

How the new Prevention of Financial Markets Abuse Act may effect the media

by David Fabri

MY BRIEF PAPER published in last Sunday's issue sought to provide a historical introduction to insider dealing and market abuse law in Malta, an explanation of selected salient features and of how Act IV of 2005 has transposed the so-called Market Abuse Directive (2003/6/EC).

The Act entered into force on Friday and is now part of our law in the full sense.

We have seen that the new Act requires increased transparency and early disclosure to the investing public of correct and relevant, price-sensitive information. Clear, correct and timely disclosure of important information by public issuers greatly reduces opportunities for insider trading and market manipulation.

More openness and transparency places the market and current and potential investors on a level playing field. This second brief paper focuses on the ways that this new Act may or will be of interest to journalists, broadcasters and others with access to the media. It will not attempt to deal with all the various issues and questions that may arise.

No reference to the media

The original insider dealing provisions that were introduced in the Malta Stock Exchange Act of 1990, and the Insider Dealing Act of 1994,

revised in 2002, made no specific references to the media.

The possibility that a market abuse offence could be committed through the wrongful use of the media was not specifically contemplated in the law. Nonetheless, the possibility could not be excluded.

Under the recently repealed 1994 Act, the offence of market abuse was defined in sufficiently broad terms and could, in the appropriate circumstances, have caught journalists or reporters who breached the Act.

In practice, no such case has ever been identified. Act IV of 2005 is therefore the first measure to address media people in this context. It explicitly recognises the possibility that market abuse may be committed through the wrongful use of the media by persons with ready access to it.

Committing an offence in the media

Market manipulation may be committed in various ways, one of which is the sending of false signals to deceive the investing public, and thereby influence the market price of a listed security.

One false signal could be the deliberate spreading of false rumours, or the creation of fictitious or simulated trades on a security between persons acting in collusion. These offences are quite heavily punished under the new Act.

Now, new administrative sanctions against market abuse, coexist with the criminal sanctions that had predated the new Act (and indeed also the EU Directive).

Every person who threads the financial markets sector, either by actively dealing (basically buying or selling) on a market or by publishing specific recommendations and investment suggestions may be caught by the provisions of the Act.

Journalists are not exempt from these rules. Nor could they be. On the other hand, there is very little local financial reporting and many writers are actually licensed under the Investment Services Act.

This law, in force since 1994, makes the offering of advice on securities and other financial instruments a licensable activity.

Recommending a specific listed instrument

Broadly, a possible breach of the market abuse law would more likely arise where a specific listed instrument is the subject of a published recommendation, whether positive or negative.

General articles on broad financial issues would unlikely ever fall foul of the new legal prohibitions.

Adhering to the Directive, the new Act introduces interesting obligations on persons who publish or broadcast information on specific financial instruments in the media. A preliminary assessment of these novel rules is that they appear uncontroversial and reflect good practice that one would like to believe is already current.

In simple terms, the law requires any such publication or broadcast to be supported by the necessary verification and vigilance that proper journalists are normally expected to exercise.

The law also expects writers to disclose any interest they may have in the subject matter of their attention. Should a writer have a financial interest in the securities he is writing about, the law now requires him to disclose it "to the public in a proper and effective manner".

Freedom of the Press

Journalists face no risk under Act IV when they carry out their work in good faith and with care, particularly whenever making sensitive statements and recommendations on listed securities.

Bad or incorrect information may disturb the market and cause serious losses to members of the public who may have invested their savings in the financial markets.

If a proven deliberate intention to falsify and deceive motivates the publication or the broadcast, the matter may have to be considered as a criminal offence, akin to forgery and fraud.

But there is nothing in the law that reduces the right of journalists to write and comment on the performance of listed securities or their issuers, provided their articles are not based on falsehoods and are not designed to manipulate the market.

Indeed, the press may be instrumental in disclosing facts, which issuers are trying to conceal or falsify. This was the case with the recent Parmalat and Cirio scandals in Italy, where the press helped uncover the official network of falsehoods published by those companies to deceive the authorities, investors, and the Italian and international financial markets.

The same can be said about cases such as Enron. The press can therefore be an ally of law enforcement and clean market operations by uncovering instances of insider dealing and market manipulation.

Crimes on the Internet

The Internet allows for the possibility of online transmission of information and dealing in financial instruments, even on a cross-border basis. It is a very fast, efficient information medium, and therefore a useful tool for certain types of criminality, particularly where information is crucial.

This is the case with crimes of insider dealing and many forms of market abuse. The Internet may be an effective instrument for spreading false messages, rumours and other devious signals, probably equal to radio and television.

In various ways, the law is gradually coming to terms with the implications, opportunities and dangers resulting from the Internet. The Market Abuse Directive makes specific references to the Internet and how it may find itself manipulated to favour attempts to abuse of the financial markets. The media may and has in foreign jurisdictions been used as an instrument of market abuse, particularly by the publication of false signals to deceive the investing public.

Just a month ago, the Financial Services Authority (UK) fined an investor £15,000 for Internet market abuse. The offender had posted illegitimately obtained confidential company information on an Internet bulletin board to boost the company's share price. As he was a shareholder, he stood to gain (FSA/PN/024/2005).

No legal definition of "journalist"

The prevention of market abuse has nothing to do with restrictions on

freedom of expression, but is only interested in blocking the transmission of false signals and deliberate deception.

The new Act does not affect or prejudice the applicable laws regulating such relevant issues as libel, the right of reply, misleading and surreptitious advertising.

Nor can the new Act guard us sufficiently against bad reporting, which may yet prove to be the greatest possible menace. This principally occurs when untrained persons recklessly write on subjects they little understand, unable to assess the possible harm they may occasion, not just to institutions, but to small investors.

There will also be instances where certain reporters may be too close to certain public issuers and may be too happy to publish what the issuers suggest.

Without loading the subject unduly with references and footnotes, this second paper has been designed as a simplified overview of where the Prevention of Financial Markets Abuse Act, 2005, meets the media... a strange meeting no doubt.

It has shown, I hope, that this Act not only adds to the development of our company, securities, criminal and administrative legislation. It also makes a novel, though possibly a marginal, contribution to media law in Malta.

An interested reader may wish to place the new law within the context of other relevant legislation, particularly the Press Act and the Broadcasting Act. These two Acts only regulate certain aspects of a journalist's profession, but fall far short of creating any coherent framework for its recognition and regulation.

We still lack a proper law governing the category, identifying who can legitimately describe oneself as a "journalist", and listing the responsibilities and rights arising therefrom.

In any event, the instrument of the law is not the best mechanism to promote good journalism or to guard the public from bad and potentially harmful reporting.

The law serves to indicate a minimum benchmark for acceptable conduct, but much will still depend on other factors as competence, proper research and integrity - factors which cannot be imposed by legal provision.

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