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FINANCIAL MARKETS LAW COMMITTEE

ISSUE 154 – ANALYSIS OF LEGAL UNCERTAINTIES ARISING FROM ARTICLE 6 OF THE PROPOSAL FOR A REGULATION ON INSIDER DEALING AND MARKET MANIPULATION

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Issue 154 – Analysis of Legal Uncertainties Arising From Article 6 of the Proposal for a Regulation on Insider Dealing and Market Manipulation

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1. INTRODUCTION

1.1. The role of the FMLC is to identify issues of legal uncertainty, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed. It was on this basis that the FMLC prepared its paper "Market Abuse Directive Review: Analysis of uncertainty around the insider dealing offence under the Market Abuse Directive arising from the judgment of the ECJ in *Spector Photo Group NV v CBFA"*,[1] (the "2010 Paper").

1.2. The 2010 Paper was prepared following the European Commission's public consultation "A Revision of the Market Abuse Directive", which proposed the extension of that Directive (hereinafter "MAD"). Amongst other matters, the Paper considered that *Spector*[2] raised uncertainty as to: (a) whether the insider dealing offence[3] is made out when a person is "in possession of" inside information or whether the behaviour needs to be "on the basis of" inside information; (b) the extent of an issuer's obligation to disclose inside information[4]; and (c) certain exemptions from the disclosure obligation.[5] The 2010 Paper suggested that the European Commission implement the FMLC's proposals (by way of amending MAD or by new technical standards to be developed by ESMA) such that the insider dealing offence would be defined as either:

- trading "on the basis of" inside information (the FMLC's preferred approach); or

- trading whilst "in possession" of inside information, with appropriate safe harbours including Chinese walls, trading plans, market makers and takeovers, as well as a catch-all provision which uses the concept of material influence.

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1 The FMLC Issue 154 Paper of November 2010 can be accessed from http://www.fmlc.org/papers/Issue154ReportDec10.pdf

2 Spector Photo Group NV v Commissie voor het Bank, Financie-en Assurantiewezen, C-45/08.

3 Pursuant to Article 2, MAD.

4 Pursuant to Article 6, MAD.

5 Cf. Article 7, MAD.

1.3. The FMLC has reviewed with interest the proposals for a Regulation on market abuse (the "EU MAR"). In general, the FMLC welcomes the Commission's proposals but is of the view that, in the interest of enhancing legal certainty, the issues identified below should be considered and the relevant areas of the EU MAR amended accordingly.

1.4. The FMLC has noted that some of the drafting in the proposals reflects language in the super-equivalent UK market abuse regime,[6] which expands on the various offences as prescribed in MAD. An account of this regime is given in the Appendix to this Paper for the purposes of comparison. However, while the substance of these provisions is contained in draft Article 6, they do not provide for any safe harbours nor are they tempered—like those of the UK regime—by reference to the conduct of a "regular user" in the market concerned. Accordingly, while the Committee welcomes the expansion of the current EU market abuse regime to capture behaviour which is plainly abusive (though perhaps not capable of satisfying the necessary elements of the current legislation), it does not welcome the proposed changes contained in draft Article 6 which go beyond the provisions of the super-equivalent UK market abuse regime. Further, the manner in which Article 6 has been drafted, rather than resolving the ambiguities already inherent in the UK super-equivalent provisions (as well as the UK market abuse regime generally), is likely to cause further confusion when transposed into national law.

1.5. Based on its review of the Commission's proposals, the FMLC is of the view that, in particular, the precise scope of the insider dealing offence (contained in Article 6) should be limited or further revised. In its current form, Article 6 creates such significant uncertainties that it would effectively operate to prevent dealings in shares by parties who have come across information which, merely because of its "relevance" to the issuer, will constitute "inside information".

[6] Sections 118(4) and (8) FSMA.

2. ARTICLE 6(1)(e) AND (3), EU MAR

2.1. Article 6, EU MAR makes at least two major changes to the current definition of inside information under MAD. First, Article 6(1)(e) introduces a free standing category of inside information:

> "*1. For the purposes of this Regulation, inside information shall comprise the following types of information:*
>
> *(e) information not falling within paragraphs (a), (b), (c) or (d) relating to one or more issuers of financial instruments or to one or more financial instruments, which is not generally available to the public, but which, if it were available to a reasonable investor, who regularly deals on the market and in the financial instrument or a related spot commodity contract concerned, would be regarded by that person as relevant when deciding the terms on which transactions in the financial instrument or a related spot commodity contract should be effected."*

This new category does not require information to be either "precise" or "price sensitive". It simply arises by virtue of the "reasonable investor" test, as was applied in *David Massey v Financial Services Authority*[7]*;* further discussion on this case is included in the Appendix. Under this category, information constitutes inside information if a reasonable investor would regard it as "relevant" when deciding the terms of a transaction.

2.2. Secondly, Article 6(3) states as follows:

> *"3. For the purposes of applying paragraph 1, information which, if it were made public would be likely to have a significant effect on the prices of the financial instruments, the related spot commodity contracts, or the auctioned products based on the emission allowances shall mean information a reasonable investor would be likely to use as part of this basis of his investment decisions."*

2.3. In MAD, the "reasonable investor" test was intended to supplement and not replace the "significant price effect" test. In this way, the reasonable investor test has

[7] [2011] All ER (D) 95 (Feb)

provided a useful threshold.[8] However, the introduction of both Article 6(1)(e) and 6(3), EU MAR has the result of elevating the importance of the reasonable investor test so that it replaces the concept of "a significant effect on price". This is a significant change from the current position under MAD.

2.4. Although the words used are equivalent to those under the MAD implementing directive,[9] proposed Article 6(3) will plainly now be a provision of the Regulation and thus of direct application. It will thereby be capable of modifying the essential provisions of Article 6(1)(a) to (d) so that the reasonable investor test replaces the price sensitivity test as contained in Article 6(1)(a) to (d). This is difficult to reconcile with the requirements of Article 6(2) which contemplate that an effect on price (albeit not a significant one) is a relevant consideration in deciding whether information is precise. Proposed Article 6(1)(e) will also dispense with any requirement that the relevant information is precise as well as *any* requirement that the information be price sensitive. In effect, it would be enough that a reasonable investor would regard that information as "relevant" when deciding the terms of a transaction.

2.5. These changes are likely to put firms and individuals in an invidious position if they know of any potentially relevant information that is not demonstrably already in the public domain. Almost any non-public information could be considered to be the type of information which would be taken into account by a reasonable investor (even, possibly, when that information is merely affirmative of market expectations). A person's conduct will thereby be judged with hindsight against an imprecise ambiguous test and it is very difficult to see how firms could have adequate systems which can adequately monitor or detect abusive behaviour on this basis.

2.6. On a day-to-day basis, during the course of ordinary business activities, firms and individuals will receive a significant amount of information which has not been made

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8 The current position is reflected in a statement published by CESR in July 2007 (paper 06-562b): "*The 'reasonable investor' test...assists in determining the type of information to be taken into account for the purposes of the 'significant price effect' criterion. In this context it should be noted Article 17.2 of MAD makes clear that implementing measures do not modify the essential provisions of the Level 1 Directive*."

9 Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions.

generally available to the public. As a result, such persons—who will routinely interact with customers and counterparties as well as current or prospective investors—could inadvertently find themselves holding inside information as characterised by EU MAR. One possible consequence of this is that issuers may be put under pressure by market participants to make general disclosure of information which they receive—regardless of its importance—and will thereby risk flooding the markets with potentially insignificant information.

2.7. There are many circumstances in which even the most commonplace interactions could be caught by EU MAR and brought within its scope of regulation. This issue is exacerbated by the limited explicit defences available in EU MAR and the effect of the ECJ's decision in *Spector*. As highlighted in the 2010 Paper, the *Spector* judgment raised significant uncertainty as to whether an offence is committed under MAD if a person deals while in possession of that information even if the information had no influence on the decision to deal. Moreover, the absence of a requirement for intent, or at least recklessness or negligence, under EU MAR amplifies the uncertainties faced by firms or individuals who are thereby at risk of unintentionally contravening provisions of the Regulation.

2.8. By way of illustration, consider the following scenarios:

(a) <u>The private investor – engagement with management</u>

An investor is contemplating an investment in a small listed company. As is common in such cases, the investor first arranges to meet the management of the company at its offices. During the meeting, the investor gets some good information on how the company operates and the management team's views on strategy, and leaves with a positive impression of the company.

The positive impression formed by the investor as a result of the information given in the discussions is, by definition, not generally available to the public. It might, however, be regarded as relevant by a reasonable investor when deciding whether to invest in the company. It could therefore amount to inside information under the new definition even though it is not price-sensitive nor precise as the information given is not of a nature to have a significant effect on price. It makes up part of the overall

mix of information on which an investor will base his/her investment decision. Because it is "relevant", albeit not significant, this means that the investor will be reluctant to deal. In these circumstances, the investor only has two options: invest without meeting management; or don't invest at all. However, it is unlikely that investors will invest in small and medium-sized companies without meeting management.

In effect, the fact that the investors are likely to receive non-public information will deter them from making such investments with consequent detriment to the capital-raising process for such companies.

(b) Shareholders holding board seats – internal disclosures

Company A has an important strategic cross-holding in another listed company ("Company B") and one of Company A's directors sits on the board. In order to raise working capital, Company A needs to sell some of its cross-holding. At a regular board meeting of Company B attended by Company A's director, the CEO of Company B discloses that Company B's financial performance is in line with market expectations and research analysts' consensus forecasts. Because the information is not price-sensitive Company B makes no public announcement.

The information provided by Company B is likely to be inside information under the new definition because it is not generally available and would be regarded as relevant by a reasonable investor in deciding whether to trade in Company B's shares. Company A will therefore be unable to sell its shares. In fact, because insiders of listed companies receive information like this on an almost continuous basis it is unlikely that Company A will ever be able to sell its cross-holding unless its director resigns from the Board, which will be unattractive while it holds a strategically important shareholding.

Company A is therefore effectively prevented from raising the working capital it needs.

(c) Discussions with market experts

Fund Manager A attends an event for investors in the alternative energy sector. At the

event he speaks to Fund Manager B—whose views are highly respected—and they discuss a number of companies. Fund Manager A offers his views on the public financials of certain of the companies which have been the subject of their discussions. Fund Manager B makes some general remarks about the sector but also offers his personal perspectives on the financials that essentially confirm Fund Manager A's analysis.

Information about the companies that Fund Manager B has discussed is not generally available but is relevant to a reasonable investor because of the respect in which his views are held. Fund Manager A therefore has inside information under the new definition and cannot deal in the shares of the companies on which Fund Manager B has offered his views.

The effect of the legislation should not be to prevent good faith discussions between investors about potential investments.

2.9. Some commentators have likened the proposed Article 6(3) to the UK's "super-equivalent" provision in section 118(4) of the Financial Services and Markets Act 2000 ("FSMA"), i.e. the misuse of information in a manner contrary to the standards of the regular market user. However, this is not altogether accurate. While it is true that the UK regime (as described more fully in the Appendix) applies to behaviour based on information which is "relevant" rather than "price sensitive", it does not impose an absolute bar on trading on or disclosing such information; it only imposes sanctions for behaviour which the "regular market user" would consider to be below the standards expected in the market. In addition, UK MAR asserts that trading and disclosure based on relevant information is only market abuse if it "relates to matters which a regular user would reasonably expect to be disclosed to users of the particular prescribed market."[10] By contrast, proposed Article 6(1)(e) would prohibit all trading on or disclosure of such information regardless of the disclosability of such information or any other factor.

2.10. Article 12, EU MAR excludes Article 6(1)(e) information from the disclosure obligations in that provision. However, this does not assist greatly. First, as already

[10] See MAR 1.5.2E.

discussed, Article 6(3) results in the reasonable investor test supplanting the price sensitivity test and therefore puts issuers in a very difficult situation when they have to determine what information they need to announce. Secondly, those in possession of relevant information are nonetheless still effectively precluded from dealing unless they disclose/persuade the issuer to disclose the information. This provision is likely to have a chilling effect on investors' willingness to engage with the management of issuers for fear of receiving any "relevant" information, which might bar them from dealing.

3. THE RULE OF LAW

3.1. The FMLC is given to understand that the proposed EU MAR—and in particular Article 6—is intended to enhance legal certainty for market participants through a closer definition of "precise" and "significant effect on price". Nonetheless, on the basis of the current drafting, the FMLC is of the view that the addition of Article 6(1)(e), EU MAR places investor confidence and market integrity at risk. This is especially so given that the proposed provisions – and their likely application and interpretation by national courts—depart significantly from established principles of the "rule of law", at a time when market participants need legislators to bring substantial certainty to this area.

3.2. The doctrine of the rule of law is a means by which nations can achieve procedural fairness.[11] A modern summary of the doctrine of the rule of law might state that procedural fairness requires, *inter alia*, that new laws: (i) should be drafted in specific, ascertainable terms; (ii) should not impose intolerable costs or burdens; (iii) should be limited to standards the application of which can be reliably predicted; and (iv) should use concepts which are consistent, in so far as possible, with the existing body of laws and with the common standards that persons ordinarily use to guide their conduct. It is against this background that specific aspects of EU MAR and, in particular, Article 6 appear to the FMLC to be problematic and objectionable.

3.3. These principles are well-established as embodying the constraints that should be observed by government and legislators today. They require that those who propose,

[11] For an account along these lines see, e.g., Lyons, *Ethics and the Rule of Law* (Cambridge, 1984), ch. 7.

draft and enact legislation should resist the temptation to resort to certain legislative expedients, such as the use of vague, ambiguous or abstract concepts which lack specificity such that their application cannot accurately be predicted.

3.4. Yet, as has been demonstrated, the proposed Article 6 does not in many respects adhere to these important principles. In particular, by attempting to add flexibility to what is otherwise an established and (fairly) definitive set of concepts, lawmakers have not drafted the definition of "inside information" in specific, ascertainable terms. It includes concepts which are vague and abstract, such as the "reasonable investor" and "relevant" information and does not explain clearly the relationship between these concepts and the requirement that information must be precise, contained in Article 6(2). The meaning of these terms may not be reliably predicted. As a result, the large number of corporates, firms and private individuals affected by the EU MAR may be impeded from participating fully in the business of firms in which they choose to invest or, at worst, resisting investment at all. Further, investors and market participants cannot be expected to adapt their existing conduct to avoid commission of the relevant offences and to otherwise comply with the requirements of EU MAR because they cannot be sure of what the law is and they cannot predict its consistent application. The significance of these legal uncertainties is further heightened by the proposed revision of the Market Abuse Directive (MAD2) which may permit criminal proceedings (arguably, in parallel to any civil proceedings) for behaviour which amounts to an offence under EU MAR.

4. RECOMMENDATIONS

4.1. There are several approaches which could be followed in order to add much-needed certainty to Article 6(1)(e) of EU MAR. We have set out these recommended approaches as follows:-

(a) <u>Delete Article 6(1)(e) entirely</u>

The purpose of Article 6(1)(e) has not been made clear at any stage. Whilst recitals (11) and (12) of EU MAR are helpful, they do not adequately explain the rationale for or scope of Article 6(1)(e). The examples in recital (14) of information that is intended to be covered by Article 6(1)(e) mostly relate to matters which are in the

course of negotiation. It could be said that the purpose of Article 6(1)(e) is to capture information which has not already been disclosed to the market because disclosure of that information has been delayed by an issuer pursuant to Article 12(4), EU MAR. If this is the case, we are of the view that Article 6(1)(e) does not necessarily fulfil this aim as such information would already fall within the scope of Article 6(1)(a) as Article 12(4) only applies in circumstances where an issuer has accepted that the relevant information constitutes inside information. On this basis, we recommend that Article 6(1)(e) is deleted as it is superfluous and does not achieve its intended purpose.

(b) Limit Article 6(1)(e) in line with section 118(4) FSMA and MAR

On another view, it would seem that the purpose of Article 6(1)(e) is to capture the kind of information which would be caught under the UK's super-equivalent regime in section 118(4), FSMA. If so, Article 6(1)(e) should, like the UK regime, be limited to information the misuse of which is likely to be regarded by a regular user of the market as a failure to observe the proper standard of behaviour. It should also include the important safeguards contained in UK MAR.

As discussed in section 4 of this Paper, the proposed Article 6(1)(e) is far wider than section 118(4), FSMA. It covers information which is not generally available and which would be considered as relevant by a regular user of the market when deciding the terms on which to trade, without including a requirement that such information be "price sensitive" or "precise". The aim of the UK regime is only to capture behaviour which is based on information likely to be regarded by a regular user of the market as a failure to observe the standard of behaviour reasonably expected of such a person. In particular, UK MAR makes clear that (in the FSA's view) dealing will only constitute market abuse if the relevant information "*relates to matters which a regular user would reasonably expect to be disclosed to users of the particular prescribed market".*[12] Article 6(1)(e), however, would catch all relevant non-price sensitive or imprecise information as inside information, regardless of whether it is information which a regular user of the market would expect to be disclosed.

[12] MAR 1.5.2E.

UK MAR sets out guidance as to what factors should be taken into account in determining whether or not a regular user would regard information as "relevant information". One such factor—in the case of information relating to possible future developments—is whether the information provides, with reasonable certainty, grounds to conclude that the possible future developments will, in fact, occur.[13]

As information falling within Article 6(1)(e) is not required to be disclosed under Article 12, the wider definition set out in Article 6(1)(e) (compared with the UK regime) gives rise to significant uncertainty. Effectively, once a person comes into possession of relevant information in relation to financial instruments, unless it is information which will—at a later stage—become precise or price sensitive such that is it disclosed to the market, it is not clear when that person may begin dealing again in the financial instruments to which that information relates.

(c) Modify Article 6(1)(e) to add clarity

In the event that options (a) or (b) are not accepted, at a minimum, the FMLC is of the view that the wording of Article 6(1)(e) certainly should be further clarified in order to avoid significant interpretative difficulty for issuers and investors. For example, Article 6(1)(e) can be modified so that it only includes information not generally available which offers those possessing it a reasonable prospect of obtaining a significant financial advantage by dealing in the relevant financial instruments.

5. CONCLUSION

5.1. It is not the role of the FMLC Committee to comment on policy questions regarding the substance or application of the proposed EU MAR. Nonetheless, the proposal to extend the definition of inside information by the addition of Article 6(1)(e) has been surprising given that it is not discussed in the Commission's consultation or impact assessment on EU MAR. Indeed, the Commission stated in its 2009 Call for Evidence[14] that "there does not seem to be a need to revise the concepts used to define inside information for MAD purposes."

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13 MAR 1.5.6E.

14 http://ec.europa.eu/internal_market/consultations/docs/2009/market_abuse/call_for_evidence.pdf, see page 8.

5.2. The FMLC welcomes an expansion of the scope of inside information which follows more closely the scope of the UK's super-equivalent regime. However, in seeking to emulate these provisions, as well as incorporate the objective "reasonable user" as a mitigating standard, Article 6 EU MAR expands the EU market abuse regime in a manner which undermines commercial reality. This will likely have a chilling effect on the dissemination of information and the readiness of market participants to take investment decisions, especially given that they will not benefit from clear exemptions or safe harbours for market standard behaviour.

5.3. The intention of this Paper and its Recommendations (further to those contained in the 2010 Paper) is to assist those involved in finalising the text for the proposed Article 6, EU MAR by drawing attention to the various legal uncertainties which will arise from the current drafting. In particular, the FMLC is of the view that the current drafting will give rise to substantial uncertainty as to the interpretation and application of the insider dealing offence. As such, in order to ensure that the offences (as amended) are interpreted consistently by all Member States (particularly in light of the introduction of a criminal regime, which will seek to prosecute equivalent behaviour), the FMLC would encourage the Commission to resolve the issues highlighted in this Paper by one of the methods recommended above.

APPENDIX

1. THE UK FSA'S MARKET ABUSE REGIME

1.1. The UK implemented its current civil market abuse regime—following the coming into force of MAD—through the amendment of Part VIII of the Financial Services and Markets Act 2000 ("FSMA"). This modified certain aspects of a pre-existing regime which had been first introduced by FSMA. However, certain "super-equivalent" FSMA provisions were retained. As a result, the current UK regime has a wider definition of what constitutes market abuse than that set out under MAD.

1.2. Under section 118 FSMA, market abuse is defined to encompass behaviour which occurs in relation to certain qualifying investments. Such behaviour must fall within one or more of the seven categories/types of behaviour prescribed by FSMA, which includes dealing on the basis of inside information[15] and the improper disclosure[16] or misuse[17] of inside information.

1.3. As mentioned above, there are two super-equivalent market abuse behaviours in the UK as prescribed by sections 118(4) (misuse of information) and 118(8) (misleading behaviour and market distortion), FSMA and Chapter 1 of the FSA's Market Conduct Sourcebook ("UK MAR"). "Misuse of information" covers circumstances either where there is possible abusive behaviour which is other than a dealing in investments, or where the information on which behaviour is based (whether or not a dealing) is price sensitive but arguably not "inside information" as defined in FSMA. "Misleading behaviour and market distortion" is an offence of most relevance to the commodity markets and covers circumstances where a person's behaviour is likely to give a regular user of that market a false or misleading impression as to the supply of or the demand for or as to the price or value of qualifying or related investments.

1.4. These offences are subject to the "regular user" test, whereby conduct is only abusive if it would be regarded by a regular user of the market concerned who was aware of

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15 Section 118(2), FSMA

16 Section 118(3), FSMA

17 Section 118(4), FSMA

the conduct as a failure to observe the standard of behaviour reasonably to be expected of a person in the position of the alleged abuser. In the case of market distortion, the behaviour is to be judged by reference to a number of factors, including the experience and knowledge of market users, the structure of the market and its legal and regulatory requirements, the identity and position of the person engaging in the behaviour and the extent and nature of its visibility.[18]

1.5. A concept central to the section 118(2) and (3) offences is that of "inside information". The definition is derived from MAD and covers information of a precise nature which is not generally available, relates directly or indirectly to one or more issuers of certain investment, and would, if generally available, be likely to have a significant effect on the price of those investments [emphasis ours].[19] Information is "precise" if it indicates circumstances that exist (or may reasonably be expected to come into existence) or that an event has occurred (or be reasonably be expected to occur), and is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of the investments. As to a "significant effect on price", the information must be of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions.[20]

1.6. In addition to those which were introduced under MAD—regarding trading in shares in share buy-back programmes[21] and price stabilisation activities[22]—Part VIII FSMA provides for two additional safe harbours[23]. These operate to exclude from the definition of market abuse certain behaviour where it complies with existing rules which include provisions to the effect that compliance with such rules does not amount to market abuse: this includes (i) the control of information and use of information barriers within the scope of the FSA's Systems and Controls Sourcebook, as well as the Disclosure Rules and the Listing Rules, and (ii) behaviour done by a

18 UK MAR 1.9.4E.

19 Section 118C(2)

20 Section 118C(6), FSMA.

21 MAR 1.10.1G(1).

22 MAR 2.

23 Section 118A(5), FSMA.

public authority in pursuit of monetary policies.

2. DAVID MASSEY V THE FINANCIAL SERVICES AUTHORITY

2.1. The judgment of the Upper Tribunal in David Massey v the Financial Services Authority[24]—in upholding the FSA's decision to fine the claimant for engaging in market abuse—considered *inter alia* the statutory meaning of "inside information" under section 118, FSMA.

2.2. In brief, Mr Massey short sold 2.5 million shares of an AIM-listed company, Eicom plc. Immediately following this sale, he subscribed for 2.6 million newly-issued shares at a significantly discounted price in order to close his short position. While certain information relating to Eicom plc's willingness to issue shares at a discount was generally available to the market, the depth of the discount available to Mr Massey was not known. Mr Massey's net profit from this transaction was over £100,000.

2.3. The Tribunal found that Mr Massey had committed market abuse by virtue of dealing on the basis of the inside information. Of note in this judgment was the Tribunal's consideration of the objective test under section 118C(6) FSMA which provides that inside information would be "likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use *as part of the basis* of his investment decisions" [emphasis added]. The Tribunal was offered the opportunity to choose between two approaches to this test: either "significant effect on price" means that a reasonable investor would use that information to form the basis of his investment decisions (i.e. supplanting the ordinary meaning of "significant effect on price"); or information could only have a "significant effect on price" on the condition that it has an effect that would influence a "reasonable investor". The Tribunal preferred the former approach and did not agree, as was argued by the Defendant, that the "reasonable investor" test operated as a condition to the meaning of "significant effect on price".

[24] [2011] UKUT 49 (TCC) ("*Massey*")

2.4. In addition to this decision, recent FSA Enforcement cases[25] appear to indicate that the FSA has replaced the price-sensitivity test with a "reasonable investor" test, contrary to guidance provided by the Committee of European Securities Regulators ("CESR").[26] This has led to a considerable lack of clarity for market participants. In particular, the uncertainty inherent in the "reasonable investor" test—as now applied in the UK—will most likely lead to confusion and inconsistent approaches towards disclosure obligations and dealing decisions. This confusion and uncertainty is against the background that, although the FSA appears to have adopted the "reasonable investor test" as the sole criterion for assessing whether information is price-sensitive, it is still a requirement that (under Section 118 FSMA) inside information must be "precise".

[25] See for example Final Notice in JJB Sports plc – 25 January 2011.

[26] See Ref: CESR/06-52b, Level 3 guidelines July 2007, at section 1.10-1.16.