manipulating the market is built on the idea to distort the mechanisms of normal financial transactions. Transactions that in themselves are not harming market integrity or liquidity are carried out with the intent to mislead. *This is the core of market manipulation.* To act manipulatively constitutes a tool to make profits that would otherwise be unattainable, *unless the action was performed detrimental to other market actors*.' (Emphasis added). Cf. Bergþórsson (n 41) 134–152.

[380] C-445/09 *IMC Securities BV v Stichting Autoriteit Financiële Markten* EU:C:2011:459 [2011] ECR I-5917. The case does unfortunately not give any guidance on how the elements 'false' and 'misleading' are to be interpreted. See also Hansen, 'Market Abuse Case Law – Where Do We Stand With MAR?' (n 20) 387ff.

the MAR's objectives may provide guidance on this issue. Misleading information that would demonstrably be detrimental to the objectives could clearly be held as *misleading*.

Even information that is only slightly true, exaggerated, of a speculative nature or a combination thereof might have a significant impact on the price of a financial instrument and be hard or impossible to repudiate credibly. As such, information that is obviously very false may not even cause any damage to the integrity of the regulated markets (provided that the markets recognize it as false), whereas speculative and exaggerative information may create significant market uncertainty and thus damage issuers and investors in particular.[381] The fact that even slightly false or misleading information may cause significant damage to the markets should also be reflected in the contextual and teleological interpretation of the MAR's market manipulation provisions.

The prevailing view in legal literature and case law seems to be that it is sufficient to demonstrate that an allegedly misleading piece of information *could have misled investors*.[382] According to Jenkins et al., a sensible test is whether *the statement would be reasonably likely to mislead those who may be expected to hear or read it*.[383] These standards are yet again highly contextual and rightly depend on the particular circumstances of each case. Nevertheless, some general guidelines may be provided on the basis of case law and legal doctrine, wherein *misleading* information is characterised as information that is not necessarily untrue but misleading as it omits material facts or is deceptively presented.[384] Moreover, statements also may be perfectly clear to those with knowledge of relevant matters but misleading to others without such knowledge.

[381] However, even information that is *intended to be false and incredible* may have an effect on the market. An excellent example of this is fools on the first of April. See, for example, Teigelack, 'Market Manipulation' (n 21) § 15 para 15. As an example, Teigelack mentions the April fool's joke that had an 0.75% impact on the share price of Tesla.

[382] See Bergþórsson (n 41) 148–149 and citations therein; Häyrynen, *Arvopaperimarkkinoiden väärinkäyttö* (n 35) 422 (who argues that the causation element is met 'as long as there is a showing that the information provided *could have misled the investors.*'); Häyrynen and Kajala (n 238) 514. Cf. MAR Article 12(c): 'gives, or is *likely* to give, *false or misleading signals*'. It should also be noted that also attempted market manipulation is prohibited. See also Jenkins and others 'Market Manipulation: Misleading Statements' (n 374) 137ff.

[383] Jenkins and others 'Market Manipulation: Misleading Statements' (n 374) 144. Cf. Bergþórsson (n 41) 148–149.

[384] Cf. Bergþórsson (n 41) 148ff and cases cited therein; Jesper Lau Hansen, *Informationsmisbrug. En analyse af de centrale bestemmelser i børsrettens informationsregime* (Jurist- og Økonomforbundet 2001) 494 – 495, wherein Hansen suggests that even partial concealment (partiel fortielse) may amount to misleading information if the recipient receives 'incomplete' information. 'hvor manipulatoren framsætter en sproglig ytring men fortier visse informationer. […] Det forudsætter dog, at den partielle fortielse ville ændre på den erkendelse, som modtagaren af kommunikation har fået af den meddelte ufuldstædige information.'

Statements can also be misleading even if they do not contain explicit misinformation.[385] For example, several statements taken together could paint up a misleading picture even though each individual statement is true, if the statements would create a misleading impression on the whole.

To conclude, a contextual assessment of the elements 'misleading' and 'false' is dependent on the particular circumstances of each case; this includes the nature of the information, the character of the legal or natural person disseminating it, the relevant market and the nature of the financial instruments. The assessment of what is false and misleading may vary slightly depending on the information's disseminator and whether this disseminating party has additional obligations to present the information objectively. Statements made by an activist shareholder or a hedge fund representative who sits on a target company's board may eventually be assessed with greater scrutiny than those made by non-shareholders.[386]

E. *Freedoms of Expression and the Press – A 'Get Out of Jail Free Card'?*

As noted above, the relationship between market abuse and *freedoms of expression and the press* may come under scrutiny in connection with various form of activist investing. Equally, activist investors who are suspected of market abuse often cite provisions on freedom of expression as a part of their defence against such allegations,[387] with varied rates of success.[388] It should be noted that freedoms of expression and the press are not unqualified rights and they may most certainly conflict with the market abuse provisions.

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[385] Jenkins and others (n 374) 144.

[386] The ratio of the regime seems to be that a person who has a holding in the company or is otherwise recognized as an expert is more likely to have an impact on the market, and that stricter obligations should apply to such persons. See, for example, ESMA/2015/1455 (n 332) 72–73 and Salo (n 243) 160–163. This finding is aligned with the economic data that suggests that investors value information disseminated by the issuer and insiders higher than information from 'outsiders'. See, for example, Ji-Chai Lin and John Howe, 'Insider Trading in the OTC Market' (1990) 45(4) *J Fin* 1273, 1274–1284.

[387] See, for example, the decision by the District Court of Stockholm, 22 December 2016, Mål nr B 5189-15 (appealed, proceedings pending), wherein the court found that conduct that amounts to market manipulation cannot enjoy protection under the constitutional regime. For a commentary on the case, see Holmquist (n 42) 336. See also *SEC v Left* (n 373) para 106ff, wherein counsel for Mr. Left submitted that s.277(1) clearly impinged on the fundamental right to freedom of expression and therefore had to be interpreted in accordance with the following three principles: '[f]irst, that fundamental rights are to be interpreted generously; second, that any restrictions on fundamental rights are to be interpreted narrowly and; third, that it is for the Government to bear the burden of justifying any restriction.' The Tribunal did not find any infringements of the rights of Mr. Left. However, the ruling has been appealed on points on law on freedom of expression, and a ruling by the Court of Appeal is still pending.

[388] Walker and Forbes, 'SEC Enforcement Actions and Issuer Litigation in the Context of a "Short Attack"' (n 48) 689–738 wherein the authors have studied US case law on activist short-selling, reaching the conclusion that 'perpetrators of short attacks have demonstrated success with free-speech and other defences'. Cf. Susan Heyman, 'Rethinking Regulation Fair Disclosure and Corporate Free Speech' (2015) 36

The market manipulation allegations recently directed at J.P. Morgan Chase & Co CEO Jamie Dimon serves as an illuminating example of the underlying conflict between the freedom of expression and the MAR provisions.[389] On 17 September 2017, Blockswater LLP filed a market abuse report with the Swedish Financial Supervisory Authority alleging the 'dissemination of false and misleading statements' about the bitcoin cryptocurrency. The report refers to an interview given by Dimon, wherein he is reported to have said that

> [Bitcoin] is a fraud and honestly, I am just shocked anyone can't see for what it is […] worse than tulip bulbs. […] The only good argument I've ever head […] is that if you were in Venezuela or Ecuador or North Korea[,] or if you were a drug dealer, a murderer, stuff like that, you are better off dealing in bitcoin than in US dollars […] If we had a trader who traded bitcoin I'd fire him in a second for two reasons. One, it's against our rules. Two, it's stupid.[390]

The report further alleges that the given statements were false and misleading, as J.P. Morgan simultaneously traded in the bitcoin ETFs 'BITCOIN XBT' (SE0007126024) and 'BITCOIN XBTE' (SE0007525332) on the Nasdaq Stockholm AB.[391] The day after the report was filed, a spokesperson for J.P. Morgan established that J.P. Morgan merely acts as an agent for buyers and sellers of bitcoin ETFs and that the trades in the relevant instruments were 'not J.P. Morgan orders', but instead 'clients purchasing third-party products directly [with J.P. Morgan acting as an agent]'.[392] When asked nearly a month later for comments on bitcoin's latest surge to a new high, Dimon promptly answered that

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Cardozo L Rev 1099; Antony Page and Katy Yang, 'Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?' (2005) 39(1) *UC Davis L Rev* 1; Wendy Couture, 'The Collision Between the First Amendment and Securities Fraud' (2014) 65(4) *Ala L Rev* 903.

[389] Henry (n 26) 'JPMorgan Handles Bitcoin-related Trades for Clients Despite CEO Warning' and Shen Jamie Dimon Says the Whole Bitcoin Craze Will "End Badly"' (n 26).

[390] Laura Noonan, 'JPMorgan's Jamie Dimon calls bitcoin "a fraud", "worse than tulip bulbs"' *Financial Times* (12 September 2017) <https://www.ft.com/content/b1ee6c14-2cd0-3ad5-a9db-c8e82d993987> accessed 30 October 2017. See also Angela Monaghan, 'Bitcoin is a Fraud that Will Blow Up, Says JP Morgan Boss' *The Guardian* (13 September 2017) <https://www.theguardian.com/technology/2017/sep/13/bitcoin-fraud-jp-morgan-cryptocurrency-drug-dealers> accessed 30 October 2017.

[391] Blockswater LLP, 'Subject: Market abuse report – violation of § 8 of the Swedish Financial Instruments Trading (Market Abuse Penalties) Act (2005:377) and Article 12 of the [MAR]' (17 September 2017) <https://www.scribd.com/document/359518100/Market-Abuse-Report-JP-Morgan-20170917-Final> accessed 30 October 2017. The report alleges that the '[f]ollowing evidence suggests that [the CEO] knew, or ought to have known, that the information he disseminated was false and misleading: a) JP Morgan Securities Ltd. traded the exchange traded notes "BITCOIN XBT" (SE0007126024) and "BITCOIN XBTE" (SE0007525332) on Nasdaq Nordic before and after his false and misleading comments. It can be presumed that JP Morgan would not trade an instrument that follows a fraudulent underlying asset, or that JP Morgan's customers would not be *"murderers"* and *"drug dealers"*. b) Even if [the CEO] was unaware that his firm was trading these instruments, his statements that it would be *"against our rules"* or that he would *"fire"* any employee who traded bitcoin *"in a second"*, were evidently false because JP Morgan Securities Ltd. was the 4th largest buyer of SE0007126024 three days after his statements, on September 15.' (Emphasis in original).

[392] Shen (n 389).

he was ‘not going to talk about bitcoin anymore’.[393] This thesis intentionally refrains from making specific comments on this particular case, as official investigations into the matter are still pending and as all facts concerning the case are not yet be publicly known.

On a more general note, it could be concluded that one can (and may arguably even be entitled to) have the *bona fide* opinion that bitcoin (or any other financial instrument) is unstable and under- or overpriced.[394] At the same time, the broadly worded ‘catch-all’ MAR provisions can be used to police views and opinions that directly or indirectly relate to financial instruments and do not present the ‘absolute truth’ in a legal sense.[395] The absence of CJEU (and national high court) precedents on the meaning of false and misleading information and the relationship between market abuse provisions and the freedom of expression results in a disturbingly high level of uncertainty. Consequently, even *bona fide* opinions, views and statements that are publicly disseminated could potentially amount to market abuse if they include any false or misleading information.

Article 21(a) of the MAR provides that where information is disclosed or disseminated and recommendations are produced or disseminated, the rules governing the freedoms of expression and the press shall not be taken into account ‘if the persons concerned, or “persons closely associated”,[396] derive directly or indirectly, an advantage or profits from the disclosure or the dissemination of the information in question’. Consequently, rules that govern the freedoms of expression and the press do *not* need to be considered under the MAR *if a closely associated person derives an indirect advantage from the dissemination*

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[393] Evelyn Cheng, ‘Jamie Dimon Says He’s Not Going to Talk About Bitcoin Anymore’ *CNBC* (12 October 2017) <https://www.cnbc.com/2017/10/12/jamie-dimon-says-hes-not-going-to-talk-about-bitcoin-anymore.html> accessed 30 October 2017.

[394] For example, the European Central Bank (ECB) vice-president Vítor Constâncio gave very similar remarks on Bitcoin, only a few days after the JPMorgan CEO. See Claire Jones and Patrick Jenkins, ‘Bitcoin is like Tulipmania, says ECB vice-president’ *Financial Times* (22 September 2017) <https://www.ft.com/content/18507a26-9fb4-11e7-8cd4-932067fbf946> accessed 30 October 2017.

[395] Cf. SAN-2013-24, Décision de la Commission des Sanctions à l’Egard de MM. Jean-Pierre Chevallier et Mike Shedlock (7 November 2013), wherein the AMF fined a US citizen for quoting ‘incorrect and misleading information’ concerning the indebtedness ratio of Société Générale on his blog. See also *Left v SEC* (n 373) above.

[396] Cf. MAR Article 21. *Persons closely associated* is in accordance with MAR Article 3(26) to be read to include ‘(a) a spouse, or a partner considered to be equivalent to a spouse in accordance with national law; (b) a dependent child, in accordance with national law; (c) a relative who has shared the same household for at least one year on the date of the transaction concerned; or (d) a legal person, trust or partnership, the managerial responsibilities of which are discharged by *a person discharging managerial responsibilities* or by a person referred to in point (a), (b) or (c), which is directly or indirectly controlled by such a person, which is set up for the benefit of such a person, or the economic interests of which are substantially equivalent to those of such a person.’

of a statement that the disseminator ought to have known to be false or misleading(!)[397] It could be concluded that the freedom of expression would almost never apply to senior executives or members of the administrative, management or supervisory bodies of a multinational bank (or to any other substantial legal person engaged in the financial markets, such as an activist investor with a holding in the target entity), as an underlying legal person could derive an indirect advantage from virtually every given statement which the person ought to have known to be false or misleading. It should also be noted that according to MAR Article 21(b), the freedoms of expression and the press do not need to be considered when the information is disclosed or disseminated with *an intention to mislead the market*.[398]

An activist investor who has a direct or indirect position in the target or intentionally misleads the markets is likely to fall within the exceptions of Article 21(a) or (b), whereby rules governing the freedoms of expression and the press need not be considered in connection with the dissemination of investment recommendations or false or misleading information or the disclosure of inside information.[399] The recitals of the MAR are also fairly explicit on this issue. For example, Recital 47 sets out that it is 'appropriate *not to allow those active in the financial markets to freely express information contrary to their own opinion or better judgement*, *which they know or should know to be false or misleading* […]'.[400] However, Recital 77 further specifies that the

> [r]egulation respects the fundamental rights and observes the principles recognised in the [EU Charter]. Accordingly, [the MAR] should be interpreted and applied in accordance with those rights and principles. In particular, when this [the MAR] refers to rules governing the freedom of the press and the freedom of expression in other media and the rules or codes governing the journalist profession, *account*

[397] Cf. MAR Article 21 and 12(1)(c). Moreover, a *person discharging managerial responsibilities* would in accordance with Article 3(25) be read to include '(a) a member of the administrative, management or supervisory body of that entity; or (b) a senior executive who is not a member of the bodies referred to in point (a), who has regular access to inside information relating directly or indirectly to that entity and power to take managerial decisions affecting the future developments and business prospects of that entity'.

[398] Cf. MAR Article 21(b). This rationale of this caveat is very reasonable: no one should be allowed to disclose inside information or disseminate misleading or false information intentionally.

[399] Cf. MAR Article 21.

[400] Emphasis added. The ratio of the limitation is also included in recital 47, which reads 'the spreading of false or misleading information can have a significant impact on the prices of financial instruments in a relatively short period of time. It may consist in the invention of manifestly false information, but also the wilful omission of material facts, as well as the knowingly inaccurate reporting of information. That form of market manipulation is particularly harmful to investors, because it causes them to base their investment decisions on incorrect or distorted information. It is also harmful to issuers, because it reduces the trust in the available information related to them.'

> *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*.[401]

It should also be noted that the MAR and CSMAD take slightly different approaches to this point. Recital 28 of the CSMAD sets out that *'nothing in the [CSMAD] is intended to restrict the freedom of press or the freedom of expression in the media in so far as they are guaranteed in the Union and in the Member States, in particular under Article 11 of the Charter and other relevant provisions*'.[402] Moreover, Article 4(5) of the CSMAD provides that 'the prohibition against unlawful disclosure of inside information shall be applied in accordance with the need to protect the freedom of the press and the freedom of expression'. An *a contrario* reading of MAR Recital 77 and CSMAD Recital 28 implies that situations may exist in which some specific conduct that is within the scope of the market abuse provisions may also enjoy protection under the provisions that govern the freedoms of expression and the press.

Nonetheless, the EU market abuse regime can be seen as a qualified limitation on the freedoms of expression and the press, at least to the extent that disseminated information amounts to false or misleading information or inside information.[403] The restrictions are arguably proportionate and necessary for the functioning of the markets. However, a too broad interpretation of the elements 'misleading' and 'false' could have a chilling effect on the free exchange of ideas, opinions and information, which forms a very fundamental part of the price discovery mechanism in regulated markets.[404] Nonetheless, no policy reasons

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[401] MAR Recital 77 (Emphasis added):

[402] Cf. MAR Recital 47 (It is 'appropriate not to allow those active in the financial markets to freely express information contrary to their own opinion or better judgement'). A comparison of the [administrative] MAR and the [criminal] CSMAD reveals a significant difference between the civil and criminal regimes on market abuse. Whereas nothing in the CSMAD is intended to restrict the freedom of the press and freedom of expression, the MAR suggests that freedom of expression and freedom of the press may, and have *de facto* been limited, in administrative and civil proceedings that apply the MAR. These findings are aligned with ones made above in section II.B., see (n 102).

[403] In legal literature, the prohibition has further been divided into content-based (dissemination of false or misleading information) and manner-based (unlawful disclosure of inside information) restrictions. The latter restrictions do not even regulate the content of free expression, but merely the appropriate time, place, and manner (for the disclosure of inside information). Manner-based restrictions have been seen as less controversial in US legal discourse, whereas content-based restrictions have been argued to have a chilling effect on corporate speech, disclosure and communications. See, Page and Yang (n 388) 25–79; Heyman (n 388) 1131–1135; Coutore (n 388) 903–974. See also Hansen, 'MAD In a Hurry: The Swift and Promising Adoption of the EU Market Abuse Directive' (n 238) 206, where in the formulates the dilemma as '[a]lthough the right of free speech never entails the right to misinform, the right could be seriously curtailed if misinformation was subject to harsh punishment.'

[404] See Page and Yang (n 388) 25–79; Heyman (n 388) 1131–1135; Coutore (n 388) 903–974. The US Courts have required a degree of 'materiality' for liability for fraud and manipulation under the US Rule 10B-5.

exist for allowing fraudulent dissemination of false or misleading information, and permitting manipulation via false or misleading statements on freedom of expression grounds would have dire consequences for regulated markets at large.

At the same time, in the era of 'alternative facts' this assessment may often be less than straightforward.[405] For example, imagine a hypothetical situation in which the CEO (a US citizen) of a globally leading oil producer makes a public statement that '*Climate change is a hoax invented by the Chinese. No support exists for the claim that climate change is due to human activity*.' Would this statement amount to false or misleading information in the meaning of MAR, or even (attempted) market manipulation? Assessing this question would first require considering whether the statement gives or is likely to give *false* or *misleading signals* in relation to a *financial instrument* (e.g. the oil producer's securities), an *oil-related spot commodity contract* or *auctioned emission allowances* in the meaning of MAR 12(c). The assessment would then have to explore whether the CEO knew or ought to have known that the statement was likely to send misleading signals; if most US citizens believe that global climate change is not due to human activity,[406] could the CEO be expected to know otherwise or would his/her stated opinion be reasonable? In accordance with MAR Article 21, the rules governing freedom of expression would not need to be considered if the oil producer derives an indirect advantage from the statement.

Ultimately, a conflict between the CSMAD (as implemented by a Member State) or the MAR on the one hand and the freedoms of expression and the press on the other would *prima facie* have to be solved by a national court—or even a competent NCA or the ESMA. A national court would consider national constitutional provisions governing the freedoms of expression in addition to the relevant jurisprudence of the ECtHR and CJEU.[407] As such, it would also have to consider the ECHR and the EU Charter. Certain

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Vague statements, 'sales talk', 'puffing' and 'statements of opinion' have been considered not to be actionable in US case law. See Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* (7th edn, Thomson West 2017) § 12:60–70 and the cases cited therein.

[405] Or in the words of Hansen: '[i]n a world where right and wrong is not always clear, the fear of being punished for misinformation may be detrimental to the exercise of free speech.' See Hansen 'MAD In a Hurry: The Swift and Promising Adoption of the EU Market Abuse Directive' (n 238) 206–207.

[406] Cary Funk and Brian Kennedy, 'Public Views of Climate Change and Climate Scientists' (Pew Research Center, 4 October 2016) <http://www.pewinternet.org/2016/10/04/public-views-on-climate-change-and-climate-scientists/> accessed 30 October 2017. In an independent survey conducted between May 10 and June 6, 2016, 31 % of US respondents reported that climate change is due to natural causes and 20 % reported that there is no evidence that climate change is due to human activity.

[407] Freedom of expression in a commercial context has been confirmed in ECtHR case law since Markt Intern Verlag Gmbh and Klaus Beermann v Germany (1990) 12 EHRR 161, IHRL 92 (ECHR, 21 November 1989). However, it should be noted that commercial freedom of expression is not expressly recognized in the EU

rights, such as the freedoms of expression, may also enjoy wider and more extensive protection under a national constitutional regime.[408] The national adaptation of the MAR and its consideration for the national constitutional regime consequently constitute crucial factors in the assessment.[409] However, it should be noted that freedoms of expression are also qualified rights in all Member States. They may be limited by law, and the market abuse regime creates a strong presumption of such limitation when the disseminated information amounts to inside information or is false or misleading by nature.[410]

Statements such as 'worthless trash' or 'the next Apple' concerning financial instruments in connection with an activist campaign could be held to be misleading or false, if the instruments would clearly not be. However, a too broad interpretation of the elements false or misleading will be detrimental to the free exchange of information, opinions and views, which constitute a fundamental element in the price discovery mechanism on the markets. The MAR affords protection to the price discovery mechanism as well, and a sensible balance needs to be struck. The assessment ought to ultimately consider the impact of disseminated information in light of the MAR's objectives (both those of integrity and functioning markets), as established in section II.C. above.

Charter. Article 11 of the EU Charter does however reproduce the wording of ECHR, and arguably, the CJEU would interpret the same wording in an equal manner in EU context. Divergent interpretation by the CJEU and ECtHR of the same wording is however possible. See Vasiliki, *Fundamental Rights in EU Internal Market Legislation* (n 102) 166–167 and Grewe (n 89).

[408] See also Vasiliki (n 102) 167.

[409] For example, the Finnish legislative history on the adaptation of MAR provides that the application of the prohibitions against market manipulation and *unlawful disclosure of inside information requires due consideration of the freedom of expression*, as granted by § 12 of the Finnish Constitution (HE 65/2016 vp, [The Government Proposition on Amendments to the Finnish Securities Act and certain thereto related laws] (hereinafter HE '65/2016'), 47–60. See also the statement of the Constitutional Committee PeVL 2005/4/I, 4 on the relationship between market abuse provisions and freedom of expression). HE 65/2016 makes further reference to MAR Article 21 and concludes that *no such consideration is necessary if the person disseminating the information or 'persons closely associated' receives an advantage or a benefit*. Cf. SOU 2014/46, [Final Report of the Committee on Market Abuse 'Market Abuse II'], hereinafter ('SOU'), 162–3, wherein the Swedish regulator sets out that not all use of media is covered by *Tryckfrihetsförordningen,* 'TF' and *Yttrandefrihetsgrundlagen,* 'YGL'. The SOU concludes that actions that intend to mislead the market or the public for private benefit are outside the material scope of the constitutional provisions governing freedoms of expression and the press. The Swedish regulator finds that there are no issues with the provisions of MAR and CSMAD in relation to the freedoms of expression and the press in market manipulation cases. See also the decision by the District Court of Stockholm, 22 December 2016, Mål nr B 5189-15 (appealed, proceedings pending), wherein the court found that *conduct that amounts to market manipulation cannot enjoy protection under the constitutional regime*. For a commentary on the case, see Holmquist (n 42) 336.

[410] Cf. MAR Recital 47. See also MAR Impact Assessment (n 95) 151: 'the limitation on these rights […] *is necessary to meet objectives of general interest recognised by the Union and the need to protect the rights and freedoms of others, in accordance with article 52 of the Charter of Fundamental Rights. Limiting these rights is necessary to meet the general interest objective of ensuring market integrity and to protect the fundamental right to property (article 17 of CFR).*' On the complex relationship between the national constitutional regimes and the 'full application and effectiveness of EU law', see, Darinka Piqani, 'The Role of National Constitutional Courts in Issues of Compliance' in Marise Cremona (ed), *Compliance and the Enforcement of EU law* (OUP 2012) 132–156.

On the basis of the above, conduct that amounts to market abuse is unlikely to enjoy protection under the constitutional regimes, especially in circumstances where the exceptions in MAR Article 21(a) or (b) apply. However, it cannot be excluded that the rules governing the freedoms of expression included in the EU Charter, ECHR or Member States' constitutional regimes would not be in conflict with the market abuse provisions in exceptional circumstances.[411] The Swedish regulator recognizes that this may, for example, be the case when inside information is (legally) disclosed to a journalist within the material scope of the TF and YGL.[412] The disclosure of inside information via the press may consequently be unlawful in some Member States and lawful in others. If the lawfulness of disclosure via the press is recognized as being within the scope of freedoms of expression, it might also be argued that the disclosure of inside information *to the market as whole* should also be recognized as falling within this scope—especially if it reveals fraud or other serious misconduct that an issuer is engaged in (as discussed in section IV.D).

This thesis has not conducted an exhaustive investigation of Member States' national constitutional regimes, and no comparative constitutional research on the relationship between the MAR and the national constitutional regimes governing the freedoms of expression exists to date.[413] However, as noted in the brief overview above, a national constitutional regime may effectively limit the scope of the MAR. An analysis of whether certain activist conduct (e.g. disclosure of inside information to the markets via the press) may enjoy constitutional protection must be assessed under the applicable constitutional regime. However, neither the EU Charter nor the ECHR seem to yet recognize such

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[411] This could be the case, for example, if the fundamental right to freedom of expression for a board member or senior executive of a large company is rendered null and void in accordance with MAR Article 21 on the basis of some very alien indirect advantage that a closely associated person would enjoy.

[412] SOU (n 409) 163 'Om en person röjer information som är att betrakta som insiderinformation till t.ex. en journalist kan detta mycket väl ske inom TF:s och YGL:s materiella tillämpningsområde. Detsamma gäller om något av de medier som TF och YGL omfattar publicerar informationen. I dessa fall skulle det alltså kunna strida mot TF eller YGL att straffa den som röjt informationen. […] [Det är] förenligt med både förordningen och direktivet *att låta de svenska grundlagarna ha företräde i dessa fall*.' See also SOU (n 409) 162, where it is expressly stated that the freedom of expression applies to *anyone* within the material scope, regardless of whether that person is a journalist or not. Cf. Parkkonen and Knuts (n 366) 330 fn 549, wherein it is suggested such disclosure may amount to unlawful disclosure under Finnish law 'Sisäpiiritiedon julkitulo lehdistön kautta voi käytännössä olla seurausta siitä, että sisäpiiritieto on tietovuoden seurauksena annettu (lainvastaisesti) lehdistölle.' See also Clarke (n 238) 75: '[i]t is common for certain financial journalists to be provided with [inside] information about forthcoming large corporate announcements on an 'embargoed' basis […] there is nothing wrong with this.' Cf. Alexander (n 354) 41ff.

[413] However, such research would be urgently needed. Comparative constitutional research on the juxtaposition of freedoms of expression and the press and market abuse could presumably reveal some significant differences between the constitutional regimes in the Member States. Any such differences would have a direct effect on the scope of the CSMAD and MAR. This thesis consequently warmly welcomes any future contributions on the topic.

exceptions. Nonetheless, this thesis argues that they should indeed be recognized when the disclosure uncovers corporate fraud or other serious misconduct.

VI. SUMMARY OF MAIN FINDINGS AND CONCLUDING REMARKS

This thesis has examined, interpreted, and systematized the EU framework in relation to activist investing. A contravention of this framework amounts to market abuse under the EU market abuse regime. The following general conclusions and observations may be made on the basis of the analysis presented herein.

On the basis of empirical studies, this thesis has reached the conclusion that offensive shareholder activism may be performance enhancing for target companies and wealth enhancing for shareholders and the market overall, provided that the activism is within the *lawful* boundaries explored in this thesis. Likewise, activist short-selling may help the markets uncover to fraud and combat overpricing and consequently enhance the price discovery mechanism in the regulated markets. As such, both forms of activist investing do benefit the price discovery process and consequently have an efficiency-enhancing effect that is economically meaningful. Nonetheless, this thesis has also identified and demonstrated the detrimental impact that *unlawful* activism may have on market integrity, investor confidence and the markets at large. The thesis has thus argued that the separation of lawful and unlawful activist investing is of uttermost importance. The examination of that issue has also been the main focus of this thesis, as it has analysed the highly critical issue of when activist investing may amount to market abuse under the EU market abuse regime from a doctrinal point of view.

Some concluding remarks may also be made on the basis of the doctrinal analysis. Firstly, an activist investment strategy may itself amount to inside information. Secondly, any non-public information acquired by an activist may on its own or in combination with stand-alone research conducted by that activist, also amount to inside information. In either case, onward disclosure of the inside information or any dealings on the basis of it would amount to market abuse. The EU market abuse regime does therefore also effectively hinder activist collaboration (wolf packs) in the pursuit of a non-public (price-sensitive) strategy, as pursuing such collaboration would amount to market abuse. However, once the activist strategy is publicly known, other activists may follow suit. This thesis has further noted that extensive collaboration among offensive shareholder activist may, depending on

the chosen strategy, trigger takeover obligations in the target company. Triggering such obligations would not be unlawful per se, but any deceptive measures that seek to disguise true holding in order to avoid takeover or disclosure obligations would be.

Moreover, this thesis proposes a pragmatic approach to the issue of whether the European courts, and ultimately the CJEU, ought to recognize market irrationality as information that is relevant to the reasonable investor. If the irrationality is verifiable on the basis of *ex ante* available information, it should be considered to have a significance for the reasonable investor—provided that the irrationality is likely to have a significant effect on the price of a qualifying financial instrument. However, if a certain irrational market (re)action on the basis of *ex ante* information is unlikely, the information should not be considered relevant to the reasonable investor. Consequently, activist strategies that on the basis of *ex ante* available information may be deemed to have a likely significant—even if irrational—effect on the market could amount to inside information, provided that the further criteria of inside information are met (as explored in section IV.A.). A literal, contextual and teleological reading that considers the EU market abuse regime's objectives would support such an interpretation.

In addition, a practical issue for activist investors who engage in public campaigns is whether any produced or publicly disseminated information (e.g. independent research) might amount to an investment recommendation or information that recommends or suggests an investment strategy. The definitions for *investment recommendations* and *information suggesting and recommending an investment strategy* should arguably include most publicly disseminated opinions and evaluations by activist investors who take an explicit view on whether a targeted company or financial instruments related thereto are under- or overpriced. When this is the case, an activist investor must ensure that such information is presented objectively and that any interests and conflicts of interest are sufficiently disclosed. The latter ought to be of particular concern for activist investors who disseminate information, as even recommendations that do not contain any false or misleading information may amount to market abuse if they fail to disclose conflicting interests sufficiently (as examined in section V.B.).

Activists should also exercise due care to not disseminate any false or misleading statements regarding their agenda, objectives, or underlying estimates, which as examined above, would amount to market abuse. Any publicly disseminated (price-sensitive)

information ought to be presented in an objective manner, and potential interests and conflicts of interests should be sufficiently disclosed. Moreover, activist investors must present their views in a non-misleading manner; different opinions and estimates may be well justified, but the intentional presentation of misleading or false information is not. The interpretation of what is false or misleading is essentially a question of fact that needs to be objectively assessed on a case-by-case basis. Such an assessment must consider the nature of the information presented and the relevant pre-existing circumstances, such as the information that was available to the market at the time of the dissemination, the role of the disseminator, the type of the relevant financial instrument(s) and ultimately, whether the statement was likely to mislead those to whom it was directed.

This thesis has concluded that the rules governing the freedoms of expression and the press included in the EU Charter, the ECHR and the national constitutional regimes of the Member States are unlikely to protect conduct and dissemination that amounts to market abuse under the EU market abuse regime, especially in circumstances in which the exceptions listed in MAR Article 21(a) or (b) apply. However, collisions between the EU market abuse regime and the aforementioned instruments cannot be excluded; in such rare scenarios, the latter are likely to prevail. This thesis has also argued *de sententia ferenda* that the European courts, and ultimately the CJEU, ought to recognize an exception on *outsider disclosure* when such disclosure uncovers fraud or other serious misconduct (see section IV.D.). The disclosure of inside information is currently strictly prohibited under the MAR, even if such disclosure would uncover serious fraud or misconduct. The basis for recognizing the proposed exception is motivated with the very aims of the MAR, which seek to enhance market integrity and public confidence—objectives that may be attributed a normative meaning in the sense that they guarantee the markets *freedom from misinformation.* The disclosure of material non-public information would be justified in accordance with these aims if the disclosure uncovers serious misconduct and consequently guarantees the markets' integrity. The proposed exception could and should consider the safe harbour carve-out that has been defined and refined in the US line of cases based on *Dirks v SEC* and the mosaic theory. Recognizing such an exception would arguably enhance the integrity and efficiency of the regulated markets in Europe. National courts would also be able to recognize this exception on the basis of a national constitutional regime governing the freedoms of expression and the press, as such an exception would also effectively limit the scope of the MAR.