



In order to prevent insider dealing, information must be made public even if the holder of the information does not know how precisely it will influence the price of financial instruments

Otherwise, the holder of the information could cite uncertainty as a pretext for not making the information public, in order to profit from it to the detriment of the other actors on the market

An EU directive¹ prohibits insider dealing and requires issuers of financial instruments to inform the public of inside information which directly concerns them, that is to say, of any information of a **precise nature** which is likely to have a significant effect on the prices of the financial instruments concerned. Another EU directive² adds that information is to be regarded as precise if it makes it possible to assess whether the set of circumstances or the event in question is likely to have an effect on the price of the financial instruments concerned.

Between 2006 and 2007, Wendel – a French company specialised in investment – concluded total return swap agreements (for credit derivatives on yield transfers³) with four banks for a total of 85 million shares in Saint-Gobain (a company which manufactures construction material), whereby Wendel gained exposure to Saint-Gobain. In 2007, Wendel officially took the decision to convert the financial exposure to Saint-Gobain into actual possession of share certificates, which led it to acquire more than 66 million shares in Saint-Gobain (17.6% of the share capital of that company).

In the course of an inquiry into the circumstances surrounding the increase in Saint-Gobain's capital brought about by Wendel, the Autorité des marchés financiers (AMF) found that Wendel had intended from the outset to acquire a significant shareholding in Saint-Gobain's capital. The AMF accused Wendel of failing to make public the principal characteristics of the financial operation designed to enable Wendel to acquire that shareholding and of failing to make public the inside information as to the implementation of that financial operation. Fines of €1.5 million were imposed on both Wendel and Mr Jean-Bernard Lafonta, Chairman of its Board of Directors.

Mr Lafonta submits that there was no need to make public the information on the financial operation at issue because that information was not precise enough to support an inference as to whether its possible effect would be a rise or a fall in the price of Wendel's shares. The AMF responds that, for information to be regarded as 'precise', there is no need to be able to predict the effect that a financial operation is likely to have on the direction of change (that is to say, whether it is likely to bring about an increase or a decrease in the relevant price), the most important thing being that the price of the shares is expected to change. The French Cour de cassation, hearing the case at last instance, seeks clarification from the Court of Justice on this point.

¹ Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16).

² Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6 as regards the definition and public disclosure of inside information and the definition of market manipulation (OJ 2003 L 339, p. 70).

³ In a transaction of this kind, one party (generally a banking institution) undertakes to pay over to an investor for a certain length of time all the income generated by a given asset (the underlying asset). In return, the investor pays the banking establishment for the service rendered and, if the asset falls in value over the contractual period, pays that establishment an amount equivalent to the loss of value. This mechanism enables the investor to benefit from any increase in the value of the asset, and from the income generated, without having to purchase or dispose of the asset in question. The investor thus gains exposure to the underlying assets in the sense that the financial effects of those assets accrue to him as they would through ownership, but without ownership having to be transferred.

By today's judgment, the Court states that it is not apparent from the wording of the directives that **'precise' information covers only information which makes it possible to determine the likely direction of a change in the prices of the financial instruments concerned.** The only information that may be regarded as imprecise is information that is vague or general, from which it is impossible to draw a conclusion as regards its possible effect on the prices of the financial instruments concerned.

The Court points out in that regard that a reasonable investor may well base his decision to invest on information which does not necessarily make it possible to determine the movement in a given direction of the prices of the financial instruments concerned. Furthermore, the increased complexity of the financial markets makes it particularly difficult to identify accurately the direction of a potential change in the prices of financial instruments. **If it were accepted that information is to be regarded as precise only if it makes it possible to anticipate the direction of a change in the prices of the instruments concerned, the holder of that information could use any uncertainty in that regard as a pretext for refraining from making certain information public and thus profit from that information to the detriment of the other actors on the market.**

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

Unofficial document for media use, not binding on the Court of Justice.

The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

Press contact: Christopher Fretwell ☎ (+352) 4303 3355