Market Soundings: The Interaction between Securities Regulation and Company Law in the United Kingdom and Italy

by

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Before deciding on operations involving share issuance or sale, companies or shareholders may seek to disclose information to selected investors, in order to gauge their opinion on the envisaged market operation. Despite such "market soundings" risk violating the prohibition of insider trading, selective disclosures have been partially accepted in several European jurisdictions. Market soundings have been eventually regulated in the MAR, which clarifies under which circumstances they are allowed and the position of the involved parties. This article analyses the rules on market soundings in the MAR with regard to issuance in the secondary market and accelerated bookbuildings. In this context, the question arises of whether harmonised rules on market soundings are compatible with national company law regimes. To address this issue, it will be assessed how Italian and English company law regimes react towards selective disclosures. It will be shown that a tension may still exist between uniform rules on market abuses and national company law rules, mostly with regard to directors' duties and liabilities.

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1. Introduction

Regulation (EU) No 96/2014, the Market Abuse Regulation (hereinafter "MAR"),[1] and Directive 2014/57/EU (hereinafter "CRIM-MAD"),[2, 3] have replaced the Market Abuse Directive (hereinafter MAD),[4] regulating insider trading[5] and market manipulations in the European Union.[6] The main reason why a directive was replaced with a regulation is to grant regulatory uniformity and clarity regarding the key concepts throughout the whole territory of the Union.[7] A uniform regulatory framework was judged to be key to repealing trade obstacles and distortions of competition, which may arise from dif-

1 Regulation (EU) No 96/2016 of the European Parliament and the Council of 16 April 2016 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, OJ 12.6.2014 L173/1.

2 Directive 2014/57/EU of the European Parliament and the Council of 16 April 2016 on criminal sanctions for market abuse (market abuse directive), OJ 12.6.2014 L173/179.

3 Both Regulations entered into force on July 3 2016. For a first introduction to the MAR see *Marco Ventoruzzo/Sebastian Mock*, Market Abuse Regulation, 2017.

4 Directive 2003/6/EC of the European Parliament and the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ 12.4.2003 L96/16. This Directive had repealed Council Directive of 13 November 1989 coordinating regulations on insider dealing (89/592/EEC), OJ 18.11.1989 L334/30, on insider trading and introduced a regulation for market manipulation.

5 We use the term "insider trading" summarizing the offences included in Article 14 MAR.

6 See *Carmine Di Noia/Mateja Milic/Paola Spatola*, "Issuers' obligations under the new Market Abuse Regulation and the proposed ESMA guideline regime: a brief overview", Zeitschrift für Bankrecht und Bankwirtschaft 2014, 96.

7 Recitals 3, 4 and 5 MAR.

ferent national laws, and to developing further the internal capital market. Although the new regulation has introduced some innovative rules (such as the extension of the regulatory scope to MTF and OTF[8] or the black-out period for manager transactions),[9] it does not change the fundamental logic and structure of the MAD, which proved a coherent and acceptable (albeit not perfect) framework for preventing and enforcing insider trading and market manipulation offences.[10] For the purposes of this work, it is to be reminded that under both the MAD and the MAR, insiders must not disclose inside information to third parties, unless such a disclosure is "in the normal exercise of an employment, a profession or duties".[11] In that case, an insider must make "complete and effective public disclosure" of such information, unless the recipient is bound by a duty of confidentiality based on law, regulations, articles of association or on a contract.[12]

One of the innovative provisions of the MAR is Article 11 regulating "market soundings", which governs the procedure to be followed when a market participant seeks to disclose information to selected investors, in order to gauge their opinion on a possible transaction.[13] The main reason for the introduction of this provision is that offerors commonly need to capture the opinion of potential investors on an envisaged operation, particularly on its pricing, and to attain this goal they are normally requested to disclose pieces of inside information.

It is worth remembering that the European Court of Justice (ECJ) addressed the question as to whether an offeror, by disclosing to selected parties an envisaged operation in order to gauge their opinion, was acting in the "normal course of exercise of an employment, profession or duties".[14] The Court decided that a piece of information is deemed to be disclosed in the normal course of the exercise of employment, profession or duties only when (i) there is a close link between the disclosure and the exercise of the employment, profession or duties and (ii) the disclosure is strictly necessary for the exercise of

8 Article 5.1. MAR.

9 Article 19.11. and 19.12. MAR.

10 A comprehensive assessment of the MAD does not fall within the scope of this article.

11 Article 10.1 MAR; this provision was originally entailed in Article 3.1(a) MAD.

12 Article 17.8 MAR; this provision was originally entailed in Article 6.3. MAD.

13 For first comments on market soundings, see *Simon W. Tissen*, "Die Investorensuche im Lichte der EU-Marktmissbrauchsverordung", Neue Zeitschrift für Gesellschaftsrecht 2015, 1254; *Stefano Lombardo*, "I sondaggi di mercato: prime riflessioni", Le Società 2016, 159; *Dirk Zetzsche*, Marktintegrität/Marktmissbrauchsrecht, in: Martin Gebauer/Christoph Teichmann (ed.), Enzyklopädie Europarecht – Europäisches Privat- und Unternehmensrecht, vol. 6, 2016, p. 171 at para 210; *Dirk Zetzsche*, "Die Marktsondierung nach Art. 11 MAR. Pflichten der Sondierenden und der Marktgegenseite", Die Aktiengesellschaft 2016, 610.

14 ECJ, 22 November 2005, *Grøngaard and Bang,* C-384/02, ECLI:EU:C:2005:708.

that employment, profession or duties. This decision, therefore, did not seem to leave much free space for market soundings in the normative framework designed by the MAD.[15]

Nevertheless, informal contacts between securities' offerors and potential investors are deemed necessary for the success of operations that would otherwise risk not being accepted by the market once officially announced. Despite the restrictive case law of the ECJ, therefore, market soundings have become common practice with regard to several types of transactions related to listed shares.

Market soundings, additionally, may also trigger quite complex company law issues.[16] By deciding to communicate an envisaged transaction to only selected investors, directors of the issuing company might reveal classified and sensitive information to third parties; additionally, if such information is only disclosed to selected shareholders, directors would discriminate other shareholders. In both cases, a decision to disclose an envisaged transaction might be deemed a violation of directors' fiduciary duties. This potential conflict between financial regulation and company law might reveal a much broader contradiction. On the one hand, due to the globalisation of financial markets, market actors and regulators are pushed to develop homogeneous practices and rules at the broadest geographical level;[17] on the other hand, companies' internal affairs are governed by national states and the EU harmonising effort in this field has not touched core elements of companies' internal relations such as director duties and liabilities.[18] Furthermore, it is still controversial whether harmonising directives have really had a significant impact on national company law regimes and on domestic legal discourses and taxonomies.[19]

Thus, rules on market soundings are at the crossroads of securities regulation, which requires uniformity across national borders, and company law rules, which are rooted in national political balances and legal discourses. This con-

15 See *Chiara Mosca*, "Director–Shareholder Dialogues Behind the Scenes: Searching for a Balance Between Freedom of Expression and Market Fairness", European Company and Financial Law Review 2018, 805, 836.

16 See *Holger Fleischer/Dorothea Bedkowski*, "Aktien- und kapitalmarktrechtliche Probleme des Pilot Fishing bei Börsengängen und Kapitalerhöhungen", Der Betrieb 2009, 2195.

17 See *Wolfgang Streeck*, Einleitung: Internationale Wirtschaft, nationale Demokratie?, in: Wolfgang Streeck (ed.), Internationale Wirtschaft, nationale Demokratie, 1998, p. 11.

18 See *Carsten Gerner-Beuerle/Edmund Schuster*, "The Evolving Structure of Director Duties in Europe", European Business Organization Law Review 2014, 191.

19 See: *Luca Enriques,* "EC Company Law Directives and Regulations: How Trivial are they?", University Pa. J. Int'l Econ. Law 2006, 1; *Harald Halbhuber*, "National Doctrinal Structures and European Company Law", Common Market Law Review 2001, 1385, 1405–1408.

cealed tension between uniform securities regulation and national company law regimes also emerges in other areas of EU intervention, such as, for instance, capital requirements and risk management of cross-border financial groups,[20] or financial support within groups of banks,[21] which face divergences across member states as to the role of intra-group relations and groups' interest.[22] Addressing market soundings, therefore, is also a way of addressing the fragmentation of law and society in the new globalized order, which is revealed by the struggle between, on the one hand, the globalising tendencies of financial markets and, on the other hand, local interests addressed by national rules.[23] This article, therefore, also aims at unbundling the interaction between national company law and EU securities regulation. As an example of this interaction, the United Kingdom and the Italian national regimes will be compared. The U.K. has a longstanding and highly sophisticated practice in financial market regulation, including market abuses and insider dealings, which reflects the predominance of widely-held companies, so that its regime was one of the models for the provisions detailed in the MAR on market soundings;[24] in this regard, it is worth stressing that, despite its decision to leave the European Union, the U.K. is likely to keep its role as a benchmark regime for securities regulation.[25] Italy, by contrast, is a civil law country whose financial market is far less significant than the British one; additionally, share ownership of Italian companies is extremely concentrated and families still keep a dominant role in its economy.[26]

20 Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, OJ 26.6.2013 L176/338; Regulation 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms, OJ 27.6.2013 L176/1.

21 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, OJ 12.6.2014 L173/190.

22 See: *The Informal Company Law Expert Group (ICLEG),* Report on the recognition of the interest of the group, October 2016, p. 15–16.

23 See *Andreas Fischer-Lescano/Günther Teubner*, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", Michigan Journal of International Law 2004, 999.

24 The point is made also by *Zetzsche*, Die Aktiengesellschaft 2016, 610 (fn. 13), 610, who also adds France as one of the models for the MAR. In particular, see points 1.4.5 and 1.4.6 G of the British Code of Market Conduct containing rules on market soundings.

25 On 23 June 2016, a referendum was held in which the majority of British voters chose to leave the European Union; as a consequence, the British government triggered the exit procedure under Article 50 of the TFEU. At the moment, it is unforeseeable what the final outcome of this procedure and the following negotiations will be.

26 In 2015, the largest shareholders' voting shares of companies listed at the Milan stock exchange was 29%: *Fabio Bulfone*, "Insider job: corporate reforms and power resources in France, Italy and Spain", Socio-Economic Review 2016, 16. On the analysis of cor-

This article is organized as follows. Section 2 provides an overview of market soundings in the MAR and introduces the situations we intend to study, namely when securities of a listed company are offered to the market or selected investors, that is to say: (i) secondary offerings (or seasoned offerings), when a listed company seeks to increase its capital; (ii) accelerated bookbuilding, when a shareholder aims at selling its shares; (iii) and accelerated bookbuilding, when a listed company aims at selling own shares held as treasury shares or issuing new shares to selected investors.[27] Section 3 analyses the interaction between company law and market soundings in Italy and the U.K. Short conclusions are elaborated in Section 4.

2. *Market Soundings in Context*

2.1. *The Context*

In order to better understand market soundings, it is useful to briefly address the main features of the MAR. As for the MAD, its main purpose is to ensure equal access to inside information with the aim of increasing financial market efficiency.[28] The crucial concept is "inside information",[29] namely information that (i) is precise, (ii) is not public (iii), has a direct or indirect relation with one or more issuers or financial instruments and (iv), if made public, would have a

porate governance mechanisms as embedded in national-specific settings of dominant interests see *Ruth V. Aguilera/Gregory Jackson,* "The Cross-national Diversity of Corporate Governance: Dimensions and Determinants", Academy of Management Review 2003, 447.

27 In this regard, we do not address market soundings in initial public offerings (IPOs) (on which see *Stefano Lombardo/Federico M. Mucciarelli*, Market soundings: the interaction between securities regulation and company law in the United Kingdom and Italy, ECGI Law Working Paper, 2017 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012183, last visited: 5 February 2019) and in mergers and takeover bids (governed by Article 11.2 MAR).

28 Recitals 1 and 24 MAR. Equal access has been recognized as a primary objective of insider trading regulation by the ECJ, 23 December 2009, *Spector Photo Group NV, Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA)*, C-45/08, ECLI:EU:C:2009:806; see on the point e.g. *Lars Klöhn*, "Ad-hoc-Publizität und Insiderverbot im neuen Marktmissbrauchsrecht", Die Aktiengesellschaft 2016, 423, 424; *Marco Ventoruzzo*, Comparing Insider Trading in the United States and in the European Union: History and Recent Developments, ECGI Law Working Paper, 2014, p. 17 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2442049, last visited: 5 February 2019).

29 Article 7.1(a) MAR.

significant effect on prices of financial instruments.[30] The MAR codifies also previous decisions of the ECJ,[31] by qualifying inside information any intermediate steps of a decisional process, provided that they also fit into the four elements of the general definition.[32]

While MAR is one of the EU measures aimed at unifying national rules that "have as their object the establishment and functioning of the internal market"[33], CRIM-MAD is a directive aimed at ensuring "the effective implementation of a Union policy in an area which has been subject to harmonisation measures"[34] that only focuses on criminal sanctions for market abuse.[35] These measures are complemented by subordinate legislations,[36] such as Regulatory Technical Standards (RTS)[37], Implementing Technical Standards (ITS)[38], proposed by ESMA[39] and enacted by the Commission, and ESMA guidelines and recommendations.[40]

30 In particular, a piece of information is "precise" when it (i) indicates a set of circumstances which exists or which may reasonably be expected to come into existence or an event which has occurred or which may reasonably be expected to occur and (ii) is specific enough to enable a conclusion as to the possible effect of those circumstances/events on the prices of financial instruments, Article 7.2. MAR.

31 ECJ, 28 June 2012, *Marcus Geltl v Daimler AG*, C-19/11, ECLI:EU:C:2012:397.

32 Article 7.3. MAR.

33 Article 114 TFEU.

34 Article 83.2. TFEU.

35 Today's European legislation seeks to increase regulatory uniformity with regard to securities regulation by replacing directives with regulations. See, for instance, Recital 5 of the Prospectus Regulation (Regulation (EU) 2017/1129 of the European Parliament and the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and replacing Directive 20037/71/EC, OJ 30.6.2017 L 168/12).

36 According to the procedure of the "Lamfalussy process", on which, see *Niamh Moloney*, "The Lamfalussy Legislative Model: a New Era for the EC Securities and Investment Services Regime", International and Comparative Law Quarterly 2003, 509; see also *Niamh Moloney*, EU Securities and Financial Markets Regulation, 2014, p. 26.

37 Delegated acts according to Article 290 TFEU.

38 Implementing acts according to Article 291 TFEU.

39 According to, respectively, Article 10 and Article 15 of Regulation (EU) No 095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ 15.12.2010 L331/84.

40 According to Article 16 of Regulation 1095/2010, guidelines and recommendations can be implemented by national authorities following a specific procedure. For a list of directives and regulations adopted by the Commission, see ESMA, 2016, Questions and Answer on the Market Abuse Regulation, 13 July 2016, ESMA /2016/1129. For the guidelines see, ESMA, 2016, Final Report. Guidelines on the Market Abuse Regulation –

The core tenet of the European market abuse regime is prohibiting insider dealing and unlawful disclosures of inside information. In particular, both primary and secondary insiders must not[41] (a) engage or attempt to engage in insider dealing,[42] (b) recommend that another person engage in insider dealing or induce another person to engage in insider dealing,[43] (c) unlawfully disclose inside information, except where the disclosure is made in the normal exercise of an employment, a profession or duties.[44]

Additionally, in order to grant market egalitarianism and to prevent insider trading, inside information should be disclosed as soon as possible.[45] Such a duty only concerns information related to an issuer (i.e. corporate information), while mere market information is excluded.[46] A disclosure of inside information, however, can be delayed (including cases of protracted processes) when three conditions are met: (a) an immediate disclosure is likely to jeopardize an issuer's legitimate interest, (b) a delay of disclosure is not likely to mislead the public and (c) the issuer is able to ensure the confidentiality of that information.[47]

Interestingly, as we have seen above, when a piece of inside information is disclosed to selected third parties "in the normal course of exercise of an employment, profession or duties", it also has to be disclosed to the public, unless the recipient is bound by a duty of confidentiality based on law, regulations, articles of association or a contract.[48] This provision is important for understanding whether and to what extent selective disclosure of inside information is allowed.[49]

market soundings and delay of disclosure of inside information, 13 July 2016, ESMA /2016/1130.

41 Article 14.1. MAR; on primary and secondary insiders see Article 8.4. MAR.

42 Article 8.1. MAR.

43 Article 8.2. MAR.

44 Article 10.1. MAR.

45 Article 17 MAR.

46 It is to be stressed, however, that the difference between "corporate information" (i.e. information directly concerning an issuer: Article 17.1. MAR) and "market information" (i.e. information related to facts outside an issuer's activity) is somewhat unclear.

47 Article 17.4. MAR.

48 Article 17.8. MAR (former Article 6.3. MAD).

49 This rule seems to be a legal transplant of Rule 100 of Regulation FD from the US (Regulation Fair Disclosure, on which see SEC, 1999, Release N. 34–42259, Selective Disclosure and Insider Trading. Proposed Rule, FD 64, 248 72590) where it has its origin in the capital market report system and not in the insider trading regulatory system; on which point, see *Holger Fleischer*, "Investor Relations und informationelle Gleichbehandlung im Aktien-, Konzern- und Kapitalmarktrecht", Zeitschrift für Unternehmens- und Gesellschaftsrecht 2009, 505, 516. On Regulation FD see, *Martin Bengtzen*, "Private In-

2.2. What Are Market Soundings?

According to Recital 32 MAR, market soundings "are interactions between a seller of financial instruments and one or more potential investors, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and its pricing, size and structuring".[50] This notion of market sounding reflects a broad spectrum of possible interactions between a seller of financial instruments and potential investors regarding an envisaged transaction. Market soundings, in particular, facilitate initial public offers and secondary offers of securities. In both cases, the offer price should match the value at which most investors are ready to subscribe or buy the offered securities. In initial public offers, however, there is no market price of the issued securities that can be used as a parameter or a benchmark in establishing the issue price; in this context, the offeror needs to gauge the interests of potential investors in order to establish the final issue price.[51] In secondary offers, by contrast, securities already have a market price to be used as a yardstick; nevertheless, the offering company normally tries to gauge the interest of potential investors in the offer's conditions. Furthermore, when a company aims at issuing a small amount of securities or at selling its own shares, public offers are excessively lengthy and time-consuming, so companies often use a different method, commonly called "placing" of securities or "accelerated bookbuildings", whereby issued securities are allotted to selected investors, normally through an investment bank, in a short period of time (normally one day).[52] Furthermore, individual shareholders seeking to sell their securities might also

vestor Meetings in Public Firms: The Case for Increasing Transparency", Fordham Journal of Corporate and Financial Law 2017, 33. In the US there is not a general duty of full disclosure comparable to Article 17 MAR (on this point, see *Ventoruzzo* (fn. 28), p. 14; SEC, Release N. 34–42259, 72591).

50 This Article is complemented by other provisions: (a) the Commission Implementing Regulation (EU) 2016/959 of 17 May 2016 laying down implementing technical standards for market soundings with regard to the systems and notification templates to be used by disclosing market participants and the format of the records in accordance with Regulation (EU) No 96/2014 of the European Parliament and of the Council, OJ 17.6.2016 L160/23 (hereinafter CIR 2016/959); (b) the Commission Delegated Regulation (EU) 2016/960 supplementing Regulation (EU) No 96/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings, OJ 17.6.2016, L160/29 (hereinafter CDR 2016/906), as "Level 2" regulations; (c) ESMA guidelines, ESMA/2016/1130 (n 36), being "Level 3" implementing rules.

51 ABI, Encouraging Equity Investment: Facilitation of Efficient Equity Capital Raising in the UK Market (July 2013) 13.

52 See *Louise Gullifer/Jennifer Payne*, Corporate Finance Law 2016, p. 480.

selectively disclose inside information during an accelerated bookbuilding with the aim of gauging "potential interest in those securities from other potential investors";[53] in these latter cases, the troublesome issue is to justify a shareholder's being in possession of inside information about the company's business. In all these circumstances, the question arises as to whether a selective dissemination of information, in order to gauge the interests of investors on the offered securities, violates rules on insider dealing.[54]

Usually, in all possible business situations, the interaction between a seller and potential investors prior to the formal conclusion of a deal includes preliminary contractual steps, which are aimed at aligning the different interests and at reducing informational asymmetries.[55] These interactions may give rise to several critical issues related to possible exchanges of information. The first aim of new rules on "market soundings" is, therefore, to clarify whether, and to what extent, such selective disclosures do not infringe general insider trading principles.

A functional analysis reveals that there is no real contradiction between general rules against insider trading, which focus on full disclosure of inside information in order to grant equal access to information, and provisions on market sounding. As is well known, insider trading in the last 60 years has been extensively debated under legal, economic, as well as "law and economics", perspectives.[56] The most common justification underpinning prohibition of insider trading and rules on disclosure of inside information is the aim of reducing information asymmetries, which might discourage potential investors and, as a consequence, jeopardize market liquidity and efficiency. Market soundings, albeit involving selective disclosures of (inside) information, might be beneficial when a transaction only becomes feasible if the market actor gauges potential investors' opinions and identifies the price at which a given transaction can take place. Regulations and, in general, institutional settings of financial markets should aim at encouraging investments and trust and at making market prices of securities to be

53 See Recital 33 MAR.

54 Regarding IPOs, it is worth remembering that the prohibition of insider dealing, indeed, also applies to securities "in respect of which a request for admission to trading on [a prescribed market] has been made".

55 One may only think of the activity of due diligence as a mechanism designed to reduce asymmetric information.

56 It is not possible here to provide a full overview of the literature on insider trading: see *Utpal Bhattacharya*, "Insider Trading Controversies: A Literature Review", Annual Review of Financial Economics 2014, 385; see also *Jonathan R. Macey*, Insider Trading: Economics, Politics and Policy, 1991; *Stephen M. Bainbridge*, Securities Law: Insider Trading, 1999. A comparison between the US and the EU legal framework can be found in *Ventoruzzo* (fn. 28).

as efficient as possible.[57] Therefore, to the extent that market soundings serve the purpose of increasing information exchanges between contractual parties, their benefits are larger than their costs and market efficiency is likely to be increased.[58] Clearly, market soundings are not the only borderline situations where a tension arises between full disclosure of inside information and prohibition of insider trading, on the one hand, and advantageous effects of communicating or using inside information for specific purposes, on the other hand. Pragmatically, EU legislation tries to strike a balance between different purposes and principles, by regulating various exceptions to its general principles.[59]

2.3. *The Rules on Market Soundings*

It is worth noting that the market sounding procedure is related to disclosures of any information, regardless of whether it is "inside information" or not. However, the procedural steps designed by the MAR are much more significant when market sounding is related to pieces of inside information.[60]

57 *Ronald J. Gilson/Reiner Kraakmann*, "The mechanism of market efficiency", Virginia Law Review 1994, 549.

58 *Dirk Zetzsche*, "Normaler Geschäftsgang und Verschwiegenheit als Kriterien für die Weitergabe transaktionsbezogener Insiderinformationen an Arbeitnehmer", Neue Zeitschrift für Gesellschaftsrecht 2015, 817, 820; See also *Lombardo* (fn. 13), 160. See Recital 32 MAR: market soundings "are a highly valuable tool to gauge the opinion of potential investors, enhance shareholder dialogue, ensure that deals run smoothly, and that the views of issuers, existing shareholders and potential new investors are aligned. They may be particularly beneficial when markets lack confidence or a relevant benchmark, or are volatile. Thus, the ability to conduct market soundings is important for the proper functioning of financial markets and market soundings should not in themselves be regarded as market abuse".

59 Such exceptions are: (i) delay of disclosure of inside information (Article 17.4. MAR) on which see *Sergio Gilotta*, "Disclosure in Securities Markets and the Firm's Need for Confidentiality: Theoretical Framework and Regulatory Analysis", European Business Organization Law Review 2012, 45; (ii) safe-harbors regarding buy-back programmes and stabilization activity (Article 5 MAR) on which see *Mathias Siems/Amedeo De Cesari*, "The Law and Finance of Share Repurchases in Europe", Journal of Corporate Law Studies 2012, 33 and *Stefano Lombardo*, "The Stabilisation of the Share Price of IPOs in the United States and the European Union", European Business Organization Law Review 2007, 521 as well as *Dmitri Boreiko/Stefano Lombardo*, "Stabilisation Activity in Italian IPOs", European Business Organization Law Review 2011, 437; (iii) legitimate behaviours under Article 9 MAR as previously foreseen in the recitals of MAD. Furthermore, the general prohibition of market manipulation (Article 15 MAR) knows some weakening in relation to accepted market practices (Article 13 MAR).

60 Recital 34 specifies that "conducting market soundings may require disclosure to potential investors of inside information".

Two parties are involved in market soundings: (i) a disclosing market participant who communicates information to (ii) investors, in order to gauge their interests in a transaction. The disclosing market participant can be: (i) an issuer, (ii) a secondary offeror of a financial instrument in such quantity or quality that the transaction is distinct from ordinary trading and involves a selling method based on the prior assessment of potential interest from potential investors.[61] MAR places an obligation in particular on the disclosing market participants.

Before engaging in a market sounding, the disclosing market participant has to assess whether a disclosure of inside information will also be involved. In this respect, disclosers should hold a written record of their conclusions and the reasons thereof, and should inform the competent authority of any market sounding procedure upon request. The framework requires this behaviour to be taken for each disclosure of information throughout the course of the market sounding.[62] As we have seen above, market participants can only disclose inside information (a) in the normal exercise of an employment, a profession or a duty, and (b) if the recipient is bound by a confidentiality duty.[63] In this respect, Article 11 MAR explicitly clarifies that disclosure of inside information made in the course of a market sounding procedure is deemed to be made "in the normal exercise of an employment, a profession or duties".[64]

Under the MAR, the question arises of whether the rule in the *Grøngaard* case should continue to be applied in the new regulatory regime.[65] Should the answer be in the positive, the consequence would be that a market sounding could only be undertaken if the disclosure is strictly necessary for implementing the envisaged transaction.[66] On the other hand, the MAR seems to follow a formal approach, by maintaining that, when the offeror complies with the pro-

61 A disclosing market participant can also be an emission allowance market participant or a third person acting on behalf or on account of the market sounding receiving the same level of information.

62 Article 11.3. MAR.

63 Article 10.1. MAR.

64 Article 11.4. MAR and Recital 35 MAR. See also *Tissen* (fn. 13), 1255.

65 As mentioned, the ECJ in the *Grøngaard and Bang* case (fn. 14) decided that a piece of information can be disclosed in the normal course of the exercise of an employment, profession or duties if (i) there is a close link between the disclosure and the exercise of the employment, profession or duties and (ii) the disclosure is strictly necessary for the exercise of that employment, profession or duties.

66 See (with different opinions), *Tissen* (fn. 13), 1255; *Dörte Poelzig*, "Insider-und Marktmanipulationsverbot im neuen Marktmissbrauchsrecht", Neue Zeitschrift für Gesellschaftsrecht 2016, 52, 53; *Zetzsche* (fn. 58), 819; *Zetzsche*, Die Aktiengesellschaft 2016, 610 (fn. 13), 613.

cedural rules set forth in Article 11,[67] a selective disclosure is deemed to be made in the normal exercise of the discloser's employment, profession or duty. In other words, the satisfaction of the special procedural conditions set in Article 11 is likely to replace the requirements set forth by the ECJ in the *Grøngaard* decision,[68] or, at least, to put forward a strong presumption that, by fulfilling the requirements of a market sounding procedure, a selective disclosure seeks to gauge the opinion of selected investors on a potential transaction and is, therefore, lawful.[69] This solution mirrors the British regime, in which a disclosure is deemed to be made in the exercise of the discloser's employment, profession or duties, among other factors, when it is "reasonable" for the purpose of attaining an allowed purpose.[70]

When pieces of inside information are disclosed during a market sounding, the disclosing party has to properly qualify its relationship with the recipient.[71] The disclosing market participant, in particular, is required to (a) obtain the consent of the recipient to receive inside information, (b) inform the recipient that he or she is prohibited to conduct insider trading, (c) inform the recipient to keep the information confidential.[72] The disclosing market participant seems to be free to select the recipients of disclosed information; it is however controversial whether all recipients should receive equal treatment and the same kind of information.[73] The rationale of the MAR is to grant equal access and market egalitarianism, thus this principle of equal treatment is paramount and

67 And, in particular, the application of Article 11.3. and 11.5. MAR as explicitly required by Article 11.4. MAR.

68 The purpose of Article 11 MAR is to regulate market soundings that have the aim of gauging the interests of possible transactions. See: *Zetzsche* , Die Aktiengesellschaft 2016, 610 (fn. 13), 613; *Klaus J. Hopt/Christoph Kumpan*, "Insidergeschäfte und Ad-hoc-Publizität bei M&A – Unternehmenskäufe und Übernahmeangebote und Marktmissbrauchsverordnung (MAR)", Zeitschrift für Unternehmens- und Gesellschaftsrecht 2017, 765, 780; *Giovanni Strampelli*, "Knocking at the Boardroom Door: A Transatlantic Overview of Director-Institutional Investor Engagement in Law and Practice", Virginia Law and Business Review 2018, 187, 219.

69 *Mosca* (fn. 15), 845.

70 FSA/FCA guidelines MAR 1.4.5. as amended on 3/7/2016.

71 Article 11.5. MAR.

72 To the extent that the delay of information according to Article 17.4 is a prerequisite to permit market soundings according to Article 17.8., the obligation of confidentiality owed by the person receiving the information has to be qualified according to national elements because the duty can be based on law, on regulations, on articles of association or on a contract.

73 Indeed, the extent to which the persons receiving the market sounding with inside information receive the same amount (in terms of quality and quantity) of information is doubtful at Level 1. At Level 2, Recital 1 and Article 3.5 of CDR 2016/960 specify that all persons receiving the market information receive the same level of information.

is to be applied also with regard to exceptions to the general rules entailed in the regulation. As a consequence, any exception to the prohibitions of disclosing inside information (such as the market sounding exception) also requires that recipients should be treated equally and should receive identical (in terms of quality and quantity) pieces of information.[74]

2.4. Market Soundings and Information

In a market sounding procedure, the disclosing market participant can communicate pieces of information that are not deemed "inside information". In this case, the discloser faces simplified duties regarding the minutes and the records that are to be kept. In particular, the discloser should indicate that the recipient is about to receive information that "the disclosing market participant considers not to be inside information"[75] and the recipient should consent to such disclosure on a "non-wall-crossed" basis.[76] By accepting a market sounding, however, the recipient is not automatically safe, as he should "assess for itself whether it is in possession of inside information or when it ceases to be in possession of inside information".[77]

Within this legal framework, the dissemination of inside information in a market sounding procedure raises several controversial questions. The first issue is the relationship between communication of inside information during a market sounding and the cases when companies are allowed to delay a disclosure of inside information (hereunder paragraph a). Once this preliminary question is clarified, we can address other issues, namely: whether a transaction discussed during a market sounding is to be held as inside information (hereunder paragraph b); whether a transaction that requires several steps[78] should be considered inside information before it is eventually finalised and upon one of the intermediate steps (hereunder paragraph c); which pieces of inside information are to be communicated (hereunder paragraph d).

74 See also *Zetzsche* , Die Aktiengesellschaft 2016, 610 (fn. 13), 614.
75 CIR 2016/959 annex II, vi.
76 Article 11.5.1(a) MAR and Article 3.3(g) CIR 2016/960.
77 Article 11.7. MAR.
78 Article 7.2. and 7.3. MAR.

a. Market Soundings and the Reasons for Delaying Disclosures of Inside Information

The disclosure of inside information in the context of a market sounding is likely to require that the prerequisites occur for legitimately delaying its disclosure according to Article 17.4 MAR.[79] Indeed, MAR requires full disclosure of information as an incentive to avoid insider trading; at the same time, it allows the delaying of such disclosure in specific circumstances. In particular, as we mentioned above, a delay is justified (a) if a prompt disclosure is likely to jeopardize legitimate interests of the issuer, (b) if a delay of disclosure is not likely to mislead the public and (c) if the issuer is able to ensure the confidentiality of that information. In sum, it appears that the communication of inside information in the context of a market sounding can be legitimately undertaken only when a delay of disclosure is justified under Article 17.4 MAR.

b. The Envisaged Transaction Is Per Se a Piece of Inside Information

The operation disclosed in a market sounding is to be considered inside information when its realisation is almost certain. In this case, the envisaged transaction fulfils all four elements of the definition of inside information and, as a consequence, it should be disclosed to the market.[80] A typical example is when directors of a listed company have reached an agreement on a capital increase, but have not yet taken an official decision. In this case, the issuing company has an interest in capturing the opinion of potential investors on this transaction's conditions. In such a situation, information on an imminent secondary offer-

79 The relation between market soundings and delay of information according to Article 17.4. MAR is also stressed by *Di Noia/Milic/Spatola* (fn. 6), 102; *Lombardo* (fn. 13), 163; *Zetzsche*, Die Aktiengesellschaft 2016, 610 (fn. 13), 613. ESMA does not explicitly consider the relation between market soundings and delay of information in its guidelines. Indeed, ESMA does not directly specify that the transactions in which market soundings are conducted could justify delay. There is an indirect reference to delay of information in the context of a market sounding only in ESMA/2014/809, 23 Nr. 74.

80 See the Harrison case decided by the FSA in September 2008. Mr Harrison, an investment manager, was informed about the imminent refinancing of Rhodia SA in a kind of market sounding and used this inside information (disclosed later on) to trade on it. Mr Harrison was informed about the operation in a kind of market sounding: "Credit Suisse contacted Mr Harrison in order to help establish the correct pricing and other feedback on the specifics of the proposed refinancing which involved the tender for certain of its existing bonds and the issue of new floating rate notes. This necessitated providing Mr Harrison with inside information regarding the proposed refinancing", see *FSA*, 2008, Final Notice, (https://www.fca.org.uk/publication/final-notices/steven_harrison.pdf, 2.2.1., last visited: 5 February 2019).

ing of securities is to be classified "inside information", which the issuer should immediately disclose to the market. In this scenario, any selective communication of the plan of issuing shares risks violating the prohibition of "insider trading". As mentioned in point (a), the disclosure of inside information about a capital increase to selected investors is only acceptable under the conditions set forth in article 17.4 MAR.

c. *The Envisaged Transaction Is the Outcome of Many Intermediate Steps*

Contrary to the case discussed in point (b), in which a transaction has been already decided and is deemed inside information, other transactions might require several steps to be eventually decided.[81] Therefore, the question arises of when such operations become sufficiently certain to be treated as inside information. A typical example is the situation when executive directors aim at increasing their company's capital and in order to reach this goal they need to convince other directors and a majority of shareholders, since such a decision requires the intervention of both the board of directors and the general meeting of shareholders. In that case, executive directors inform selected large shareholders of a possible capital increase, in order to gauge their opinion and their availability to vote in favour of this proposal and, eventually, to subscribe new shares. This communication does not involve a disclosure of inside information, since this capital increase also depends on what the recipient shareholders are going to decide on its merit and, therefore, it is far from being certain at the moment of its disclosure.[82] On the other hand, it is desirable avoiding that shareholders who were sounded out speculate on the basis of this information; hence, as soon as a capital increase becomes reasonably certain (for instance, because most shareholders have positively reacted to such a proposal) this transaction is to be deemed inside information.[83]

In this context, the question arises as to whether the fact that a person uses his or her own knowledge on how he or she will behave regarding a certain market transaction should be deemed inside information. In our case, shareholders

81 Regarding intermediate steps, see *Sergio Gilotta/Federico Raffaele*, "Informazione privilegiata e "processi prolungati" dopo la Market Abuse Regulation", Rivista delle Società 2018, 83.

82 This kind of information about a possible increase in capital could be qualified as "soft information" according to the proposal of the European Commission where the information is not precise but of potential interest for a reasonable investor.

83 See *Lombardo* (fn. 13), 163; *Hopt/Kumpan* (fn. 68), 809. Apparently, ESMA does not consider this issue and the deriving hypothesis of inside information but recital 1 of CIR 2016/959 considers the possibility that the nature of information changes after the market sounding, so implicitly admitting the potential problem.

who were sounded out could speculate by using their knowledge on their own decisions.[84] This question has not been yet fully clarified, albeit the MAR seems to answer in the negative by maintaining that "the mere fact that a person uses its own knowledge that it has decided to acquire or dispose of financial instruments in the acquisition or disposal of those financial instruments shall not of itself constitute use of inside information".[85] What matters for the purposes of this article is that recipients of market soundings should assess by themselves whether they are in possession of inside information or when they cease being in possession of inside information.[86] This is a catch-all provision that puts a precise obligation on any persons receiving a market sounding.[87] This provision is crucial for addressing market operations requiring several steps and for clarifying whether a piece of information becomes inside information due to an active involvement of the sounded party.

d. Disclosure of Many Pieces of Inside Information

When potential investors are sounded out regarding an envisaged transaction, the issuer or seller might disclose several different pieces of inside information. In these cases, it is to be assessed whether each piece of information falls within the scope of Article 11 MAR or not. Such assessment is to be conducted on a case-by-case basis, so that no comprehensive taxonomy seems to be feasible.[88]

84 In the example, the shareholders are sounded out according to Article 11 and contribute to create and possess the inside information being persons "having a holding in the capital of the issuer", according to Article 8.4(b) MAR. This issue (commonly labelled "insider of itself") is of particular relevance for takeover regulation and the Italian Corte di Cassazione has recently deemed it compatible with the MAD (presumably also with the MAR): see *Stefano Lombardo*, "L'insider di se stesso alla luce della decisione della Cassazione (civile)", Giurisprudenza Commerciale 2018, II/666.

85 Article 9.5. MAR.

86 Article 11.7. MAR.

87 This is the case although, in the market sounding regulatory framework, duties are mostly allocated on disclosing market participants. Note that the Article starts with the words "Notwithstanding the provisions of this Article, ...", which means that the requirement of this provision does not only refer to Article 10.5 MAR but to the entire Article. On the importance of Article 11.7. MAR, see also *Zetzsche*, Die Aktiengesellschaft 2016, 610 (fn. 13), 618. Additionally, it is worth noting that article 11.7. MAR seems to replicate the content of Article 8.4. last sentence, which provided the general principle that "This Article also applies to any person who possesses inside information under circumstances other than those referred to in the first subparagraph where that person knows or ought to know that it is inside information".

88 See ESMA/2014/809, 23 Nr. 74, on this specific issue see also *Zetzsche*, Die Aktiengesellschaft 2016, 610 (fn. 13), 619.

In this regard, when the disclosed information is related to the envisaged transaction, such disclosure falls within the scope of Article 11 MAR, while in any other cases it is to be treated as an unlawful disclosure of inside information.[89]

2.5. Market Soundings in Three Situations

As we have mentioned above, we aim at assessing whether market soundings can be carried out through a disclosure of inside information in three specific cases.

a. Secondary Offerings

Market soundings may occur during secondary offerings (also called "seasoned offerings" in business jargon), when an already listed company seeks to increase its capital. In this transaction, securities regulation and company law are strictly intertwined, and such a connection raises several problems with respect to market soundings, as we shall see hereunder.

b. Accelerated Bookbuilding when the Offeror Is the Company

Recital 33 MAR describes a case of accelerated boobuilding as follows: "where the sell-side analyst is seeking to sell a large amount of securities on behalf of an investor and seeks to gauge potential interest in those securities from other potential investors". Article 11.1 MAR clarifies this description by stating that a market sounding is made by secondary offerors of a financial instrument, when the offer is "in such quantity or value that the transaction is distinct from ordinary trading and involves a selling method based on the prior assessment of potential interest from potential investors".[90] A company that holds own

89 See ESMA/2014/809, 23 Nr. 74; *Zetzsche*, Die Aktiengesellschaft 2016, 610 (fn. 13), 619.

90 Importantly, we note that the Italian version of the MAR slightly departs from the English, German and French versions: while the Italian version refers to offerors in the secondary markets, which seem to be distinguished from the secondary offerors, the other versions employ the notion of "secondary offeror" (Italian: *un offerente sul mercato secondario di uno strumento finanziario*; English: a secondary offeror of a financial instrument; French*: par un offreur secondaire d'un instrument financie*; German: *einen Zweitanbieter eines Finanzinstruments*)*. Zetzsche*, in: Gebauer/Teichmann (ed.), Enzyklopädie Europarecht (fn. 13), at para 217b, describes the situation of a block trade in which a large number of shares are placed outside any regulated market; such a transaction (which amount to about 0.5% of shares' value) can have a negative impact upon

shares as treasury shares[91] or seeks to issue new shares, might implement an accelerated bookbuilding in order to quickly allot such shares among selected investors. In a typical accelerated bookbuilding, the selling party asks an investment bank to find potential investors for the shares at a selling price defined by testing the potential interest of the investors.[92] The reason for using this mechanism is that the offering of a consistent number of shares usually depresses the price of these shares. Because of this consequence arising from the large amount of offered shares, the equilibrium price of an accelerated bookbuilding is likely to be lower than the listing price and higher than the price that would be reached by selling on the market.[93]

Instead of undertaking an accelerated bookbuilding, listed companies might either: (a) sell shares directly on a regulated market,[94] or (b) engage in a public offer of securities. Alternative (b) is based on general principles of full disclosure, which is normally undertaken by publishing a prospectus and under a general duty of equal treatment.[95] In both cases, the issuer should fully disclose inside information and the question arises as to whether the same principles to be followed in such transactions have to be applied to the accelerated bookbuilding cases. Should the answer be in the positive, the consequence would be that, during an accelerated bookbuilding, the issuer should fully disclose inside information to the market before the deal becomes effective, albeit such information having been previously disclosed to selected institutional investors.

market liquidity. Block trades are types of accelerated secondary offerings: *Bernardo Bortolotti/William Megginson/Scott B. Smart*, "The Rise of Accelerated Seasoned Equity Underwritings", Journal of Applied Corporate Finance 2008, 35, 37.

91 The second company law Directive allows issuers to hold their own shares as treasury shares but only up to a certain limit in order to avoid problems with the regime of capital and capital maintenance, which is a core element of European company law. See in particular, Article 22 et seq. of Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect to the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, OJ 14.11.2012 L315/74.

92 On accelerated bookbuilding offerings (ABO) see *Bortolotti/Megginson/Smart* (fn. 90), passim.

93 The final price depends on several variables related e.g. to liquidity of the shares, amount sold, ability of the investment bank etc.

94 This strategy risks depressing share price.

95 This strategy is more costly and time-consuming than other strategies.

c. Accelerated Bookbuilding When the Offeror Is a Shareholder

Investment banks can also be entrusted with the task to find potential investors by shareholders who aim at selling their shares in a listed company. In this situation, it is natural that the investment bank sounds out potential investors, and yet it is unclear whether it can also disclose inside information related to the issuing company. Selling shareholders can acquire information about their company either on the basis of their holding capital of the issuing company[96] or because of their being members of corporate bodies.[97] Selling shareholders should comply with general rules on insider trading, unless they trigger a market sounding procedure under Article 11 MAR.

The communication of inside information between the selling shareholder and the potential investor(s) aims at balancing information asymmetry and increases the deal's efficiency. The selling shareholder communicates to the potential buying party inside information about the issuing company in order to establish the most efficient price, which includes this piece of inside information. Nevertheless, the general prohibition of insider trading would jeopardize the effective conclusion of the deal before the listed company publicly informs the market. In this case, only the company can legitimately disclose a piece of inside information that was transmitted by a selling shareholder to potential investors. Obviously, if the company refuses to disclose the inside information invoking the delay according to Article 17.5. MAR, the deal cannot occur. As a result, the conclusion is that the hypothesis described in Article 11.1.b. requires the previous disclosure by the listed company of the inside information communicated by the secondary offeror to potential investors.

3. Market Soundings and National Company Law Regimes

From a company law standpoint, market sounding raises different problems, whose solutions, as we shall see, might not be entirely compatible with the procedure entailed in the MAR. To understand these issues, we should distinguish activities undertaken by the issuing company before a secondary offer of securities, from activities undertaken by a company's shareholders when they decide to sell their shares.

Before public offers, companies' managers or other fiduciaries sound out the market by meeting selected investors to gauge their interest in subscribing newly issued securities or treasury shares and their view on such transactions.

96 Article 8.4(b) MAR.
97 Article 8.4(a) MAR.

As we have seen in the previous section, when directors engage in market sounding, information is disseminated to selected potential investors, be they shareholders or not. When the company, or a company's agent, decides to sound out selected shareholders, the latter receive more pieces of information than other fellow-shareholders; although sounded shareholders voluntarily accept to receive inside information, and suffer the disadvantage of not being able to trade after this disclosure, they are objectively treated differently from other shareholders, whom the company does not offer the same option in the first place; hence the question arises as to whether shareholders can be discriminated according to their sophistication or the quantity of shares owned. By contrast, when third parties are sounded out, the question arises as to whether a company can disclose inside information to third parties in order to facilitate share acquisitions. By contrast, pre-marketing activities undertaken by a shareholder who seeks to sell his or her shares in the market do not involve directors' relation with shareholders or the question of whether and under which circumstances discriminations may be justified, and yet other "company law" questions may arise. First of all, it is to be clarified whether shareholders owe each other duties of fair or equal treatment; secondly, the question arises as to whether their company can or should cooperate with them by facilitating a disclosure of inside information. Despite capital markets being increasingly globalized, most rules governing intra-corporate affairs, such as the relations between directors and shareholders and relations among shareholders, are nation-based and depend on each country's company law regimes. As a consequence, national regimes might have an impact on uniform rules such as those provided in the MAR.

In this regard, it is worth remembering that inside information can be disclosed "in the normal exercise of an employment, profession or duty". In these cases, the issuer should also make complete and effective public disclosure of that information, unless the recipient owes a duty of confidentiality.[98] Interestingly, the Market Abuse Regulation maintains that any disclosures of inside information that respect market sounding procedures are deemed to be made in the normal exercise of an employment, profession or duty.[99] Such disclosures, however, might violate national company law even though market soundings procedures are fully respected. Therefore, directors and other company's agents should assess whether, and in which circumstances, domestic company law rules allow selective disclosures, even when they comply with provisions regulating market sounding procedures.

98 Article 17.8. MAR.
99 Article 11.4. MAR.

In general, we can expect that national company law rules prohibit directors from discriminating between shareholders. The main reason is that directors' powers, however constructed, derive from shareholders' positions,[100] with the consequence that the former must not behave arbitrarily *vis-à-vis* their shareholders. Additionally, even if discriminations are allowed, it is reasonable to expect that the applicable company law regime requires that such discrimination be supported by specific justifications for the benefit of the company as a whole.[101] However, the precise contours of these limits on directors' powers vary across jurisdictions. On this point, it is worth mentioning that EU law does not impose a strict duty of equal treatment of shareholders. The ECJ, in the *Audiolux* case, argued that the principle of equal treatment of shareholders who are in the same position is not a general principle of EU law.[102] Additionally, according to Advocat General *Trstenjak*, in the case *Commission v Spain* discussing pre-emption rights granted to holders of bonds convertible to shares, the principle of equal treatment of shareholders, "is not construed as an obligation on the part of the company to treat shareholders in the same way, but is understood to mean that unequal treatment needs sufficiently objective justification".[103] Similarly, the question of whether shareholders owe reciprocal duties of "fairness" even when they act as individuals (such as in secondary offers) is also governed by national company law rules that vary from country to country. In the next pages, we will address director duties in Italy and the U.K., in order to assess whether these national company law regimes could block market soundings or affect their feasibility.

100 For an overview of different constructions of shareholders' positions in the company see, *Mathias Siems*, Convergence in Shareholder Law, 2008, 60.

101 *Nicola De Luca*, "Unequal Treatment and Shareholders" Welfare Growth. 'Fairness' v. 'Precise Equality'", Delaware J. Corporation Law 2009, 853; *Mosca* (fn. 15), 830; *Strampelli* (fn. 68), 222.

102 ECJ, 15 October 2009, *Audiolux SA v Groupe Bruxelles Lambert SA* (*GBL*), C-108/08, ECLI:EU:C:2009:626, on which see *Federico M. Mucciarelli*, "Equal treatment of shareholders and European Union law", European Company and Financial Law Review 2010, 158. See also ECJ, 19 December 2013, *Alfred Hirmann v Immofinanz AG,* C-174/12 ECLI:EU:C:2013:856, para. 27, which maintained that the principle of equal treatment only regulates "the legal relationships established between the company and its shareholders which derive exclusively from the memorandum and Articles of association", with the consequence of a duty to pay damages to shareholders resulting from the dissemination of false information.

103 ECJ, 18 December 2008, *Commission v Spain,* C-338/06, ECLI:EU:C:2008:740. On the scope of EU principle of equal treatment see *Giovanni Strampelli*, "Rendering (Once More) the Financial Assistance Regime More Flexible", European Company and Financial Law Review 2012, 530, 545–546.

3.1. Italy

a. The Market Abuse Regime

The Italian market abuse regime is traditionally based on a dual system, which includes both criminal and administrative sanctions.[104, 105] Before the MAR entered into force, selective disclosures were only lawful when they were made in the "normal exercise of an employment, a profession or duties".[106] This issue was only posed with regard to IPOs and share issues with a prospectus,

104 Legislative Decree N. 58/1998, as amended, hereinafter the "Unified Act on Finance". On this dual system, and its questionable legitimacy, see *Marco Ventoruzzo*, Do Market Abuse Rules Violate Human Rights? The Grande Stevens v. Italy Case, ECGI Law Working Paper, 2014 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2517760, last visited: 5 February 2019); *Francesco Mucciarelli*, Illecito penale, illecito amministrativo e ne bis in idem: la Corte di Cassazione e i criteri di stretta connessione e di proporzionalità, www.penalecontemporaneo.it, 17 October 2018 (https://www.penale contemporaneo.it/d/6272-illecito-penale-illecito-amministrativo-e-ne-bis-in-idem-la-corte-di-cassazione-e-i-criteri-di-stre, last visited: 5 February 2019); The legislative decree 107/2018 has confirmed the dual system, on which see *Francesco Mucciarelli*, Gli abusi di mercato riformati e le persistenti criticità di una disciplina, www.penalecontem poraneo.it, 10 October 2018 (https://www.penalecontemporaneo.it/d/6249-gli-abusi-di-mercato-riformati-e-le-persistenti-criticita-di-una-tormentata-disciplina, last visited: 5 February 2019).

105 Unified Act on Finance, Article 187-bis.

106 Article 184(1)(b) Unified Act on Finance (implementing MAD Article 3(a), now MAR Article 10). Due to a reform of 2005, the "normal exercise of an employment, a profession or duties" has become an element (the *actus reus*) which is to be proven by the public prosecutor, while previous rules only exempted disclosures made with a "justified motivation" that had to be proven by the defendant: Statute n. 262/2005, 28 January 2005, *Luigi Foffani*, Art. 184, in: Francesco Vella (ed.), Commentario T.U.F., 2012, vol. 2, p. 1778; *Stefania Giavazzi*, L'abuso di informazioni privilegiate, in: Giovanni Canzio/Luigi Domenico Cerqua/Luca Lupária (ed.), Diritto penale delle società, 2016, p. 705. The same piece of information should be simultaneously disclosed to the market, unless the recipient was bound by a confidentiality commitment based upon a statutory rule or a private agreement: Article 114.4 Unified Act on Finance (implementing Article 6.3 MAD, repealed through Art. 3 legislative decree 107/2018). CONSOB Communication DME/6027054, 28th March 2006, para. 52. See, *Enrico Macrì*, Informazioni privilegiate e disclosure, 2010, p. 95; *Sergio Gilotta*, Trasparenza e riservatezza nella società quotata, 2012, p. 168; *Paolo Montalenti*, "*Disclosure* e riservatezza nei mercati finanziari: problemi aperti", Analisi giuridica dell'economia 2013, 245, 251; *Giovanni Strampelli*, "L'informazione societaria a quindici anni dal T.U.F.: profili evolutivi e problemi", Rivista delle società 2014, 991, 1041. Criminal sanctions only apply to actions committed by "primary insiders", such as members of a company's board or other corporate bodies, or by shareholders of the issuing company; administrative sanctions apply to any person who is in possession of inside information, even if this was communicated by a primary insider. On selective disclosures in the "pre-market-

whereas accelerated bookbuildings of listed companies do not seem to have been implemented in Italy.[107] Italian scholars and courts have acknowledged that the concept of "normal exercise of an employment, a profession or duties" includes disclosures that are essential elements of a profession, such as disclosure of information to a trading company or a law firm, and disclosures of information within a company or within a group of companies if they are aimed at drafting the group's consolidated accounts.[108] Additionally, no doubts have ever arisen on whether inside information can be selectively disclosed to experts or financial and legal consultants to gauge their opinion on a company's financial or legal situation.[109] Interestingly, the Italian supervisory authority has also held that issuers can selectively disclose inside information to any subjects with whom negotiations related to commercial or financial transactions are on-going.[110] Therefore, selective disclosures and "market soundings", aimed at gauging the opinions of potential investors, could be compatible with the previous Market Abuse regime, within the limits described so far, even if no explicit provision existed.[111]

Furthermore, the provisions on disclosure of inside information have been recently amended to make direct reference to notions entailed in the MAR.[112] In particular, it has been clarified that disclosures are not only allowed when made in the normal exercise of an employment, a profession or duties, but also in a market sounding procedure according to the MAR.[113] Despite this clarifica-

ing" phase of an IPO, see *Stefano Lombardo*, Quotazione in borsa e stabilizzazione del prezzo delle azioni, 2011, p. 236.

107 See Borsa Italiana at http://www.borsaitaliana.it/notizie/sotto-la-lente/accelerated-bookbuild-157.htm, last visited: 5 February 2019.

108 *Giavazzi* (fn. 106), p. 706–707. See, however, *Gilotta* (fn. 106), p. 167: selective disclosure is only allowed in the same circumstances in which an issuer can delay disclosing that information, namely in order to avoid a prejudice to legitimate interests of the company, as specified by the CONSOB Regulation on Issuers (n. 11971/1999, as amended) art. 66-*bis*.

109 *Armoando Bartulli/Mario Romano*, "Sulla disciplina penale dell'insider trading (legge 17 maggio 1991, n. 157)", Giurisprudenza Commerciale (1992), 660, 665 (which was related to previous rules, but is likely to be applied under the new formula).

110 CONSOB DME/6027054 28 March 2006 § 52; see *Sergio Gilotta*, Art. 114, in: Francesco Vella (ed.), Commentario T.U.F., 2012, vol. 2, p. 1163.

111 The general definition of "inside information" also includes circumstances that "may reasonably be expected to come into existence", such as a plan for issuing new shares that has not been yet approved by the general meeting of shareholders and is only discussed informally at board level: Article 181/3(a), Unified Act on Finance, implementing Article 1 of Directive 2003/124/EC; see *Andrea F. Tripodi*, Informazioni privilegiate e statuto penale del mercato finanziario, 2012, p. 221.

112 See art. 114 Unified Act on Finance, as amended by Art. 3 legislative decree 107/2018.

113 Art. 184.1(b) Unified Act on Finance.

tion, however, Italian company law rules and principles might put some obstacles in the way of secondary offers and accelerated bookbuildings.

b. Directors' Duties and the Principle of Equal Treatment of Shareholders

According to the Italian Civil Code, shares grant to their owners the same rights, unless the articles of association create special classes of shares.[114] In this regard, scholars debate on whether directors of Italian companies are bound by a general principle of equal treatment of all shareholders in any circumstances. Several authors answer in the negative, holding that minorities would only be protected through fairness standards or by the prohibition of abusive oppression, not by a strict overarching principle of equality.[115] Other opinions maintain that a general principle of equal treatment is implicit in companies' contractual nature and is to be derived from the general principle of shares' equality.[116]

Listed companies, however, should comply with an additional statutory duty of equal treatment of all security holders, which protects both shareholders and bond-holders.[117] This rule was expanded in 2007 to include a right of security holders to be equally given sufficient information for exercising their corporate rights.[118] Despite this provision being introduced to comply with the principle of equal treatment entailed in the second company law directive[119], its

114 Article 2348 Italian Civil Code. See *Carlo Angelici*, Parità di trattamento degli azionisti, in: Carlo Angelici/ Giovanni B. Ferri, Studi sull'autonomia dei privati, 1997, p. 416; *Floriano D'Alessandro*, "La seconda direttiva e la parità di trattamento degli azionisti", Rivista delle società (1987), 1.

115 See e.g. *Angelici* (fn. 114), p. 420; *Giorgio Marasà*, Modifiche al contratto sociale, in: Giovanni E. Colombo/Giuseppe B. Portale (ed.), Trattato delle società per azioni, 1993, vol. 7(1), p. 107; *De Luca* (fn. 101), 885; Id. "Premi di fedeltà ed eguaglianza tra azionisti: riflessioni sull'art. 127-*quater* tuf", Rivista del Diritto Societario 2012, 23.

116 *Disiano Preite*, Abuso di maggioranza e conflitto d'interessi, in: Colombo/Portale (ed.), Trattato delle società per azioni, 1993, vol. 3(2), p. 37–42 (prohibition of discriminations in any situation deriving from the company's constitution, such as lengths of speeches during a general meeting, directors' refusal to register a share purchase, or amendments of the original Articles of association); *Gian Carlo M. Rivolta*, Diritto delle società – Profili generali, in: Vincenzo Buonocore/Renzo Costi (ed.), Trattato di diritto commerciale, 2015, p. 232; *Giacomo D'Attorre*, Il principio d'eguaglianza tra soci nelle società per azioni, 2007, p. 297–307 (with regard to selective disclosure).

117 Article 92.1. Unified Act on Finance.

118 Article 92.2. Unified Act on Finance, as amended by Article 1 Legislative decree 195/2007.

119 Article 42 Directive 77/91/EEC of 13 December 1976 (now Article 85, Directive (EU) 2017/1132 of 14 June 2017 relating to certain aspects of company law (codification).

scope is not limited to the topics regulated in that directive and is drafted as a general principle. Therefore, most scholars maintain that listed companies that seek to issue new shares must not disclose information on the envisaged transactions to selected shareholders.[120] Under such a strict application of the equality principle, selective disclosures would not be deemed "in the normal exercise" of directors' duties.[121] Other scholars, however, have recently argued that selective disclosures are compatible with the principle of equal treatment when such disclosures are necessary for a transaction to succeed, provided that the recipients do not abuse inside information and signs a confidentiality agreement.[122] The reason is that the principle of equal treatment protects holders of any kind of securities, not only shareholders, and is to be also applied to foreign issuers listed in an Italian regulated market, not only to Italian companies. The aim of the principle of equality is, therefore, protecting a security's "exchange value" and maximizing security holders' chances of buying and selling their shares.[123] This solution, however, is still controversial. What emerges clearly is the continuing debate among Italian scholars and practitioners, and discord as to whether the principle of equality is to be relaxed in order to allow market transactions to succeed.

c. *Shareholders' Preemptive Right*

A further question is under which circumstances Italian company law rules and principles allow domestic companies to exclude or limit preemptive rights on newly issued shares. This issue is obviously relevant for both offers to the public and allotments to selected shareholders. In general, a company can legitimately exclude or limit shareholders' preemptive rights when the "interest of the company requires such exclusion".[124] In this regard, Italian law has increasingly simplified the disapplication of preemptive right. While older case

120 *Francesco Mucciarelli*, "L'informazione societaria: destinatari e limiti posti dalla normativa in materia di insider trading", Banca borsa titoli di credito (1999), I/745, 746; *Umberto Belviso*, "L'informazione dei soci nelle società con azioni quotate", Rivista delle Società 2004, 827, 861; *D'Attorre* (fn. 116), p. 299; *Macrì* (fn. 106), p. 96.

121 See *Giavazzi* (fn. 106), p. 708.

122 *Andrea Giannelli/Chiara Mosca*, Flussi informativi tra amministratori e soci nella società quotata, tra ambiguità ed esigenze di disciplina, Working Paper 2012, p. 35, (http://orizzontideldirittocommerciale.it/media/11996/giannelli_andrea_-_mosca_chiara.pdf, last visited: 5 February 2019; *Chiara Mosca*, "Comunicazione selettiva degli amministratori agli azionisti nella società per azioni quotata", Rivista delle Società 2018, 29.

123 See *Federico M. Mucciarelli*, "Sulla parità di trattamento nelle società quotate", Rivista delle Società 2004, 180, 198.

124 Article 2441.5 Civil Code.

law allowed such disapplication only when necessary to pursue the interests of the company (*i.e.,* only if the exclusion is necessary for the company's survival)[125], most recent authorities follow a liberal path, by accepting that shareholders' preemptive right can also be waived when preferable to pursuing the company's business strategies.[126] Additionally, a reform of 2014 lowered the majority requirements to approve a disapplication of preemptive right.[127] It is worth remembering that companies should allot new shares with a premium that reflect the company's "real" value,[128] although discounts from the market price are allowed to facilitate shares' allotment and seem to be quite common.[129] More importantly, according to the Italian Civil Code, listed companies can issue new shares without preemptive right if their offering price is equivalent to their market price and the total amount of newly issued shares is not more than 10% of the legal capital.[130] The reason is that, when the issue price is nearly equal to the shares' market price, shareholders can keep their position in the company by purchasing shares or by subscribing the newly issued shares. What is still uncertain and debated, however, is whether the

125 See *Pier Giusto Jaeger*, L'interesse sociale, 1963, p. 220; *Giuseppe Ferri,* Le società, 1987, p. 929; *Roberto Rosapepe*, L'esclusione del diritto d'opzione, 1988, p. 54.

126 See e.g.: Corte Suprema di Cassazione (Supreme Court of Cassation), 13 January 1987, Le Società 1987, 291; Corte Suprema di Cassazione (Supreme Court of Cassation), 23 March 1993, n. 3458, Giurisprudenza Commerciale 1994, II/372. *Franco Di Sabato*, Manuale delle società, 1995, p. 679; *Gian Franco Campobasso*, Diritto commerciale, 2015, vol. 2, p. 511. See also: *Nicola Robiglio*, "Delega dell'aumento del capitale e D.P. R. n. 30/1986", Rivista delle Società 1991, 657, 681; *Federico M. Mucciarelli*, "Interesse sociale ed esclusione del diritto di opzione: spunti di riflessione sulla logica dell'argomentazione del giudice", Giurisprudenza Commerciale 2002, I/455; *Enrico Ginevra*, Diritto d'opzione, in: Pietro Abbadessa/Giuseppe B. Portale (ed.), La società per azioni, 2016, vol. 2: the limitation of pre-emptive right is justified when it is necessary to pursue a specific business choice or strategy.

127 L. 116/2014 amending Article 2441.6 Civil Code. Before 2014, such decisions had to be approved by shareholders representing at least half of the legal capital, on top of the supermajority requirements for amending the Articles (2/3 of the represented capital).

128 Article 2441.6 Civil Code.

129 *Giuseppe B. Portale*, "Opzione e sovrapprezzo nella novella azionaria", Giurisprudenza Commerciale 1975, I/222. See, for instance, the raising of new capital of Unicredit in 2017, for shares were issued at a discount of 38% to the theoretical ex-right price ("TERP"). The TERP is the price of the shares immediately prior to announcement adjusted for the dilution caused by the rights issue. On the recent problem of diluition in capital increases, see *Enrico R. Restelli*, "Finanziamento dell'impresa e coazione a sottoscrivere. Gli aumenti di capitale iperdilutivi", Osservatorio del diritto civile e commerciale 2018, 547.

130 Article 2441.4 Civil Code.

company must necessarily issue these new shares to the public[131] or can select investors through a private offer of shares or a bookbuilding procedure.[132]

In general, when a company decides to waive shareholders' preemptive right (under one of the conditions mentioned above) and to allot new shares to selected investors, instead of offering them to the public, the question arises whether such allotment might violate company law principles. Legal scholars seem to accept the idea that such selective allocations of shares may be allowed, provided that they are justified under one of the specific conditions mentioned above.[133] Eventually, when shares are issued to directors or other "related parties", such allotment should also respect the special proceedings for related parties' transactions, which are based upon a non-binding opinion of a committee of non-executive directors.[134]

d. Sale of Treasury Shares

Furthermore, we should address the sale of shares held by a company as treasury shares. This decision poses the question whether these shares are to be offered to shareholders in a way that does not undermine their position in the company or that does not discriminate certain shareholders.[135] A sale of treasury shares, in particular, alters the position of shareholders in their company similarly to an issue of new shares. This issue is not addressed by any statutory rules. Nevertheless, it has been argued that treasury shares should be preemptively offered to all shareholders[136] and that such a preemption right can be

131 *Enrico Ginevra*, "La determinazione del prezzo e del sovrapprezzo negli aumenti di capitale sociale a pagamento", Rivista delle Società 1998, 498, 519.

132 *Piergaetano Marchetti*, Gli aumenti di capitale, in: Serenella Rossi (ed.), Il nuovo ordinamento delle società, 2003, p. 274 (shares can be offered either through a public offer or to selected investors); *Gaia Balp/Marco Ventoruzzo*, "Esclusione del diritto di opzione nelle società con azioni quotate nei limiti del dieci per cento e determinazione del prezzo di emissione", Rivista delle Società 2004, 811 (same solution); *Amal Abu Awwad*, Il diritto d'opzione nelle società quotata, 2013, p. 126 (shares can only be offered to selected investors).

133 See, with different general positions: *D'Attorre* (fn. 116), p. 321 (when the exclusion of preemptive right is justified it does not necessarily respect shareholders' equality) and *Abu Awwad* (fn. 132), p. 190 (shareholders' equal treatment is pursued through market mechanisms).

134 CONSOB Regulation 17221/2010.

135 Directors can only sell these shares if they have been previously authorized by the general meeting of shareholders: Article 2357-bis Italian Civil Code.

136 *Nicola De Luca,* La società azionista, 2012, p. 69–71 (who differentiates a right to keep shareholders' position from shareholders' equal treatment).

waived following the rules and conditions on the issue of new shares.[137] This issue, however, is still controversial and no decision on its merit has been published so far.

Finally, it is worth mentioning that large shareholders routinely use accelerated bookbuilding mechanisms in order to sell their shares.[138] In this case, the main issue is whether a shareholder, who aims at selling its stake in a company, can legitimately possess inside information to be disclosed to potential buyers in order to gauge their interests in that deal, and whether companies should transfer inside information to shareholders who aim at selling their shares. As a general rule, shareholders can only receive information on their companies' affairs in circumstances indicated in specific statutory rules[139] and directors must not disclose business information, unless such disclosure is statutorily allowed for specific purposes. In particular, information can circulate between a controlled entity and its controlling shareholder or among controlled companies.[140] Such rules related to groups of companies have led to debate: while certain scholars have argued that the general duty of confidentiality does not apply within groups of companies[141], other scholars maintain that subsidiaries do not face any duties to provide information to the holding com-

137 *De Luca* (fn. 136), p. 72. For a different opinion, see *D'Attorre* (fn. 116), p. 368.

138 Italian legal scholars, however, do not seem to have addressed this topic; this point is made by *Paolo Giudici*, Le offerte degli emittenti: determinazione dei prezzi e altre clausole contrattuali. I contratti con i gatekeepers, in: Vincenzo Roppo/Alberto M. Benedetti (ed.), Trattato dei contratti, 2014, p. 991, 1071.

139 Shareholders can ask to view the shareholders' book, minutes of shareholders' general meetings (Italian Civil Code, Article 2422) and the annual accounts filed with the company's statutory seat (Italian Civil Code Article 2435 c.c.). Additionally, shareholders of listed companies can also inspect any documents filed with the company's seat regarding general meetings that have been already called: Unified Act on Finance Article 130. See, *Dario Latella*, Informazione societaria e tutela delle minoranze nelle società quotate, in: Mario Campobasso/Vincenzo Cariello/Vincenzo Di Cataldo/Fabrizio Guerrera/Antonella Sciarrone Alibrandi (ed.), Società, banche e crisi d'impresa – Liber Amicorum P Abbadessa, 2014, vol. 1, p. 775 (who suggests a broad interpretation of this rule that is to be applied to other cases by analogy).

140 Italian Civil Code Article 2381(5): executive directors should inform the board on most relevant transactions decided by controlled companies; Italian Civil Code Article 2403bis(2): the auditing board can ask the board of directors to disclose information related to controlled entities; Italian Civil Code Article 2497: liability of the controlling entity for damages suffered by controlled companies; Unified Act on Finance Article 151(1): the supervisory board of listed companies can require information directly to supervisory boards of controlled companies.

141 *Giovanni E. Colombo*, Amministrazione e controllo, in: Serenella Rossi (ed.), Il nuovo ordinamento delle società, 2004, p. 182; *Giorgio M. Zamperetti*, Il dovere di informazione degli amministratorri nella governance delle società per azioni, 2005, 221; *Paolo Montalenti*, "L'informazione nei gruppi societari", Società per azioni, corporate gov-

pany.[142] However, due to the concentration of share ownership of Italian listed companies, exchanges of information continuously occur between blockholders and directors.[143] These circumstances were originally reflected in the Italian regime, according to which "controlling entities" had also to comply with the duty to disclose inside information[144] and insider dealing could also be committed by persons "having a holding in the capital of the issuer" when they possess inside information.[145] This provision was likely to be at odds with general company law principles[146] and was eventually repealed in 2012.[147] Additionally, such a disclosure of information to selected shareholders risks violating the general principle of equality, which, as we have seen above, is still paramount for Italian listed companies. And yet, any shareholders who aim at selling their shares need to disclose pieces of inside information, to sound out potential investors and to allow potential buyers to assess the value of the shares ("due diligence"). Whether companies face a duty to facilitate shareholders who aim at selling their shares, is a further question shrouded in uncertainty, which legal scholars, with the clear aim to facilitate such transactions, seem to accept, despite the general duty of confidentiality and the principle of shareholders' equal treatment.[148] As a general principle, however, any situation in which a block trader, such as a majority shareholder, discloses information to the buyer, in order to finalize a deal and sell its shares, is not to be classified as a market sounding activity.[149]

ernance e mercati finanziari, 2011, 265–266 (board members of a controlled entity should provide information to the controlling entity if requested).

142 See *Vittorio Giorgi*, Libertà di informazione e dovere di riservatezza degli amministratori nei gruppi di società, 2005, p. 256; *Nicola Rondinone*, "Società (gruppi di)", Digesto delle discipline privatistiche (sezione commerciale), aggiornamento no. 5, 2009, 634 (members of the supervisory board of a controlled company do not face a general duty of providing information to the controlling entity).

143 *Berardino Libonati*, "Il ruolo dell'assemblea nel rapporto tra azionisti e società quotate", Rivista delle Società 2001, 105.

144 Unified Act on Finance, Article 114.1.

145 Unified Act on Finance, Article 184.

146 See *Giannelli/Mosca* (fn. 122), p. 16–18.

147 Legislative decree 184/2012, Article 1.10.a.

148 See: *Luca Picone*, "Trattative, *due diligence* e obblighi informativi delle società quotate", Banca borsa titoli di credito 2007, I/236, 256–257; *Umberto Tombari*, "Problemi in tema di alienazione della partecipazione azionaria e attività di *due diligence*", Banca borsa titoli di credito 2008, I/65.

149 ESMA Final Report, Draft technical standards on the Market Abuse Regulation, 28 September 2015, p. 22 para 70.

3.2. The United Kingdom

a. The Market Abuse Regime

U.K. insider dealing prohibition is also based upon a dual system. First, insider dealing is a criminal offence entailed in the Criminal Justice Act 1993, which requires a subjective element, or *mens rea,* for being punished.[150] Secondly, insider dealing is also punished through an administrative offence,[151] which, technically speaking, does not require *mens rea.* This second prong of the U.K. regime, however, has been recently amended through the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016.[152] The 2016 regulation, in particular, repealed sections 118 to 122(a) from the Financial Services Market Act.[153] The reason is, of course, that insider dealing is now entailed in a EU regulation having direct effect in the U.K. as a Member State of the EU, with the consequence that the former sections 118–122 of the Financial Services Market Act have become redundant. The logic of the reform is that the entire regulation of insider dealing, including the market sounding regime, is now governed by the directly applicable MAR, so that any market soundings will be exclusively assessed in light of the provisions of Article 11 of this Regulation.

Market soundings have also attracted much attention in the U.K. financial market.[154] In this respect, since 2005 the FSA/FCA handbook has specified which factors should be taken into account to assess whether a disclosure is made "in the proper course of the exercise of [an] employment, profession or duties".[155] In particular, any disclosures should be "accompanied by the imposition of

150 Criminal Justice Act 1993, s. 52–64.

151 Financial Services Market Act, s. 123. On the development of British rules on insider dealing, and the need to implement the first directive on this matter, see, *Paul L. Davies*, "The European Community's Directive on Insider Dealing: From Company Law to Securities Market Regulation?", Oxford Journal of Legal Studies 1991, 92.

152 The Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016, Statutory Instrument 680/2016, s. 9. Ironically, this piece of legislation was approved on June 29, 2016 and entered into force on July 3, a few days after the "Brexit" referendum.

153 Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016, s. 9(3).

154 It is interesting to note that, in the U.K. market, IPOs are normally implemented through "bookbuilding" proceedings, which have replaced the more traditional process based on the role of an underwriter. *Eilís Ferran/Look C. Ho*, Principles of Corporate Finance Law, 2014, p. 372.

155 FCA Handbook MAR 1.4.5. These provisions are based upon Financial Services Market Act s. 118(3) which specifies that disclosures are unlawful unless made "in the proper course of the exercise of [an] employment, profession or duties."

confidentiality requirements", should be "reasonable" and, among other factors, should aim at facilitating a "commercial, financial or investment transaction".[156] Additionally, the questions arise as to whether an investor can refuse to be wall-crossed and in which circumstances an investor refusing to be wall-crossed can rely on the issuer's commitment to discuss a future transaction without transferring inside information.

The FSA (now FCA)[157] addressed market soundings in a final notice rendered in 2012 upon request of *David Einhorn.*[158] David Einhorn was a portfolio manager (and sole shareholder) of a US based investment company (Greenlight Capital Inc), which held about 13% of share capital of the British company Punch Tavern plc. Punch planned to raise its capital and issue new shares, and to this aim it entered into discussion with selected potential investors, in order to gauge their interest in subscribing those newly issued shares. While other investors accepted the receipt of inside information and signed specific non-disclosure agreements, Mr Einhorn explicitly refused to be "wall-crossed" in any conversations related to possible transactions or operations envisaged by Punch. Mr Einhorn only agreed to have a telephone conference call with a broker, acting on behalf of Punch, under the assumption that it should be on a "non-wall-crossed basis". Nevertheless, during this conversation the broker referred to a possible issue of new shares by Punch, aimed at repaying convertible bonds. Following this call, Mr Einhorn decided to sell part of Greenlight's shareholding in Punch (which was hence reduced from 13.3% to 8.98%). After the announcement of the raising of new capital, the share price fell by almost 30%; consequently, by selling part of its investment in Punch, Mr Einhorn avoided a loss that would have been much more significant had he retained all shares. Mr Einhorn explicitly asked not to be wall-crossed and not to receive inside information, and indeed the conversation with the broker was set on quite general and hypothetical terms. In this regard, it is worth remembering that Greenlight mainly invested in mispriced shares, and, after his conversation with the broker, Mr Einhorn understood that Punch's profile may not have fitted Greenlight's strategies. Eventually, Mr Einhorn also replied that he only sold 4% of Punch's shares, showing that he was not sure that Punch was really about to issue new equity shares. The FSA rejected Mr Einhorn's arguments and, as a consequence, imposed on him and Greenlight a penalty for violation of insider dealing. The FSA, in particular, hold that, given Mr Einhorn's experience, "it should have been apparent to him

156 See FCA Handbook MAR 1.4.5.

157 In 2013 the Financial Conduct Authority (FCA), acting as U.K. Listing Authority as delegated by the Financial Services Market Act, replaced the former Financial Service Authority (FSA).

158 *FSA*, Decision Notice 12 January 2012.

that the information he received [...] was confidential and price sensitive" and, therefore, that it was a "serious error" not having sought for legal advice in this regard before selling Punch's shares, despite its explicit request of not being wall-crossed.[159]

Therefore, it is made clear that any investors which enter into conversations with a company on future possible transactions, such as the issue of new shares, should autonomously assess whether the information received falls within the definition of "inside information", regardless of a formal statement that such conversations were held on a "non-wall-crossed basis". This rigid interpretation of subjective factors aims at deterring insider dealings concealed behind the veil of "non-wall-crossed" conversations. This decision is clearly one of the motives behind the decision to explicitly regulate market soundings in the new Market Abuse Regulation, which clarifies that the recipient of information in a market sounding proceeding should autonomously assess whether inside information was communicated or not, regardless of their request to not be wall-crossed.[160]

b. Directors' Duties and the Principle of Equal Treatment of Shareholders

The same questions that we have analyzed with regard to the Italian regime obviously arise in a sophisticated financial market such as the British one. First of all, during securities' issuances, the question arises as to whether selective disclosures violate directors' fiduciary duties. In this respect, it is worth remembering that English law is reluctant to accept the idea that directors owe fiduciary duties to individual shareholders,[161] unless special relations between directors and shareholders exist that give rise to fiduciary duties to individual shareholders.[162] As a general principle, indeed, directors should act in good

159 In this regard, it is necessary to remember that under the original version of s. 123 FSMA, the FSA could decide not to impose penalties if there were "reasonable grounds for it to be satisfied that" the person whose actions are discusses either "believed, on reasonable grounds, that his behaviour did not fall within" the definitions of insider dealing or "took all reasonable precautions and exercised all due diligence to avoid behaving in a way which fell within" the definition of insider dealing. Financial Services Market Act, s. A123 (2). See *Gullifer/Payne* (fn. 52), p. 607. The new version of s. 123 FSMA, however, does not mention that the author should have "believed, on reasonable grounds" that his behavior was not insider dealing.

160 Article 11.7. MAR.

161 *Percival v Wright*, 23 June 1902, [1902] 2 Ch 421 (Chancery Division).

162 *Peskin v Anderson,* 14 December 2000, [2001] 1 BCLC 372 (Court of Appeal); *Sharp v Blank* [2015] EWHC 3220 (Chancery division). See *Paul Davies/Sarah Worthington*, Gower & Davies Principles of Modern Company Law, 10th ed., 2016, p. 467–469.

faith "to promote the interest of the company as a whole",[163] meaning present and future shareholders collectively.[164] This principle, however, does not clearly answer the question as to whether (and if yes, to what extent) a general duty of shareholders' equal treatment exists.

Under English company law, as a general rule of construction, the relations between shareholders and their company are governed by a presumption of equality, unless the articles of association provide for explicit preferential treatments of certain classes of shares.[165] Additionally, a possible hurdle in the way of shareholder discriminations may be erected by the proper purpose doctrine,[166] which requires assessing in an objective manner whether a certain transaction – such as issuing new shares – was underpinned by an "improper purpose" and whether such purpose was the substantial purpose envisaged by directors.[167] In the words of Wilberforce J in the decision *Howard Smith Ltd v Ampol Petroleum Ltd*, directors "are of course entitled to offer advice, and bound to supply information, relevant to the making of such a decision [launching an offer for shares], but to use their fiduciary power solely for the purpose of shifting the power to decide to whom and at what price shares are to be sold cannot be related to any purpose for which the power over the share capital was conferred upon them."[168]

In several decisions, directors were deemed to be acting for improper purposes when they issued new shares to selected investors or shareholders with the aim of altering the shareholder composition, defeating a takeover attempt, and ultimately fostering their control.[169] Furthermore, a principle of equal treatment

163 Companies Act 2006 s. 172(1).

164 *Andrew Keay*, Direcors' Duties, 2014, p. 141; *Davies/Worthington* (fn. 162), p. 465–466.

165 *Birch v Cropper,* 9 August 1889, [1889] 14 App Cas 525 (House of Lords) (equal distribution of assets during a company's winding up).

166 Companies Act 2006, s. 171 (b): directors must "only exercise powers for the purposes for which they are conferred".

167 *Howard Smith Ltd v Ampol Petroleum Ltd*, 14 February 1974, [1974] Ac 821 (Privy Council).

168 *Howard Smith Ltd v Ampol Petroleum Ltd*, 14 February 1974, [1974] Ac 821 (fn. 167), 838 (PC).

169 See: *Punt v Symons & Co Ltd,* 17 June 1903, [1903] 2 Ch 506 (Chancery Division); *Piercy v S. Mills & Co*., 22 July 1919, [1920] 1 Ch 77 (Chancery Division); *Hogg v Cramphorn Ltd* 18 October 1967, [1967] Ch 254 (Chancery Division); *Howard Smith Ltd v Ampol Petroleum Ltd,* 14 February 1974 [1974] AC 821 (Privy Council); *Extrasure Travel Insurances v Scattergood,* 22 July 2002, [2003] 1 BCLC 598 (Chancery Division). See also *Madoff Securities International Ltd (in liquidation) v Raven et al.,* 18 October 2013, [2013] EWHC 3147 (Queen's Bench Division Commercial Court), at 199, where Popplewell J held, albeit only *obiter dictum*, that the proper purpose doctrine triggers a fault-based test, not an objective test.

of all shareholders who are in the same position is entailed in the second company law directive, with regard to capital increase or decrease and share repurchases,[170] and in the transparency directive, with regard to information to shareholders.[171] These principles partially reflect previous common law rules, which maintain that, in a capital reduction and in a company's liquidation, assets should be repaid and losses are to be shared by respecting the ranking order of each class of shares.[172]

Nevertheless, English company law does not entail a general and overarching duty of equal treatment of shareholders, just a principle of fair treatment. This issue was clearly addressed in the case *Mutual Life Insurance Co v The Rank Organization Ltd.*[173] Rank Organization was a British company that decided to issue new shares, by granting a pre-emptive right to existing shareholders. Directors of the issuing company, however, decided to exclude from the offer all shareholders who were resident in the US and Canada, in order to avoid the application of US and Canadian securities law, including a duty to register in those jurisdictions and to comply with their securities regulation. US and Canadian securities regulation, indeed, normally applies "extraterritorially" to any transactions addressed to a certain number of US or Canadian residents.[174] The plaintiff challenged such a decision for being "oppressive"[175] due to its discriminatory nature. In rejecting this claim, Gourdin J stressed that Rank's directors acted in good faith in the interests of the company as a whole, since the risk of facing a duty to comply with foreign law in that specific case was a sufficient justification for such differential treatment.[176]

170 Directive 77/91/EEC of 13 December 1976, Article 46. In the event of a share repurchase, the Companies Act protects shareholders by considering market repurchase as the normal method of share repurchase, which implies a general preference for equal treatment among shareholders.

171 Directive 2013/50/EU of 6 November 2011, OJ 6.11.2013 L294/13, recasting Directive 2004/109/EC, Article 17. This principle is implemented by the FCA Disclosure and Transparency Rules, 6.1.3.

172 *Birch v Cropper,* 9 August 1889, [1889] 14 App Cas 525 (House of Lords); *Re Chatterley Whitfield Collieries Ltd,* 30 July 1948, [1948] 2 All ER 593 (Court of Appeal).

173 *Mutual Life Insurance Co v The Rank Organization Ltd,* 21 December 1981, [1985] BCLC 11 (Chancery Division).

174 See, *Stephen J. Choi/Andrew T. Guzman*, "Internalization of securities: the dangerous extraterritoriality of American securities law", Northwestern Journal of International Law & Business 1996, 207; *Milosz Morgut*, "Extraterritorial Application of US Securities Law", European Business Law Review 2012, 548.

175 Companies Act 1948, s. 210. The action for "oppression" was the predecessor of the unfair prejudice action introduced in the Companies Act 1985, s. 459 (now: Companies Act 2006, s. 994).

176 *Mutual Life Insurance Co v The Rank Organization Ltd,* 21 December 1981, [1985] BCLC 11 (fn. 173), para. 21 (CD). In doing so, Gourdin J applied the general common

This decision clearly shows that, if directors in good faith believe that special reasons exist in the interest of the members as a whole (meaning present and future shareholders), an unequal or discriminatory treatment of shareholders may be justified. Turning our attention back to market sounding activities, we can conclude that selective disseminations of information are not *per se* unlawful, yet they need to be justified by objective motivations in the interest of the company as a whole. The aim of gauging the interest of specific investors in order to make an offer of shares possible is likely to fall within this category, and unless directors' substantial purpose was not to alter the shareholder composition and foster their power.

c. Shareholders' Preemptive Right

A further obstacle in the way of share issuances is posed by shareholders' preemptive right, aimed at protecting current shareholders against wealth transfers and a dilution of their position in the company. According to the Companies Act 2006, new "equity securities" must be offered to existing shareholders in proportion to the nominal value of capital held by each shareholder.[177] The Articles or a special resolution, however, can disapply pre-emptive right, provided that such disapplication is duly authorised by the general meeting of shareholders. Such authorisations are to be recommended by directors, who should issue a written statement on the reason for excluding the pre-emptive right and on the justification of the price of newly issued shares.[178] A disapplication of pre-emptive right, therefore, does not need to be justified by special reasons in the interest of the company, provided that the specific procedure set forth in the Companies Act has been respected and directors have acted in

law rule that directors' fiduciary power should be exercised bona fide in the interest of the company: see Lord Greene in *Re Smith and Fawcett Ltd,* 27 March 1942, [1942] Ch 304, at 306. The reason given by Gourdin J was followed by Arden J in *Re BSB Holdings Ltd* (No 2), 28 July 1995, [1996] 1 BCLC 155 (Chancery Division). Before this line of cases, see also *Gaiman v the National Association for Mental Health,* 25 March 1970, [1970] 2 All ER 362 (Chancery Division): the Articles of a company limited by guarantee gave directors the power to request shareholders to resign; directors used this power against a shareholder, who challenged – unsuccessfully – this decision for breach of directors' fiduciary duties; Megarry J argued that "principles of natural justice" could apply to a company formed under the Companies Acts.

177 S. 561 (1)(a) Companies Act 2006. Equity securities are (a) ordinary shares in the company (shares other than shares that as respects dividends and capital carry a right to participate only up to a specified amount in a distribution) and (b) rights to subscribe for, or to convert securities into, ordinary shares in the company (S. 560 Companies Act 2006).

178 Companies Act 2006, s. 568.

conformity to their duties. Regarding issues of shares to the public, one of the most controversial questions is to what extent new shares can be issued at a discount to facilitate the success of their allotment. As a general fiduciary duty, directors should promote the success of the company in the interests of the members as a whole and, therefore, in principle they should obtain the best price available for newly issued shares.[179] Nevertheless, allotments at discount are a normal practice to facilitate share issuances.[180]

d. Sale of Treasury Shares

Finally, we should address sales of treasury shares, which are often conducted by way of accelerated bookbuilding. In this respect, the Companies Act 2006 grants current shareholders a pre-emption right with regard to shares held in treasury by the issuing company,[181] unless such right is waived according to the provisions set forth in the Companies Act. In this respect, it is worth mentioning that a common strategy for avoiding pre-emptive right for modest share issuances or sales is the "vendor placing", whereby the issuing company allots shares to a third party (the "vendor") in exchange for an asset, while the vendor immediately sells these shares to the market for cash. In these cases, only a moderate discount from the market price is acceptable.[182]

179 *Lowry v Consolidated African Selection Trust Ltd*, 8 May 1940, [1940] AC 648 (House of Lords).

180 *Shearer v Bercain,* 7 March 1980, [1980] 3 All. E.R. 295 (Chancery Division); *Re Sunrise Radio Ltd,* 13 November 2009, [2009] EWHC 2893 (Chancery Division). According to FCA listing rules, listed companies must not offer new shares at a discount of more than 10% of the "middle market price of those shares": FCA Handbook LR 9.5.10. Additionally, we should mention that secondary offers are normally made at a discount between 30% and 40% to the TERP (such discount was between 15% and 20% in the 1980s): Association of British Insurers, Encouraging Equity Investment: Facilitation of Efficient Equity Capital Raising in the UK Market, July 2013, 32.

181 S. 560(3) Companies Act 2006. See *Ferran/Ho* (fn. 154), p. 125; *Davies/Worthington* (fn. 162), p. 318.

182 Pre-Emption group, "Disapplying preemption right", 2015, stating that a discount of 5% is considered acceptable, beyond which limits shareholders should be granted a claw back right. The Pre-Emption Group is a private entity, representing listed companies, investors and intermediaries, with the aim of issuing guidelines for the exercise or disapplication of the preemption right: http://www.pre-emptiongroup.org.uk/About-Us.aspx, last visited: 5 February 2019.

4. Conclusions

This article has addressed the interaction between market sounding provisions of Article 11 MAR and national company law rules and principles. To this aim, we have analysed such interaction in Italy and the U.K.: while the former is a typical example of bank-led system where most companies, including listed companies, are closely-held, the latter is one of the models of market-led systems, where the capital market is highly developed and sophisticated. The major point of this article is to investigate the intersection between uniform rules on market sounding and national company law rules and principles, such as director fiduciary duties and principles of shareholders' fair or equal treatment. In particular, the following situations, in which companies or shareholders may sound out the market, have been analyzed: (a) secondary offerings; (b) accelerated bookbuilding when the company acts as offeror; (c) accelerated bookbuilding when a shareholder acts as offeror.

In the latter situation, namely when a selling shareholder sounds out the market, no national company law rules and principles exist in the U.K. and in Italy that may contradict the uniform rules of the regulation. By contrast, this article has shown that, when market sounding is undertaken before either secondary offerings or selling of treasury shares, the question arises as to whether domestic director duties and principles of shareholders' fair or equal treatment might be at odds with a uniform application of market sounding rules.

This article has shown that the Italian and British regimes move from partially different starting points. In Italy, the statutory principle of shareholder equal treatment is drafted in a rigid fashion, so that it might be an obstacle in the way of market soundings. In particular, listed companies should follow a strict principle of shareholders' equal treatment, which conflicts with the practice of disseminating information to selected shareholders in order to gauge their opinion on the envisaged transactions. In this regard, it is to be noted that scholars increasingly agree that the principle of equal treatment should be relaxed in order to allow selective disclosure, but this issue is still controversial and it is uncertain how the Italian regime will develop in the years to come. English company law rules and principles, by contrast, are generally more flexible and can be adapted to financial market needs, including issuers' aim to gauge the opinion of selected investors on an envisaged transaction. Nevertheless, companies' agents should carefully consider domestic fiduciary duties even though they fully comply with market sounding procedures regulated through the MAR and the FCA provisions. One of the possible explanations of such differences might be the diverging ownership structures of these countries. It is well-known, in particular, that families still control most Italian listed companies, while U.K. companies are predominantly widely-held.

The main tenet of this article is that company law and securities law might follow diverging principles and might contradict each other. This is also true with regard to provisions entailed in directly applicable regulations. The reason is that company law regimes, despite the intense harmonising effort of EU institutions, are still in member states' competence. Therefore, even though companies' agents comply with market sounding procedures, it is to be checked whether domestic fiduciary duties are respected. Additionally, it is unlikely that the *lex specialis* position of national company regimes will change in the future. Company law regimes, which are enacted by national parliaments and courts, respond to domestic communities and constituencies and hence reveal significant conceptual differences across jurisdictions.[183] Company law, in other words, seems to be partially embedded in local societies and in their power structures,[184] despite the increasing harmonisation effort at the EU level. Financial markets, by contrast, are increasingly governed by uniform rules decided at a supranational level, such as the MAR; these uniform rules do not respond to national communities and constituencies, but to a broader cross-border "cosmopolitan" community of business people and investors.

Rules on market soundings are a typical example of this contradiction: on the one hand, a selective dissemination of information might violate basic principles of equality or director duties rooted in national company law regimes; on the other hand, such disseminations are often necessary to gauge the opinion of potential investors and to make a share issuance possible. Despite an unavoidable tension between uniform financial rules and national company regimes, the increasing relevance of financial markets is likely to trigger a spontaneous "bottom-up" convergence of different models towards rules facilitating market transactions. Nevertheless, given the differences of ownership structures and social actors across European countries, inconsistencies between company law financial rules might always emerge, and it is to be hoped that national policy makers and courts become increasingly aware of such hidden discrepancies and fragmentation in order to rationally deal with them.

183 See for instance *Nicholas Foster*, "Company Law Theory in Comparative Perspective: England and France", American Journal of Comparative Law 2000, 573.

184 On the distinction between legal institutions "organic" to a society and its power structure and legal institutions that are merely "mechanical" or "technical", see *Otto Kahn-Freund*, "On Uses and Misuses of Comparative Law", Modern Law Review 1974, 1.