Jakub Kwieciński Warsaw, on 9 October 2023

Abstract of PhD Dissertation

"Manipulation of financial instruments and *insider trading* in judicial practice"

The purpose of this doctoral dissertation is the legal protection of the capital market against threats posed by manipulation of financial instruments and insider trading, defined as the unlawful disclosure and use of confidential information. Such crimes represent one of the most serious abuses of the capital market, leading to financial losses to market participants, due to their low detection rate and the difficult-to-estimate number of victims. For this reason, it has become crucial to provide capital market operators with effective legal protection against unauthorised practices by other market participants. It ought to be pointed out that an effectively operating capital market contributes to an improvement in economic innovation and competitiveness and is an important factor in stimulating economic growth, which helps raise the level of prosperity of society. A loss of confidence in the capital market leads investors to withdraw capital and seek other safe forms of financial investment.

As an expression of the European legislator's desire to preserve market integrity, as well as to provide effective protection to market participants, new regulations against capital market abuse were enacted almost a decade ago. These were the provisions of MAR adopted on 16 April 2014[1] and of MAD II[2]. Both regulations replaced the repealed MAD[3], which, in the view of the European legislator, insufficiently protected market participants from abuse due to legislative, market and technological developments since its entry into force. The main allegation concerned the divergent approach of the Member States in transposing the provisions of the 2003 MAD into the national order. The lack of uniformity in the imposition of criminal sanctions and, in some cases, their outright abandonment, prompted the European legislator to adopt regulations laying down a more uniform interpretation of the EU market abuse regime.

[1] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.
[2] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive).
[3] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).

The entry into force of the provisions of MAR and MAD II necessitated a number of far-reaching legal changes at national level. The most important of these concerned amendments to the 2005 Act on Trading in Financial Instruments[4] and the repeal of the rules on the prohibition of manipulation and on the disclosure and use of insider information. Indeed, the provisions of MAR did not need to be transposed into national law, as they are an act that overrides domestic regulations and is of direct applicability. For this reason, the Act on Trading in Financial Instruments, after its amendment in 2017[5], introduces only criminal sanctions for manipulation of financial instruments (Article 183(1) and (2) of the Act on Trading in Financial Instruments (ATFI)) and for disclosure (Article 180 of the ATFI) and use of insider information (Article 181(1) of the ATFI). These provisions are of a blanket nature, as they do not contain an intrinsic definition of prohibited behaviour but refer directly to MAR. If there is manipulation, interpretation of the provision of Article 183(1) and (2) of the ATFI must therefore be made with reference to the prohibition of market manipulation expressed in Article 15 of MAR and manipulative behaviour as defined in Article 12 of MAR. In turn, when interpreting the provision of Article 180 of the ATFI, reference must be made to the prohibition of insider trading expressed in Article 14(c) of the MAR Regulation and Article 10 of that Regulation, which defines unlawful disclosure behaviour. Similarly, when interpreting the provision of Article 181(1) of the ATFI, it is necessary to refer to the prohibition of insider trading expressed in Article 14a of MAR and the provision of Article 8 of that Regulation defining the use of insider information.

With the above in mind, the main objective of the paper was to assess the application of EU and national regulations on preventing and combating capital market abuse, and then to answer the question: Does the low effectiveness of combating this type of crime result from imperfect legislation or from non-legal factors affecting the effectiveness of the proceedings under way?

As part of the main research problem, I devised a number of specific research questions: (i) Do the existing legal regulations concerning the manipulation of financial instruments and the unlawful disclosure or use of insider information provide sufficient protection for the capital market against dishonest investor behaviour? (ii) How do the provisions relating to the crime of manipulation of financial instruments, as defined in Article 183 of the ATFI, and unlawful disclosure and use of insider information, as defined in

[4] Journal of Laws of 2005, No. 183, item 1538, as amended..
[5] Act of 10 February 2017 amending the Act on Trading in Financial Instruments and certain other acts, Journal of Laws of 2017, item 724.

Articles 180 and 181 of the ATFI, apply in practice? (iii) Why is capital market abuse, and in particular unlawful disclosure and use of insider information, not adequately tackled? (iv) What action should be taken to ensure that the capital market is fully protected against unlawful behaviour of market participants?

The research problems presented above prompted the main research argument of the dissertation. According to this argument, the existing EU regulations on preventing and combating manipulation of financial instruments and insider trading are complex and casuistic to such an extent that they pose a multitude of interpretation challenges. This results in lower effectiveness of disclosed abuses and constitutes a serious obstacle to the growth of the capital market.

In order to find answers to the foregoing issues, I applied diverse research methods, which made it possible to divide the paper into two main parts: theoretical and empirical. The first part uses the method of analysing legal texts and dogma, supplemented by the legal historical method and an analysis of jurisprudence.

The empirical part of the dissertation analyses prosecution and court files concerning the practical application of the provisions of Articles 180 and 181 of the ATFI and Article 183 of the ATFI. The first stage of empirical research involved statistical analysis of pre-trial proceedings conducted by the District Public Prosecutor's Office in Warsaw in the years 2005-2018. Statistical analysis was conducted on 281 proceedings registered by the Public Prosecutor's Office, which were legally qualified under Articles 180 and 181 of the ATFI and Article 183 of the ATFI. In order to determine the reasons for the identified issues, analysis of randomly selected files of pre-trial proceedings with decisions on discontinuance issued between 2012 and 2018, was carried out. Thirty-four (34) cases were analysed in this stage of research; 18 of the cases concerned legal qualification jointly under Articles 180 and 181 of the ATFI, and the remaining 16 cases concerned Article 183 of the ATFI. The files subjected to analysis were analysed from the point of view of the manner in which pre-trial proceedings were conducted, i.e. collection of evidence consisting of witness testimonies, expert opinions, as well as obtaining data from financial institutions and telecom operators. The analysed subject matter concerned suspected crime reports, including the methods of reporting to the investigating authorities, as well as the lapse of time from the incident to the submission of the report to the public prosecutor's office. The opinions of expert witnesses were also analysed, in particular the time and timeliness of issuing opinions for the purposes of pre-trial proceedings.

The object of the second stage of research was the analysis of files of final and binding closed court proceedings for the years 2005-2020, where legal qualification was provided for under Articles 180 and 181 of the ATFI and Article 183 of the ATFI. In this stage of research, a total of 61 cases were analysed; 11 of the cases involved legal qualification under Articles 180 and 181 of the ATFI, the remaining 50 cases were legally qualified under Article 183 of the ATFI. The study focused on the analysis of court decisions. Its purpose was to find out how court proceedings were concluded, and the type and amount of penalties imposed. In the course of own research, the duration of court proceedings in the first and second instance was analysed in order to discern factors influencing their lengthiness. The study of court files was wrapped up with an analysis of the profile of the insider trading and market manipulation crime perpetrator. On the basis of the collected personal data, the description of the perpetrators of such crimes was made. The modus operandi of the perpetrators and their motives were also analysed.

The paper is divided into six chapters preceded by an introduction and followed by a conclusion. The paper is supplemented with a list of tables and charts and a model research questionnaire. The first chapter outlines the principles of the organisation and functioning of stock exchanges in the Polish lands historically. Their contribution to the economic growth of the territories in the period of the Partitions of Poland and in the interwar period is shown. The beginnings of the emergence of the capital market in Poland, coinciding with the period of social and economic transition that began in 1989, are discussed.

The second chapter examines the regulation of public trading in securities before 2005. The genesis of the legal regulations on market manipulation and unlawful infringement of insider information is introduced. The starting point consists of an analysis of the criminal provisions introduced by the 1991 Law on Public Trading in Securities and Trusts and the provisions of the 1997 Law on Public Trading in Securities. This is followed by an analysis and evaluation of the provisions of the 2005 Act on Trading in Financial Instruments and the provisions of MAD II and of MAR.

The third chapter offers an introduction to the main part of the paper concerning the crime of manipulation of financial instruments. The definition of manipulation of financial instruments is introduced and the statutory elements of the crime typified in Article 183 of the ATFI are discussed. The most frequently used manipulation techniques are featured. An attempt is made to review the hitherto position of the doctrine and jurisprudence with regard to the feasibility of market manipulation with direct and possible intent. The views of the

doctrine on the constitutionality of the provision of Article 183(1) of the ATFI are outlined while reconstructing the criminal law standard pursuant to Article 12(1)(a) of MAR. The chapter also addresses issues concerning tax optimisation and the differences between stock market speculation and manipulation practices.

The fourth chapter is entirely focused on discussing the issue of unlawful disclosure and use of insider information. It discusses the role played by "information" in the modern market economy, defines the concept of "insider information", and covers its most characteristic elements. The concept of primary and secondary insiders and the criteria for classification into one of the two groups are explained. The solutions concerning issuers' duties of disclosure, the creation of lists of insiders, as well as their compliance with reporting duties with respect to their transactions, are reviewed.

The fifth chapter discusses the role of the Financial Supervision Authority in the process of detecting capital market crimes. Statistics for the years 2005-2020 on suspected crime reports filed with the public prosecutor's office, charges filed, and court proceedings concluded with final verdicts are presented.

The final, sixth chapter assesses the application of criminal law provisions on the crime of manipulation of financial instruments and insider trading in prosecution and court practice.

The conclusion recapitulates the most important issues addressed in the dissertation and provides *de lege ferenda* conclusions.

Keywords: financial instrument manipulation, market manipulation, disclosure of insider information, insider trading, market abuse