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Inside information and insider trading

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Abstract: EU law acts often have a built-in element of so-called self-control, consisting in verification of the effectiveness of regulation after a specified period of time from the entry into force of a legal act. In the year 2019, the Market Abuse Regulation (MAR), which in 2016 introduced new regulations concerning confidential information and trade related to internal information, causing a revolution in the capital market, will be reviewed. Numerous new duties were imposed on market participants, among others in the field of transaction reporting, access to confidential information, and the circle of persons having access to confidential information. Due to the above, the article discusses the regulations of confidential information and related obligations imposed on market participants, based on the current achievements of the doctrine and judicatory. These considerations have been confronted with the undesirable element of having confidential information, i.e., insider trading. Often, an entity that has access to specific confidential information uses it in an unlawful manner to achieve its own profit. This causes inequalities in access to market information and leads to distortions in the transparency of financial markets. The article also includes a polemic on the morality of insider dealing.

Informacja poufna w obrocie papierami wartościowymi

Abstrakt: Akty prawa unijnego często mają wbudowany element tak zwanej samokontroli (*self controlling*), polegający na weryfikacji skuteczności regulacji po upływie określonego czasu od wejścia w życie aktu prawnego. Na rok 2019 przypada rewizja rozporządzenia MAR (Market Abuse Regulation), które wprowadzając w 2016 roku nowe regulacje dotyczące informacji poufnej i obrotu związanego z informacją wewnętrzną, spowodowało rewolucję na rynku kapitałowym. Na uczestników ryn-

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ku zostały nałożone nowe liczne obowiązki, między innymi w zakresie raportowania transakcji, dostępu do informacji poufnej czy też kręgu osób mających dostęp do informacji poufnej. Z uwagi na to w artykule omówione zostały regulacje informacji poufnej oraz związanych z nią obowiązków nałożonych na uczestników rynku, opierając się na aktualnym dorobku doktryny i dostępnym orzecznictwie. Rozważania zostały zestawione z niepożądanym elementem posiadania informacji poufnej, to jest *insider trading*. Często podmiot mający dostęp do określonych informacji poufnych wykorzystuje je w sposób bezprawny dla osiągnięcia własnego zysku. Powoduje to nierówności w dostępie do informacji rynkowych i prowadzi do zaburzenia transparentności rynków finansowych. W artykule podjęto również polemikę co do moralności wykorzystywania informacji poufnych.

1. Introduction

Insider trading (also insider dealing) is a phenomenon still common in capital markets. Despite the relatively large interference of the European legislator (and legislators of European Union member states), with regard to the regulation of insider issues and the penalizing of this practice, it is still encountered on stock exchanges.

Insider trading mainly involves the use of confidential information that is not yet available to market participants in order to achieve their own profit. The law allows the transaction to be carried out by so-called insiders, but on strictly defined rules, regulated directly in the provisions of applicable law. However, the subject of this article is the fact that the market and its other participants have a negative impact on the functioning of the market. I am talking about a situation in which an entity that has confidential information uses it against the regulations for its own benefit in order to make a profit.

Due to the aforementioned scope of research, the subject of the analysis will be to a large extent the definition of confidential information, its legal regulation, its practical use and the effects that these practices may cause on the capital market.

Due to the socially pejorative reception of insider trading, ethical considerations have also been raised. Stiff, sometimes unintelligible regulations, their practical reflection on markets and economic theories undoubtedly have had their final effect on market participants. Particularly noteworthy is the situation of an individual investor, who as a non-professional entity is *a priori* in a worse position in matters of access to information or the possibility of their use. Due to this, an ethical description of the phenomenon of insider trading and the use of confidential information is necessary.

In the article, the regulations of the law of the European Union and the internal law appearing in Poland are analyzed, based on the achievements of the legal doctrine, jurisprudence and available literature on the subject.

2. Legal regulations — regulation of inside (confidential) information

Current regulations regarding information on the capital market (and organized trading system¹) have been largely harmonized due to the implementation of the so-called MAR Regulation (Market Abuse Regulation),² which came into force on 3 July 2016. Characteristics of the act to be amended, the significance of these changes, the effects that the EU regulator intends to achieve are undoubtedly the essence and the role that the MAR Regulation introduced on the market capital.

The subject of the regulation is the establishment of a common regulatory framework for confidential information, related reporting, the prevention of negative aspects of the disclosure of confidential information in the market, and the establishment of common preventive measures against capital market abuse. Undoubtedly, the goal is also to protect investors and generally increase confidence in the capital market.

Due to the importance of changes, the legal characteristics of the act being an EU regulation need to be emphasized. According to Art. 288, para. 2, TFEU³ “The regulation has the general scope. It shall be binding in its entirety and directly applicable in all Member States.” It is an act of general character — it has a general scope. In practice, it means that since its entry into force, the Regulation is part of the national law of a Member State and is applied directly (without the need to transpose into national law). Therefore, since the entry into force of such a legal act, it is a universally applicable law, directly applicable to law enforcement bodies and entities using this right. The scope of application is treated in Art. 2 of the MAR Regulation stating that the subject of its regulation is in particular: using confidential information, disclosing confidential information in an unlawful manner, market abuse (manipulations related to confidential information) and preventive measures against abuse. The subjective scope includes entities operating on the regulated market, on multi-lateral trading platforms and organized trading platforms.

In addition, it is worth pointing to a wide range of provisions regarding financial instruments in the area of regulation of the MAR Regulation. MAR’s provisions apply to financial instruments admitted to trading on the regulated market, which is the subject of applying for admission to trading on this market, instruments traded on MTF and OTF and financial instruments, the price or value of which depends on the price or value of financial instruments mentioned above. In addition, the scope also includes futures contracts on the cash market, derivative contracts, instruments for credit risk transfer, situations related to benchmarks.

¹ Organized trading system in meaning like A. Chłopecki in: A. Chłopecki, M. Dyl, *Prawo rynku kapitałowego*, Warszawa 2017, p. 32.

² Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse (Regulation on market abuse) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directive 2003/124/EC, 2003/125/EC and 2004/72/EC.

³ Tractat on the Functioning of the European Union, C 326/47.

2.1. Inside information

The definition of confidential information is contained in Art. 7 of the Regulation, constituting a key term for the whole regulation on the basis of which a number of obligations, orders, and prohibitions related to trade on the market were subsequently established.

In order for given information to be categorized as confidential information, it should first be examined in terms of the occurrence of necessary features, which somehow state that the information given is confidential information. In accordance with Art. 7, confidential information is information which is of a precise nature, has not been disclosed as public information, affects directly or indirectly one or more issuers (one or more financial instruments) and is pricing-in in relation to these financial instruments (or on prices of derivative financial instruments linked to the underlying financial instrument).

In addition, Art. 7 refers to commodity financial instruments stating that the confidential information concerning these instruments will be information containing the above features, as well as relating directly or indirectly to one or more such derivative instruments or directly related commodity contracts on the cash market. The provision in Art. 7 also applies to emission allowances (or products based on them sold at auctions).

The last element included in the standard of the discussed article is information provided by the client and related to orders regarding financial instruments in progress (of course meeting the general conditions determining the definition of confidential information).

Such information contains a special intrinsic value, which results from the fact that until it is made public on the market, it is the sole property of the entity (generally an issuer, but can also be generated from the client's side of a given transaction). Only a few people (insiders) have access to it in a specific property or non-financial value. For public companies, it is recommended to create an individual profile of a "reasonable investor" that would additionally contain documentation of his information needs.⁴

2.2. Assessment of information

A new construction is the adoption of an extended group of personal patterns, which is responsible for verifying the information and qualifying it as confidential. Originally, the assessment was necessary only from the perspective of the "hypothetical perception" of the rational investor, now also taking into account the element of the rational issuer (the person being the manager, the manager). Transferring this obligation on the part of the issuer is justified because it is one

⁴ P. Eleryk, A. Piskorz-Szpytka, P. Szpytka, *Compliance w podmiotach nadzorowanych rynku finansowego*, Warszawa 2019, p. 420.

who originally researches the information in terms of its hypothetical price-setting and significance and gives it the status of confidential information. Only the positive occurrence of the necessary premises implies the process of making such information public on the market (there is also a so-called “third party” insider/outsider trading).⁵

Assessment of actions taken (or not taken) by the obliged entity may also be performed ex-post by the supervisory body. Due to the fact that the review by the supervisory body is carried out post factum, it will be objectively determined. In case of doubts, the supervisory body is obliged to assess whether the information being the subject of the breach was of a price-creating nature (relevant to the valuation of the financial instrument) and whether there was any unlawful use of such information. It is indicated that such assessment must duly take into account the features of a rational investor (“two-way” analysis of the rational investor paradigm).⁶ On the one hand, it will be necessary to determine whether the investor (in such a model) would use this information for his investment decision. It is undesirable to predict in advance that an investor knows all the information available on the market (or a further-reaching statement that in the investment process he takes all this information into account). It is desirable to approach that the investor makes an “informed selection” of information and takes into account information relevant to his or her investment process.

You can see a relatively large burden of responsibility of the managing entity (manager), who is faced with the obligation to give a specific event (specific information) the confidential information, and thus the launch of the internal procedure appropriate for such an event. The MAR Regulation is here on the principle of subjective responsibility. What makes it necessary to decide on the issuer’s liability, taking into account the circumstances, whether he could correctly determine whether the given event may have an impact on the investor’s investment decisions.

When assessing the issuer’s decision, it should be analyzed whether in the given circumstances the model rational issuer could have predicted the probable behavior of the rational investor in relation to the confidential information produced.

2.3. Analysis of the characteristics of confidential information

The price-making of information, its relevance for the valuation of a financial instrument is the first element that should be examined by the entity deciding on the assignment of the characteristics of confidential information. The provision in Art. 7 indicates “the likely significant impact on the price.” Such an assessment

⁵ Wider meaning in: J. Anderson, *Insider Trading: Law, Ethics, and Reform*, Cambridge 2018, p. 115.

⁶ A. Stokłosa, S. Styp, *MAR Rozporządzenie Parlamentu Europejskiego i Rady w sprawie nadużyć na rynku. Komentarz*, Warszawa 2017, commentary to Art. 7.

does not follow (and in fact cannot happen) post factum, but by stating by the model manager (rational manager) whether on the basis of the information possessed, qualifies the information as confidential and discloses it to the market. This assessment refers to the internal impression of a rational manager who quantifies a specific event as likely to bring about changes in the price of the financial instrument. In addition (which has already been emphasized above) the assessment must be related to the model of the rational investor and decisions made by him. This was also the case of the Supreme Administrative Court, where it is stated that:

The assessment of whether given information is of a price-making nature requires each time an intellectual operation or a hypothetical price-making estimate of this information. Information is therefore of a price-creating nature when its content allows for the presentation of a forecast regarding the potential impact of its publication on the price of a financial instrument. It is not important whether this forecast will come true. The important thing is that the assessment of the price-making nature of given information should be carried out before it is made public. Such an assessment should be carried out by the owner of this information, somehow “suspicious” information that it can constitute price-making information.⁷

Only a summary of the price-creation of given information with the effect it could have on its recipients allows it to be given confidential information (including further premises/features). It is extremely important to emphasize that it is not possible to make information confidential, by only determining its price-creating nature based on the perception of a rational issuer that provides for the maintenance of a rational investor. This was also the opinion of the Court of Justice of the European Union, where it stated that

it is not necessary to deduce confidential information with a sufficient degree of probability that after their publication, the potential impact of this information on the price of given financial instruments will be of a specific character.⁸

Another feature is the accuracy of information. For the accuracy of information, prof. Wierzbowski⁹ establishes three premises, the occurrence of which sets out this feature. These are:

1. Reasons of identity — it is necessary here to refer to the reconstruction of the identity of a given event. The ordinance indicates that these events may be both one-act (occurring only once), multi-factorial (a set of circumstances), but also being the whole process, extended over time by flow chart (market tendency).
2. Reasons for reality — it means that the given information could actually occur and refer to real events.

⁷ The Judgment of the Supreme Administrative Court of 19 February 2013, Ref. II GSK 2226/11.

⁸ The Judgment of the Supreme Administrative Court of 11 March 2015, Ref. C-628/13.

⁹ M. Wierzbowski, *Rozporządzenie UE Nr 596/2014 w sprawie nadużyć na rynku: prawo rynku kapitałowego. Komentarz*, Warszawa 2016, p. 57.

3. Premises of detail — this requires an examination of the level of detail of information, which allows for the extraction of specific conclusions from it as to possible market events.

There is no uniform line in the doctrine which would point to links between the precision of information and price-setting feature. Some are in favor of its close relationship with the price-setting feature, while some point to the isolation of the precision element as a completely separate feature, unrelated to the pricecreating attribute.

The next step is to check the reference level of the given information to the financial instruments to which it applies (there may be a direct or indirect reference).

A direct reference can be made when the event relates directly to the entity whose securities are traded, which will result in a change in the penalties. An indirect reference is a circumstance in which a given event relates to an entity only indirectly, which will result in the price movement of financial instruments related to instruments belonging to the issuer (derivatives).

A direct or indirect link may occur not only in relation to the relationship of the financial instruments themselves but also to the capital links between market players (between companies that issue securities).

Due to the circumstances that may arise in practice, it is also worth pointing to the time horizon of confidential information and the process of spreading the development of such information. If the specific confidential information concerns a non-one-step process, each of the individual stages of the process (and the entire process at all) may constitute confidential information. Moreover, the intermediate stage itself can be confidential information. However, this is only if it meets the criteria of Art. 7 of the MAR Regulation, necessary to attribute the characteristics of confidential information.

Article 7 of the MAR Regulation, along with the above-mentioned characteristics of inside information, indicates that confidential information should also be treated as information that has not been made public. Determining this criterion is important because if the information is already available on the market, it loses the status of confidential information (further analysis in this case seems unnecessary). Analysis of the provision from Art. 7 does not give an answer as to in what form the information would be passed on to the market, so that it would lose the status of confidential information. The proposal may be to apply two criteria here: material and formal.¹⁰ The material criterion indicates that information loses its confidential character in a situation when an unlimited circle of people can become familiar with it. In formal terms, confidential information will lose its quality of confidentiality if it is made available to public information when carrying out information duties.¹¹

¹⁰ A. Lichosik, *Informacje poufne w spółce publicznej*, Katowice 2016.

¹¹ Ustawa z dnia 29 lipca 2005 roku o ofercie publicznej i warunkach wprowadzania instrumentów finansowych do zorganizowanego systemu obrotu oraz o spółkach publicznych, Dz.U.

The doctrine emphasizes that confidential information cannot be considered information that has already been provided through documents available to the public, information that can be obtained from documents that are legally available to the public, expertise and analyses provided to the market by entities involved in this profession, and information obtained by the investor as part of the use of consultancy services in the field of investment.

An interesting position of the doctrine is the adoption of the thesis according to which confidential information is no longer information in the possession of professional entities (analysts, traders, columnists), through special distribution channels of such information. This is supported by the thesis, according to which the price of the financial instrument already contains a correction related to the information provided to these entities (as discussed in more detail in market theory). In such circumstances, however, there may be an undesirable element of privilege for professional entities who, due to their market position, will have priority in accessing information. It is claimed that the situation described is acceptable, but it is justified by the material meaning of making information public.¹²

2.4. Reporting on confidential information

The obligation to provide confidential information is set out in Art. 17 of the MAR Regulation, which in 1 provides that: “The Issuer shall immediately disclose confidential information directly concerning it to the public.” The entire chapter refers to the regime of public disclosure of confidential information. The Issuer is obliged to provide information in a manner allowing quick access and full, correct and timely evaluation of information by public opinion.

The position of the Supreme Administrative Court is important, according to which

the deadline for the obligation to provide confidential information begins to run from the occurrence of circumstances or circumstances justifying the transfer of this information in the case of information directly concerning the issuer, and indirectly from confidential information about the issuer about such events or circumstances.

The legislator does not impose on the issuer the obligation to obtain confidential information concerning him indirectly, in particular, those available to third parties.¹³

z 2005 r. Nr 184, poz. 1539 [The act of 29 July 2005 on public offering and terms and conditions of introducing financial instruments to the organized trading system and on public companies (Journal of Laws of the Republic of Poland: 2005, No. 184, item 1539)], Art. 56.

¹² A. Lichosik, op. cit.

¹³ The Judgment of the Supreme Administrative Court of 5 July 2011, Ref. II GSK 710/10.

2.5. Transmission of information to the market (form and time of making it available)

As a rule, the issuer is obliged to provide information immediately, at the earliest possible date (as a rule, on the day the information is received). However, in view of the quality of the information provided and the need for prior analysis for the occurrence of the characteristics of confidential information, it is necessary to verify such information. It should, therefore, be assumed that the information should be made available as soon as possible after its verification, both in terms of confidentiality and integrity, compliance and completeness. Information that is poorly researched, showing features of low quality (e.g., unreliable), despite its quick transfer to the market, will not bring any significant value for the investor. The doctrine emphasizes that the transfer of all confidential information on the issuer's website serves for control, analytical and comparative purposes.

The Issuer transmits confidential information via its website. In addition, the provision in question imposes on the issuers an additional obligation to store confidential information for a period of at least 5 years. The Issuer is also obliged to provide such information via the ESPI system, at the same time to the supervisory body and news agencies.

2.6. The subjective and objective scope of the regulation

The subjective scope of the regulation under Art. 17 can be divided into several groups. The first of them will be issuers (understood in accordance with Art. 3 para. 1 point 21 of the MAR Regulation), applying for the admission of their financial instruments to the regulated market or whose financial instruments have already been admitted to such a market (also issuers from the ASO). The second group is participants of the emission allowance market (in accordance with Art. 3 para. 1 point 20 of the MAR Regulation). These entities are obliged to disclose confidential information related to their business. In the case of this group of obligated entities, there is some kind of subject limitation manifested by the obligation of these entities to be publicized, excluding two categories of confidential information: regarding emission allowances held by the entity in connection with its operations and confidential information regarding the installation.

In practice most situations apply only to the first group of obliged entities, and therefore issuers of financial instruments applying for admission to the regulated market (or already on the market).

Referring to the scope of the subject, there is a specific narrowing of the definition of confidential information in the field of making this information public. The provision in question requires public disclosure of confidential information that relates directly to the issuer. By juxtaposing this circumstance with the definition of confidential information adopted in Art. 7 of the MAR Regulation, it can be seen that

it is modified (Art. 7 indicates that confidential information may affect the issuer directly or indirectly). For the purpose of performing the obligations of the issuer with regard to making it public, the regulation from Art. 17, refers only to information about the issuer in a direct way. Therefore, this is information about a situation, an event or a circumstance directly related to the issuer's activities related to its organization, structure, state of its finances (assets, liabilities, etc.) The scope applies primarily to a situation in which the issuer is the original source of confidential information, and each subsequent entity may obtain such information only from that issuer.

2.7. Delayed publication of confidential information

Regulations introduced by the MAR Regulation impose a considerable number of restrictive obligations on issuers. Introduced in Art. 17 sec. 4 and 5, the institution of delaying the publication of confidential information is part of a compromise that the EU legislator agrees with. In the practice of trading on a regulated market, it is perfectly understandable that the process of creating certain information is stretched in time (e.g., the issuer signifying a significant contract for its functioning), and consequently, the necessity to provide any particulars confidential would impose on the issuer a difficult obligation this is a real (and proper) implementation, and in fact could actually make it difficult to finalize the entire process that was the reason for the confidential information. Professor M. Wierzbowski also points to an interesting argument in favor of introducing a delay in the publication of confidential information. He raises the thesis concerning the preservation of proper competition rules on organized markets, postulating that: "Publication obligations should not, however, diminish their competitive position in relation to entrepreneurs in which such obligations do not weigh."

The essence of delay is not postponing the obligation to publish it at all, and the use of the mechanism of delay does not deprive such information of the name "confidential information." In addition, the doctrine indicates that the option of delaying the publication of confidential information is an exception to the general principle of disclosing confidential information immediately. Since this is a deviation from the general rule, it should be interpreted strictly.

When analyzing the regulations regarding the possibility of delaying the publication of confidential information, the delay is made pursuant to Art. 17 sec. 4 and for the delay on the basis of Art. 17 sec. 5. Both provisions discuss a situation in which the issuer has the possibility of delaying the publication of such information, however, the scope of their application and the procedure for carrying out the delay vary.

The regulation from Art. 17 sec. 4 gives the opportunity to make a delay in publication without the need to obtain the consent of the supervisory body, and therefore the issuer makes the decision itself. However, it is required that the issuer should indicate the grounds and conditions for applying the delay. The circumstances under which the confidential information is delayed include the risk of violating the

legitimate interests of the issuer and the likelihood that the delay will not mislead the public. The third premise is the need to ensure the confidentiality of the information throughout the whole process of the delay. All three conditions must be satisfied cumulatively. No actual breach of the issuer's legitimate interest is required for the occurrence of a delay, it is enough to create a threat to this infringement.

It needs to be emphasized that the delay carried out in this form is at the sole risk and responsibility of the issuer. An entity obliged by itself makes a decision, providing the supervisory authority with only explanatory information on the subject.

In the preamble to the MAR Regulation, in point 50 there is an example of a catalog of situations that may be the basis for triggering a delay in the publication of confidential information, including: ongoing negotiations or related issues (if disclosure of such information at a given moment could affect their course or effect), decisions or contracts concluded by the issuer's governing body. The situations listed in the preamble are merely examples, and the catalog of events that may be the basis for applying the delay is open.

The second method of delaying the publication of confidential information is regulated in Art. 17 sec. 5 MAR Regulation. This provision applies to the closed category of issuers, and the procedure for carrying out the delay differs significantly from that carried out on the basis of Art. 17 sec. 4. The differences result mainly from potentially large, negative consequences for the market, which could have occurred in the event that the given information was made public without the possibility of delaying it.

The presented (additional) regulation concerns issuers who are credit institutions or financial institutions, who may take advantage of the possibility of delaying the publication of confidential information in order to preserve the stability of the financial system or regarding problems with their liquidity in the market. This is due to the far-reaching effects that it could imply transferring information related to these circumstances, without using the delay of its publication, dictated by guaranteeing the security of financial transactions in general. In addition, due to the size of the issuer, to which the provision of Art. 17 sec. 5 applies, the situation of not taking advantage of the delay could lead to the risk of bankruptcy, loss of financial liquidity (e.g., by withdrawing assets by investing entities), which could also cause disturbances in the functioning of the regulated market.

The rationale for using such a delay is (in principle) the intention to preserve the superiority of the public and economic interest in general, over the interest of the market that expects to provide information.

This delay, however, requires approval and approval by the competent supervisory authority. An entity that is a credit or financial institution is required to demonstrate a threat to its liquidity and financial stability or to the financial system in general, and the fact that the delay is in the public interest, which is the indication of the first condition. The second premise is the demonstration that it is possible

to ensure the confidentiality of such information. As in the case of delay based on Art. 17 sec. 4, it is necessary to meet all the conditions together.

It needs to be emphasized that the EU legislator indicates the need to prove the above premises, and not just to substantiate their occurrence. In addition, the decision of the supervisory authority is final and the lack of consent for delay means the necessity of immediate publication of the confidential information concerned. However, in the event of potential damage resulting from the necessity of public disclosure of confidential information against the request for the delay, the aggrieved issuer has the right to claim damages.

Regardless of the above, any entity wishing to benefit from the possibility of delaying the publication of confidential information must be aware of its responsibility for the decision taken and take a full risk for possible negative consequences. In any case, the supervisory authority may investigate the delay of ex post publication and draw the relevant legal consequences against the infringer.

As regards the date of forwarding confidential information on the market, the Supreme Administrative Court expressed an important view, in which it was assumed that:

In case of confidential information, the disclosure obligation should be executed immediately, but not later than within 24 hours. The disclosure of confidential information within 24 hours from the occurrence of a specific event does not mean that the information was provided immediately. Specified in art. 56 sec. 2 point 1 of the Act of 29 July 2005 on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organized Trading, and Public Companies (Journal of Laws of 2013, item 1382), the 24-hour period sets only the time limit for which the issuer in no case may it cross.¹⁴

Using the possibility of delaying confidential information, one should keep in mind the information effectiveness of the exchange market, which is considered to be an extremely important element alongside the very transparency of the market.¹⁵

2.8. Circle of people “closely related” — insider list

The Law from Art. 18 MAR Regulation requires the issuer (or persons acting on its behalf or on its behalf) to keep lists of persons having access to confidential information (the obligation also applies to update data contained in insider lists). This institution is supposed to allow the issuer to control the processing of confidential information in the issuer’s structure and to determine the circle of persons having access to this information.

The subjective scope includes issuers applying for the admission of their financial instruments to the regulated market, issuers whose instruments are already on the market, but also instruments traded solely on the MTF or ATF. The scope also includes persons acting on behalf of or for the benefit of the above-mentioned entities. The lists kept by the issuer must include all persons who are in contact

¹⁴ The Judgment of the Supreme Administrative Court of 23 September 2014, Ref. II GSK 1091/13.

¹⁵ P. Wajda, *Efektywność informacyjna rynku giełdowego*, Warszawa 2011, p. 91.

with confidential information, employed by entities obliged to keep such a list, but also internal advisors (legal, accountants, tax, finance), rating agencies, auditors, etc. In the doctrine it indicates an open catalog, an unlimited number of entities providing any services related to inside information within or outside the issuer's structure.

The subject who is on such a list is obliged to declare knowledge of the obligations of the person who has been included in the list of insiders and awareness of the consequences thereof. Insider duties are based on statutory regulation and are independent of contracts concluded between individual entities.

The provision of Art. 18 para. 3 of the MAR Regulation, states that the list should include at least the following: the personal data of the entity, the reason for listing, date and time of obtaining such a person's confidential information and the date of creating such a list.

It is extremely important to update the data contained in the insider lists, which must be made immediately after the occurrence of the reason is the basis of the update together with the indication of the date of the update. The Law from Art. 18 para. 4 indicates possible reasons for the update, they are a change of the reason for the person being placed on the list when a new person is added, when the person ceases to have access to confidential information. The issuer is obliged to keep the list of insiders for a period of at least 5 years from the date of its creation or the last update.

It is also worth analyzing the issues concerning the practical functioning of insider lists, in terms of the Regulation of the MAR Regulation and Regulation 2016/347, referring to the situation when there are many entities in the issuer's structure having specific access to various types of confidential information (or information coming from various sources). The EU legislator created and provided in Annex I to Regulation 2016/347 a list of insiders, detailing the sections on which persons with access to various confidential information may be entered. A simple scheme was created: one item of confidential information = one section.

Also interesting is the liability scheme in the event of the failure to keep the insiders' lists. This responsibility is on the part of the issuer, where (in accordance with the regulation), the obligation to keep such lists is burdened, and in the event of a breach may be subject to administrative liability. This is an interesting model of responsibility because the issuer does not have any legal instruments to "coerce" the person to be included in the list of insiders (and certification of his responsibility). The Issuer can only introduce internal sanctions for employees (obligated entities), urging them to properly perform their duties.

Lists of insiders are transmitted electronically at the request of the supervisory authority in the issuer's Member State. In addition, the supervisor is required to provide the appropriate technical means necessary for the transmission of lists of insiders (mainly due to the fact that such lists contain personal data).

The supervisory body (the Polish Financial Supervision Authority) also has access to confidential information, due to the legal structural position and the need to fulfill its statutory functions on the financial market.¹⁶

3. Ethical reasons

The reception of insider trading by market participants is not uniform, therefore it is relatively difficult to analyze its reception in a subjective way.

On the one hand, it is indicated that the use of its position by insiders to earn their own profits is immoral, because the entities have access to confidential information before the remaining part of the market receives it. It is extremely difficult to show measurable damage here that intrigues cause such behavior. Defenders of insider trading argue that the use of confidential information does not hurt anyone.¹⁷ The wider picture of the situation, however, shows an unethical element of such an approach. Insiders put their own interests above the interests of the company and its shareholders. This, however, undoubtedly does not deserve approval, because the entity established in a given position (manager, director, etc.) is to strive through its actions to ensure the growth of the company. The situation in which he uses his position to achieve his own profits (or avoid losses) does not fall within the scope of his statutory tasks. This leads to a disruption of the company's transparency and a breach of trust on the part of its shareholders. In addition, it is indicated that the market can only function if it provides uniform opportunities and equal access to information for all its participants.¹⁸

At this point, we can make a moral assessment of his behavior — is it not ethical?

Defenders of insider trading argue that such behavior is common and necessary for capital markets. They argue that this is one of the elements of the economic function of the market and shows its effectiveness because securities prices reflect all available information (they are therefore internally properly estimated).¹⁹ This fits in with the theory of an effective market, where all values reflect the actual situation of the issuer in its price and are adjusted for all available information. The result is that the price of the security is more quickly adjusted, and all market participants have knowledge about the current situation of the issuer.

Defenders of insider trading also claim that, in the long-term, sustainable insider trading leads to measurable positive effects, through the constant striving to acquire new information by all market participants.²⁰ This may result in the creation

¹⁶ M. Dyl, *Środki nadzoru na rynku kapitałowym*, Warszawa 2012, p. 279.

¹⁷ W. Shaw, *Business Ethics*, Boston 2011, p. 406.

¹⁸ Ibidem, p. 407.

¹⁹ Ibidem.

²⁰ Ibidem, p. 408.

of new products, more frequent transactions or the creation of new information that may affect the course of the financial instrument and properly estimate it.

There are also theories that say insider trading is a positive phenomenon due to the positive impact on the efficiency of capital allocation²¹ (M. Friedman himself spoke for the positive aspect of insider trading, who believed that this phenomenon accelerated the process of implementing new information on the market).

4. Summary

The detailed and relatively strict provisions of the MAR Regulation regarding the definition of confidential information are intended to protect higher values. Referring to point 23 preambles to the MAR Regulation, it should be emphasized that in this form of regulation, the protected good is primarily the integrity of financial markets and increasing the confidence of investors guided by rational evaluation of information provided by the issuer. In addition, striving for the fullest possible transparency of the market is a necessary element in the unification of the EU capital market.

Despite the restrictions imposed on capital market entities, the MAR Regulation is based on the idea of weighing the interests of these entities. On the one hand, we deal with the protection of certain values (important due to the objective of creating a single capital market), on the other, the EU regulator gives entities the flexibility to adjust and adjust the regulations to a given case (an example may be the permissibility of delaying the publication of confidential information).

The regulations are rightly targeted at the protection of individual investors — non-professional entities, smaller than other participants, but active on the stock exchanges.

Despite the fact that the European regulator is very active, by following the Polish regulator, you can still find behavior worthy of condemnation. The use of confidential information in order to achieve our own profit, at the expense of the loss often on the part of the individual investor, deserves to be condemned. Transparency of regulations establishing the framework for the functioning of the capital market are undoubtedly necessary and desirable. However, one should be aware of the negative element of excessive regulation, so-called overregulation. It leads to establishing too dense a network of rules (overlapping), causing complications in their interpretation, which contradicts the purpose of their introduction.

References

- Anderson J., *Insider Trading: Law, Ethics, and Reform*, Cambridge 2018.
 Chłopecki A., Dyl M., *Prawo rynku kapitałowego*, Warszawa 2017.
 Dyl M., *Środki nadzoru na rynku kapitałowym*, Warszawa 2012.

²¹ C. Martysz, *Manipulacje instrumentami finansowymi i insider trading. Analiza prawno-ekonomiczna*, Warszawa 2015, p. 151.

- Eleryk P., Piskorz-Szpytka A., Szpytka P., *Compliance w podmiotach nadzorowanych rynku finansowego*, Warszawa 2019.
- Lichosik A., *Informacje poufne w spółce publicznej*, Katowice 2016.
- Martysz C., *Manipulacje instrumentami finansowymi i insider trading. Analiza prawno-ekonomiczna*, Warszawa 2015.
- Shaw W., *Business Ethics*, Boston 2011.
- Stec M., (ed.), *System Prawa Handlowego*, vol. 4. *Prawo instrumentów finansowych*, Warszawa 2016.
- Stokłosa A., Syp S., *MAR Rozporządzenie Parlamentu Europejskiego i Rady w sprawie nadużyć na rynku. Komentarz*, Warszawa 2017.
- Wajda P., *Efektywność informacyjna rynku giełdowego*, Warszawa 2011.
- Wierzbowski M., *Rozporządzenie UE Nr 596/2014 w sprawie nadużyć na rynku: prawo rynku kapitałowego. Komentarz*, Warszawa 2016.

Legal acts

- Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse (Regulation on market abuse) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directive 2003/124/EC, 2003/125/EC and 2004/72/EC.
- Treaty on the Functioning of the European Union, C 326/47.
- Ustawa z dnia 29 lipca 2005 roku o ofercie publicznej i warunkach wprowadzania instrumentów finansowych do zorganizowanego systemu obrotu oraz o spółkach publicznych, Dz.U. z 2005 r. Nr 184, poz. 1539 [The act of 29 July 2005 on public offering and terms and conditions of introducing financial instruments to the organized trading system and on public companies (Journal of Laws of the Republic of Poland 2005, No. 184, item 1539)].

Judicatory

- The Judgment of the Court of Justice of the European Union, 11 March 2015, Ref. C-628/13.
- The Judgment of the Supreme Administrative Court, 5 July 2011, Ref. II GSK 710/10.
- The Judgment of the Supreme Administrative Court, 19 February 2013, Ref. II GSK 2226/11.
- The Judgment of the Supreme Administrative Court, 23 September 2014, Ref. II GSK 1091/13.
- The Judgment of the Supreme Administrative Court, 11 March 2015, Ref. C-628/13.

Internet sources

- <https://www.esma.europa.eu>.
- <https://www.knf.gov.pl>.
- <https://www.seg.org.pl/pl>.