CAN DISSEMINATION OF TRUE INFORMATION CONSTITUTE MARKET MANIPULATION?

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This article discusses whether dissemination of true information can amount to market manipulation under the 2014 Market Abuse Regulation (MAR). Market manipulation typically involves misinformation, which can be seen as a form of lying, but it can also occur when material facts are omitted, making truthful statements misleading. A reasonable investor test helps determine when true information becomes misleading and thus potentially violates the ban on market manipulation under MAR. Nordic case law, which is discussed in this article, highlights how misleading statements, even if factually correct, can violate the ban on market manipulation.

1 INTRODUCTION

Bans on giving false or misleading information have existed for ages.[1] 'You shall not lie' is, for example, part of the Ten Commandments in the Bible. In contract law, the beneficiary of a promise is often excused from breaking the promise if the promise is extracted by lies on the grounds that it is fraud.[2] In capital market law, this ban is referred to as the ban on market manipulation, in which the manipulator misinforms the other party either with verbal communication, spoken or written, or with non-verbal communication, usually conveyed through behaviour, for example securities transactions.[3]

If misinformation, which is another form of lying, is the essence of market manipulation, it raises the question of whether it is possible to commit market manipulation by disseminating true information. The aim of this article is to clarify whether dissemination of true information can constitute market manipulation according to the 2014 Market Abuse Regulation (MAR)[4] and, if so, in what instances can such dissemination amount to market manipulation. Without giving away the whole ending (this article's conclusions), it can be revealed that market manipulation can indeed encompass dissemination of true information. The more difficult part is determining when dissemination of true information can constitute market manipulation.

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1 Jesper Lau Hansen, *Introduktion Til Selskabsretten Og Kapitalmarkedsretten* (Jurist-og Økonomforbundets Forlag 2014) 123.

2 Robert Cooter and Thomas Ulen, *Law & Economics* (6th edn, Pearson Education International 2011) 297. See, e.g., Art 30 of the Icelandic act on contracts, agency and void legal instruments No 7/1936 (*i. Lög um samningsgerð, umboð og ógilda löggerninga*).

3 See Jesper Lau Hansen, 'The Trinity of Market Regulation: Disclosure, Insider Trading and Market Manipulation' (2003) 1 International Journal of Disclosure and Governance 82, 92. See also Hansen, *Introduktion Til Selskabsretten Og Kapitalmarkedsretten* (n 1) 123.

4 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) [2014] OJ L173/1.

Section 2 provides an overview of the ban on market manipulation in MAR and then presents the essential elements of the offense. Section 3 focuses on verbal manipulation and various forms of dissemination in relation to verbal manipulation. The section examines the circumstances in which the dissemination of false information constitutes market manipulation. It also explores why the complete omission of material facts - where no information is disseminated - does not fall under the ban on market manipulation as defined in MAR.. Nordic case law is examined to address these issues. Section 4 concerns whether disseminating true information but withholding material facts can constitute market manipulation.

2 MISINFORMATION – AN ESSENTIAL ELEMENT OF MARKET MANIPULATION

2.1 THE BAN ON MARKET MANIPULATION IN MAR

The ban on market manipulation in the form of misinformation is an old phenomenon in Europe and existed in many countries long before the harmonization of the concept in the EU with the adoption of the 2003 Market Abuse Directive (MAD).[5] One of the first and most famous criminal cases of market manipulation in Europe dates all the way back to 1814 in the United Kingdom (U.K.) – the case of *Rex v de Berenger*,[6] which is a classic example of verbal manipulation (dissemination of false or misleading information).

The case concerned the fake death of Napoleon Bonaparte, the emperor of France. The U.K. had been at war with France,[7] and de Berenger, along with seven other members of the English aristocracy, conspired to deliver false news of Napoleon's death and the likely peace with the French.[8] De Berenger, dressed as a French military officer, appeared in the English town of Dover and pretended to have just arrived from France. He delivered the news of Napoleon's defeat, which would consequently bring peace between the two countries.[9] Soon after the 'good' news spread, stockbrokers and other people started buying government debt notes, pushing their price significantly higher. De Berenger and his seven conspirators were then able to sell their holdings with the same debt notes which they had bought a week earlier and made a considerable profit.[10]

They were all charged with conspiracy by 'spreading false rumours and reports in different places, to occasion a rise in the price of the public funds of the country, […] and thereby to injure all those subjects who might purchase stock on that particular day'.[11] The defendants argued that this was not a crime because this particular behaviour was not

[5] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L96/16.
[6] *Rex v de Berenger* (1814) 105 ER 536, 3 Maule & S 67.
[7] ibid 536-537.
[8] See, e.g., Stuart Bazley, *Market Abuse Enforcement: Practice and Procedure* (Bloomsbury Publishing 2013) 6.
[9] William Brodie Gurney, *The Trial of Charles Random de Berenger, Sir Thomas Cochrane Etc.* (Tower-Hill 1814) 589.
[10] *Rex v de Berenger* (n 6) 536-537. See also Hubert De Vauplane and Odile Simart, 'The Concept of Securities Manipulation and Its Foundations in France and the USA' (1997) 23 Brooklyn Journal of International Law 203, 206–207. See further discussion in Bazley (n 8) 6–7.
[11] Gurney (n 9) 588.

prohibited by law.[12] The courts dismissed it, saying that affecting the price of the government debt notes was not per se a crime but that 'if a number of persons conspire by false rumours to raise the funds on a particular day, that is an offence; and the offence is, not in raising the funds simply, but in conspiring by false rumours to raise them on that particular day'.

The crime was not raising the price of the debt notes per se but raising it using false information. De Berenger and the other defendants were found guilty of conspiracy to commit fraud and sentenced to prison (six of them) and to pay a hefty fine.[13]

Even though the ban on market manipulation has a relatively short history in capital market regulation of the Nordic countries[14] compared to the U.K. and the U.S., a ban on misinformation in securities transactions has been part of the countries' criminal codes, except for Iceland's, since the early 1930s.[15] Denmark has, for example, had a provision in its criminal code since 1930 criminalizing the spreading of false information that could affect the prices of securities.[16] Sweden, Norway and Finland have had similar provisions in their criminal codes.[17] Instead of having this kind of provision in the criminal code, Iceland chose to incorporate it into the Companies Act of 1978,[18] which criminalized spreading wrong or misleading reports that can affect the sales or the price of shares in the company.[19] It was not until the midst of the 1990s that a specific ban on market manipulation was introduced in the countries' capital market regulation.[20] The Finnish securities trading act did, however, have a provision since 1985 on improper business practices in securities trading, which had been applied to market manipulation.[21]

In the European Union (EU), a step was taken towards a harmonized regime on market manipulation in 1999, when the European Commission expressed its intention in a

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[12] The judgment stated 'that not any crime, known to the law, is alleged in the count'. See *Rex v de Berenger* (n 6) 537.

[13] Gurney (n 9) 599-600. See also Emilios E Avgouleas, *The Mechanics and Regulation of Market Abuse: A Legal and Economic Analysis* (Oxford University Press 2005) 122. It says that the defendants were also stripped of their titles and removed from public office. See further discussions of the judgment in Jan Eichelberger, *Das Verbot Der Marktmanipulation (§ 20a WpHG).,* vol 199 (1st edn, Duncker & Humblot 2006) 1.

[14] Iceland, Norway, Denmark, Sweden and Finland.

[15] Jesper Lau Hansen, 'MAD in a Hurry: The Swift and Promising Adoption of the EU Market Abuse Directive' (2004) 15(2) European Business Law Review 183, 205 (fn 90).

[16] Art 296 of Criminal Code No. 126/1930 (*D. Straffeloven*). See Jesper Lau Hansen, *Informationsmisbrug. En Analyse Af de Centrale Bestemmelser i Børsrettens Informationsregime* (Jurist-og Økonomforbundets Forlag 2001) 112. See also Jens Madsen, 'Kursmanipulation' [2000] Ugeskrift for retsvæsen 569, 573. The original Art 296(1) of the Danish Criminal Code states the following: 'Med Bøde, Hæfte eller med Fængsel indtil 2 Aar straffes den, som, uden at Betingelserne for at anvende § 279 foreligger […] udspreder løgnagtige Meddelelser, hvorved Prisen paa Varer, Værdipapirer eller lignende Genstande kan paavirkes'.

[17] In Sweden, the provision can be found in the Criminal Code No. 1962:700 (*brottsbalken*) under chapter 9 on fraud. See Hansen, *Informationsmisbrug* (n 16) 151.See also Catarina af Sandeberg, *Marknadsmissbruk: Insiderbrott Och Kursmanipulation* (Iustus 2002) 101. The Norwegian provision is situated in art. 273 of Criminal Code No. 10/1902 (*straffeloven*). See Odd-Harald B Wasenden, *Energimarkedsrett: Om Informasjonsplikt Og Markedsatferd i Det Finansielle Kraftmarkedet* (Cappelen Akademisk forlag 2007) 408. See also Hansen, *Informationsmisbrug* (n 16). Finally, the Finnish provision is situated in Art 3 in chapter 51 of Criminal Code No. 39/1889 (Straffelagen). See Mårten Knuts, *Kursmanipulation På Värdepappersmarknaden* (Finska juristföreningen 2010) 6 (fn. 11). See also Madsen (n 16) 570.

[18] Art 150 of Act No. 32/1978 on Public Limited Liabilities Companies (*Lög um hlutafélög*). Currently, the provision can be found in Art 154 of Act No. 2/1995 on Public Limited Liabilities Companies (*Lög um hlutafélög*).

[19] See, e.g., Jesper Lau Hansen, *Nordic Financial Market Law: The Regulation of the Financial Markets in Denmark, Finland, Iceland, Norway and Swede*n (Jurist-og Økonomforbundets forlag 2003) 199

[20] Hansen, 'MAD in a Hurry' (n 15) 205 (fn. 90). See also Hansen, *Informationsmisbrug* (n 16) 150–159.

[21] See, e.g., Hansen, *Informationsmisbrug* (n 16) 156-159.

report from 1999 to introduce a directive on market manipulation. Inspired by a recent major reform in the U.K., it was later decided to combine in one directive rules on market manipulation, insider dealing and disclosure obligation. The directive, referred to as MAD, was adopted in December 2002 and then implemented in national legislation of most Member States in 2005. The same applied to the EEA EFTA States,[22] which included and still include Iceland and Norway.[23] One of the main objectives of the directive was to 'heighten investor protection and make European financial markets more secure and more attractive for investors'.[24] More than six years after the adoption of MAD, the Commission announced its intention to review the directive – one of the many regulatory responses of the EU to the global financial crisis that started in 2007.[25]

Initially, the Commission did not intend to make any changes to the definition of market manipulation in the upcoming review, even though it pointed out that the existing definition with its broad concepts[26] could possibly explain why regulators had difficulties in detecting and sanctioning market manipulation more frequently.[27] Despite the Commission's initial intention, several changes were made to the rules on market manipulation when MAR was adopted in 2014, along with a directive on criminal sanctions for market abuse (MAD II).[28] These changes included extending the scope of the ban to further trading venues and financial instruments and to cover attempted manipulation.[29] The so-called core definition of market manipulation did not, however, change materially from the time MAD was adopted and is worded in the following way in article 12(1) of the regulation:

> (a) entering into a transaction, placing an order to trade or any other behaviour which:
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> (i) gives, or is likely to give, *false or misleading signals* as to the supply of, demand for, or price of […]; or
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> (ii) *secures*, or is likely to secure, the price of […] at an *abnormal or artificial level* […]
>
> (b) entering into a transaction, placing an order to trade or any other activity or behaviour which affects or is likely to affect the price of […], which employs a fictitious device or any other form of *deception or contrivance*;
>
> (c) disseminating information […], which gives, or is likely to give, *false or misleading signals* as to the supply of, demand for, or price of, […] or is likely to secure, the price […] at an *abnormal or artificial level*;

[22] Decision of the EEA Joint Committee No 38/2004 amending Annex IX (Financial services) to the EEA Agreement [2004] OJ L277/5.
[23] EFTA stands for European Free Trade Association. EEA stands for European Economic Area.
[24] Commission, "Commission welcomes Council agreements on Market Abuse and Financial Conglomerates Directives. Press release" (7 May 2002) IP/02/669 2.
[25] See, e.g., the discussion in Niamh Moloney, 'EU Financial Market Regulation after the Global Financial Crisis: "More Europe" or More Risks?' (2010) 47(5) Common Market Law Review 1317.
[26] Such as 'abnormal or artificial level', 'fictitious devices or any other form of deception or contrivance' and 'dominant position'. See European Commission, 'Call for Evidence. Review of Directive 2003/6' (2009) 15.
[27] ibid.
[28] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) [2014] OJ L 73/179.
[29] See Art 5 of MAD.

> (d) transmitting *false or misleading information* or providing false or misleading inputs in relation to a benchmark […], or any other behaviour which *manipulates* the calculation of a benchmark (*emphasis added*).

MAR entered into force in the EU Member States on 3 July 2016[30] but not until 2021 in the EEA EFTA states. The reason for this time gap is the legislative processes required to incorporate EU regulations, such as MAR, into EEA EFTA States' national law. The relevant EU act must be incorporated into the EEA Agreement with a Joint Committee Decision, which is aimed at getting approval from both sides. Following that, the EEA EFTA states have some time to implement the act into their national legislation. This applies to regulations and directives.[31] Although MAR had to be implemented into their national legislation, its wording remains consistent across all EU Member States and EEA EFTA States, albeit in different languages.

2.2 WHAT KIND OF BEHAVIOUR DOES THE BAN COVER?

Market manipulation can be committed in various ways, either through verbal or non-verbal manipulation. Verbal manipulation can be committed by disseminating information, orally or in writing, through the media, including the internet, or by any other means to manipulate a financial instrument, a related spot commodity contract, an auctioned product based on emission allowances[32] or a benchmark.[33]

In the case of non-verbal manipulation, the misinformation is communicated through some kind of behaviour, such as trades. The MAD definition only mentioned 'transactions or orders to trade'.[34] Because the scope of the ban was limited to financial instruments traded on a regulated market, it can be assumed that the ban only applied to transactions and orders to trade these financial instruments, irrespective of whether the transaction (or the order) actually took place on that market.[35] Consequently, the ban did not cover other behaviour, such as preventing shares from being sold on the market to make sure the share price would not go down – only transactions and orders to trade.

The MAR definition is considerably broader, with its catch-all wording: 'transactions, placing orders to trade, or any other behaviour'.[36] This broad wording covers any kind of behaviour which manipulates financial instruments, related spot commodity contracts, auctioned based products based on emission allowances or benchmarks,[37] regardless of whether such behaviour takes place on a trading venue.[38]

Actions and omissions are included in the scope.[39] In the original MAR proposal, only 'actions' were mentioned, but after the European Parliament's first reading, 'omissions' was

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[30] Particular provisions applied from 2 July 2014. See Art 39(2) of MAR.
[31] See discussion in Standing Committee of the EFTA states – Subcommittee V on legal and institutional questions, "The two-pillar structure of the EEA – Incorporation of new EU acts" 16-532, 1-3.
[32] Cf. Art 12(1)(c) of MAR.
[33] Cf. Art 12(1)(d) of MAR.
[34] See Art 1(2)(a)-(b) of MAD.
[35] Cf. Art 9(1) of MAD.
[36] Cf. Art 12(1) of MAR.
[37] See a short discussion of this wording in Niamh Moloney, *EU Securities and Financial Markets Regulation* (Oxford University Press 2014) 717.
[38] Cf. Art 2(3) of MAR.
[39] Cf. Art 2(4) of MAR.

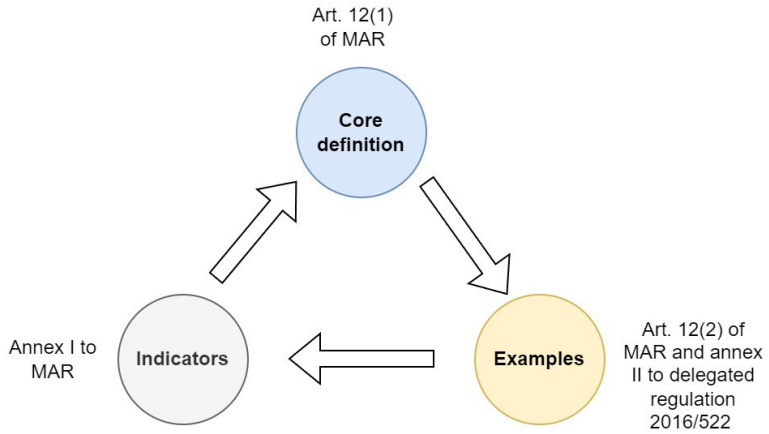
added to the scope.[40] It is easier to imagine examples of market manipulation committed through some kind of action – the most obvious ones would be transactions and orders to trade.

The scope also covers attempted market manipulation, which was not the case in MAD. This extension to the scope means that a person can be guilty of market manipulation in situations in which steps have been taken and there is clear evidence of an intention to manipulate the market but either an order was not placed or a transaction was not executed.[41]

2.3 TWO OBJECTIVE ELEMENTS: MISINFORMATION AND LIKELY EFFECT

The terms used in MAR to describe market manipulation,[42] such as 'manipulation', 'abnormal', 'artificial', 'fictitious' and 'contrivance', are open and, to some extent, vague words. Neither MAR nor any other EU legislation defines these terms. Instead, examples of market manipulation are given in Article 12(2) of the regulation and in an annex to a delegated regulation,[43] along with a non-exhaustive list of indicators of manipulative behaviour, as described in the following figure:

Figure 1: Market Manipulation Regime in MAR.[44]



Therefore, it is not obvious from the wording of the definition of MAR what the ban's objective elements are. However, an overall assessment of the text of MAD and MAR and related documents, along with extensive case law from the Nordic countries, shows that the core of the ban on market manipulation requires two objective elements: (i) material

[40] See European Parliament, 'Proposal for [MAR] – Outcome of the European Parliament's first reading' (18 September 2013) 12906/13 74.
[41] See European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) COM(2011) 0651 final - 2011/0295 (COD), 8.
[42] Also applies to MAD.
[43] See Annex II to Commission Delegated Regulation (EU) 2016/522 of 17 December 2015 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council for an exemption for certain third countries' public bodies and central banks, the indicators of market manipulation, the disclosure thresholds, the competent authority for notifications of delays, the permission for trading during closed periods and types of notifiable managers' transactions [2015] OJ L88/1 (2015 Delegated regulation on indicators of market manipulation).
[44] Based partially on a figure in David Moalem, 'Om Forbuddet Imod Markedsmanipulation' (2021) 4 Nordisk Tidsskrift for Selskabsret 48, 52.

misinformation;[45] and (ii) its likely effect[46] on a financial instrument's value.[47] The focus here is mostly on how the objective elements of market manipulation are described – *the actus reus* – and less on the mental elements of the conduct – *the mens rea* – which are a necessary element in placing criminal responsibility on the manipulator.

Misinforming, essentially, is giving false or misleading information to another person. This occurs when there is a discrepancy between what is communicated and what the person who disseminated the information believes to be true. If a person believes a fact to be A but says it is B, then this is misinformation, even if it turns out the fact really was B.[48] It matters what the person believed to be true when the information was disseminated. It can also be misinformation when the whole truth is not revealed. If someone knows a fact includes A, B, and C but only mentions A and B, it may be misleading or even false, depending on the circumstances.[49] The point of departure is what the disseminator knew or ought to have known was false or misleading.[50]

Not all misinformation is covered by the ban on market manipulation – only material misinformation. Even though the definition in MAR does not specify such a limit to the ban, this conclusion can be drawn from one of the recitals in MAR. Recital 47 of the regulation specifically states that spreading false or misleading information may 'consist of manifestly false information, but also wilful omission of material facts'. Even though this only refers to verbal manipulation, it also can apply to non-verbal manipulation because the principal thought is the same in both forms of manipulation: misinformation.[51]

Requiring misinformation to be material essentially means the misinformation would likely influence an investment decision made by a reasonable investor if he or she had known of the misinformation.[52] For example, in a *wash trade*,[53] the trade becomes misinforming because the market is unaware that the same person was acting as the buyer and seller in the trade. It is safe to assume that such misinformation would be considered material, but this must be assessed on a case-by-case basis. The materiality requirement can concern false

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45 See arguments presented in Andri Fannar Bergþórsson, 'What Is Market Manipulation?: An Analysis of the Concept in a European and Nordic Context' (2018) 2(2-4) Brill Research Perspectives in International Banking and Securities Law 1, 82–140, 171–176.

46 See arguments presented in ibid 245–258.

47 Or other instruments covered by the ban.

48 Hansen, 'The Trinity of Market Regulation' (n 3) 84.

49 See Hansen, *Informationsmisbrug* (n 16) 15–17.

50 See, e.g., the wording of Art 12(1)(c) of MAR, which requires that 'the person who made the dissemination knew, or ought to have known, that the information was false or misleading'. See also recital 47 of the regulation, which states, 'It is therefore appropriate not to allow those active in the financial markets to freely express information contrary to their own opinion or better judgement, which they know or should know to be false or misleading, to the detriment of investors and issuers'.

51 See also one of the examples of market manipulation in section B of the Annex to the European Commission, 'Proposal for a Directive of the European Parliament and of the Council on insider dealing and market manipulation (market abuse)' COM(2001) 281 final (2001 MAD Proposal): 'Making untrue statements of material facts' and 'Non-disclosure of material facts or material interests'.

52 Similar to the definition of 'significant effect' in the definition of inside information in Art 7(4) of MAR. According to the article, 'significant effect' 'shall mean information a reasonable investor would be likely to use as part of the basis of his or her investment decisions'.

53 The practice is defined as an arrangement to sell or purchase a financial instrument 'where there is no change in beneficial interest or market risk or where beneficial interest or market risk is transferred between parties who are acting in concert or collusion'. See Art 3(a) of section A of Annex II to Commission Delegated Regulation (EU) 2016/522 of 2015 Delegated regulation on indicators of market manipulation). See also indicator A(c) of Annex I to MAR.

information but also true information. As discussed in this section and section 4, verbal misinformation can be in the form of dissemination of false information but also misleading information, in which material true information is omitted. In both instances, the false information in the former and the true information in the latter, it is required that the misinformation is material.

The ban on market manipulation only covers behaviour that has an actual or a likely effect on the value of a financial instrument or other instruments covered by the ban. The most obvious case in which this requirement is fulfilled is when it has been established that the misinformation has had an actual effect (de facto) on a financial instrument's price.[54] It is, however, not necessary to establish that the misinformation had an actual effect on the value. As the definition is worded, a likely effect is sufficient to fulfil the requirement. That means that it is irrelevant whether there was an actual effect in the market; it is enough that there was a risk of such an effect.[55]

3 VERBAL MANIPULATION

3.1 INTRODUCTORY REMARKS

Verbal misinformation is essentially covered by Article 12(1)(c) of MAR, which entails disseminating information through the media, including the internet, or by any other means which gives or is likely to give false or misleading signals as to the supply of, demand for or price of instruments covered by the ban or is likely to secure the price of one or several instruments at an abnormal or artificial level, including the dissemination of rumours, where the person who made the dissemination knew or ought to have known that the information was false or misleading.[56] Based on the provision's wording, the offense (verbal market manipulation) has been committed when the communication has reached one or more market participants.

It is easier to comprehend when misinformation is communicated verbally, either in written or spoken language, than through non-verbal communication, such as through trading or placing orders in the markets. This difference is reflected in the list of indicators of manipulative behaviour in Annex I to MAR and the examples of manipulative behaviour provided in another annex in a delegated regulation. There are plenty of indicators and examples of non-verbal misinformation in the annexes but very little on verbal misinformation, except when verbal misinformation is combined with orders or transactions before or after the dissemination.[57] One example is to cause a price movement in the shares to profit from a previous held position or a planned transaction.[58] This manipulative practice has sometimes been referred to as *scalping*[59] and is very similar to practices called *pump and dump* and *trash and cash*.

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[54] Or other instruments covered by the ban.
[55] See Knuts (n 17) 229.
[56] This form of manipulation is also covered by Article 12(1)(d) on benchmark manipulation and Article 21 on disclosure or dissemination of information in the media.
[57] See indicator B(a) of Annex I of MAR and Art 12(2)(d) of MAR.
[58] See Art 1(a) of Section 2 of Annex II of 2015 Delegated regulation on indicators of market manipulation.
[59] See CESR, 'Market Abuse Directive – Level 3 – first set of CESR guidance and information on the common operation of the Directive' CESR/04-505b 12. See also, e.g., Knuts (n 17) 268.

Using verbal misinformation in a *pump and dump* scheme involves taking a long position in a financial instrument, such as shares,[60] and then disseminating false or misleading positive information about the shares to increase the share price and then sell the shares at the inflated price. The same applies to *trash and cash* schemes, but instead of taking a long position and spreading positive information, a short position is taken in the financial instrument and false or misleading negative information is spread about the instrument to decrease the price. When the price has fallen, the short position is then closed.[61]

To be able to determine whether dissemination of true information can constitute market manipulation and in what instances such dissemination can amount to market manipulation, it is necessary to examine all aspects of verbal manipulation.

3.2 DISSEMINATION OF FALSE INFORMATION

It might seem peculiar to differentiate between false and misleading information because both constitute misinformation, but there is a difference between the two. Giving false information essentially means that there is a discrepancy between what is communicated and what the person who disseminated the information believes to be true.[62] An example of such dissemination is a Swedish case from 2009 concerning Morphic Technologies.[63]

The defendant in the case had used his family's savings to buy shares in Morphic Technologies, which was traded on First North, a multilateral trading facility (MTF) in Stockholm. For over a year, the defendant spread information he pretended to have about the company in an online internet chatroom and then sold shares in the company. In the period between 2006 and 2007, he made a profit of about one million SEK.[64] He was charged with market manipulation for spreading several pieces of misleading information about the company. According to the court, the case's circumstances were undisputed: the defendant spread fabricated information about the company in the way it was stated in the indictment, and he had nothing to do with the company in question.

The court approached the misinformation part by assessing whether the information the defendant spread was likely to mislead other investors. It was not enough that the information was false; it had to be misleading. The court found that only the information that Morphic Technologies planned to build a production plant in the U.S. and that a cargo plane was almost full of Morphic's equipment was concrete enough to be possibly misleading. It was doubtful that the information the defendant shared in the internet chatroom about a possible establishment in the U.S. was likely to mislead others to buy or sell shares in Morphic. The information was, however, sufficiently specific, according to the court, that this could have been the result. The court concluded that it was impossible to rule out that some individuals who visited the chatroom had been careless enough to base their investment decision on the defendant's information and that the defendant should have

[60] Or other instruments covered by the ban on market manipulation.
[61] See Arts 4(c) and (d) of Section 1 of Annex II of 2015 Delegated regulation on indicators of market manipulation.
[62] See, e.g., the discussion in Susanne Kalss, 'Article 12. Market Manipulation' in Susanne Kalss et al (eds), *EU Market Abuse Regulation. A Commentary Regulation (EU) No 596/2014* (Edward Elgar Publishing 2021) 176.
[63] Judgment from Court of Appeal for Northern Norrland No. HovR B 459-08 from 5 February 2009 (*Morphic Technologies AB*).
[64] See p 2 of the judgment.

realized that his lie could have had such an effect. However, the court considered the effect of the information in the market so small that the defendant's behaviour did not constitute market manipulation and acquitted him.[65]

This judgment illustrates situations in which it has been established that the information was false and disseminated with the aim of inducing others to buy shares to pump up the price, but the lie was unlikely to fool anybody. It is therefore not sufficient that the misinformation is material, which was certainly the case with the production plant in the U.S.; it also must be believable. Such assessment falls under the second objective requirement of whether the information is likely to affect the value of the shares and is of course subjective and depends on the circumstances in each case.[66]

In addition, if attempted market manipulation had been punishable in Sweden at the time, the court may have convicted the defendant of an attempt because it had been established he fabricated the information he disseminated on the internet chatroom to induce others to buy shares in the company. With the adoption of the MAR, the scope of the ban in all Member States, including Sweden, has been extended to attempted manipulation.[67]

In a Danish case from 2016 known as the Neurosearch case, it was clear that the false information was likely to mislead other investors and thereby to affect the price of shares issued by a Danish biotech company called Neurosearch, which was listed on the Copenhagen Stock Exchange.[68] Unlike in the Morphic Technology case, the source of the misinformation was the company and not an internet chatroom.

On 3 February 2010, Neurosearch issued a company announcement to notify that the company had reached its primary endpoint in its research on a medicine for Huntington's disease. It was shown before the court that the market had big expectations for this research. The announcement caused the price of Neurosearch shares to rise from 85 to 168 DKK in a day and to 224 DKK in three days. According to the Danish financial supervisory authority (Finanstilsynet), the company's market value increased by more than 2 billion DKK.[69]

It was considered proven that the endpoint had not actually been reached as it was described in the announcement from Neurosearch. The appeal court,[70] therefore, concluded that the announcement had been likely to give wrong or misleading signals. It was also shown that the company's director had known that the information in the announcement was wrong and misleading and that the information published in the announcement could have a significant effect on the price. On those grounds, the court found the company guilty of market manipulation.

In the indictment and before the district court in this case, it was assumed that the company's director had used a warrant, which is a derivative that gave the director the right to buy shares in the company at a predetermined price, right after the announcement was published. The share price on the warrant was considerably lower than the shares' market price after the announcement. Based on that assumption, the district court found the director

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[65] See *Morphic Technologies AB* (n 63) p 5-7 of the judgment.
[66] See discussion on the second objective element of the ban on market manipulation in Section 2.3.
[67] See Art 15 of MAR.
[68] Judgment from the Supreme Court of Denmark No U 2016.16 H from 14 November 2016 (*Neurosearch – Supreme Court*). The page numbers are based on the judgment from the High Court of Eastern Denmark No U 2016.653 Ø (*Neurosearch – High Court*).
[69] See p 659 of the judgment.
[70] Referred to as the high court in Denmark.

guilty of market manipulation.[71] This situation is similar to the one in the Morphic Technologies case in that the false or misleading information was used to move the price of the shares to sell the warrants at an inflated price – a classic *pump and dump* scheme.

The appeal court in this case, however, concluded that the director did not use his warrant right after the announcement was published but almost a month later. Therefore, it was not proven, according to the appeal court, that the director had published the false and misleading announcement to profit from his warrant but only to protect the company's interests. He was acquitted even though the company was found guilty of market manipulation.[72] The Supreme Court confirmed the appeal court's reasoning and verdict.[73]

The director's acquittal is understandable to a certain extent because it could have been problematic for the prosecution to prove that the director was responsible for the false and misleading company announcement. However, bearing in mind his responsibility as the director of Neurosearch and that it had been established that he knew that the endpoint had not actually been reached as it was described in the announcement, it is possible to argue that such involvement should have led to the director's criminal responsibility[74] because the company was convicted.[75]

3.3 NO DISSEMINATION – FULL OMISSION OF MATERIAL FACTS

The question here is whether the ban on market manipulation also extends to instances in which there is no dissemination of information – full omission of material facts.[76] The short answer is no – the ban on verbal manipulation does not seem to extend to full omission of material facts. This applies even to circumstances in which an issuer is obliged to disclose inside information to the market[77] but neglects to do so, which can be misleading to other market participants. It might seem peculiar to apply a more serious offense (market manipulation) with generally harsher punishments to situations in which the issuer disseminated some information but omitted material facts (inside information) and to apply a milder offense (violation of the disclosure obligation) to situations in which the issuer disseminated no information but the omission still misled the market.[78]

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[71] See *Neurosearch – High Court* (n 68) p 658 of the judgment.
[72] See ibid p 659.
[73] See *Neurosearch – Supreme Court* (n 68) p 29-30 of the Supreme Court judgment.
[74] If other objective and subjective requirements of the offense had also been fulfilled.
[75] See also the judgment from the High Court of Western Denmark No S-2313-14 V from 8 June 2016 (*Aarhus Lokalbank*), in which the approach is similar. In the case, one of the bank's managers was acquitted because the court did not consider it proven that he gave instructions or should have known of the excessive buying of own shares. See p 33 of the judgment.
[76] This does not cover full omission of inside information combined with trading in own shares, which constitutes insider dealing and not market manipulation. See Caroline Bang Stordrange, 'Kan brudd på utsteders løpende informasjonsplikt innebære markedsmanipulasjon?' (2014) 53 Lov og Rett 290, 292. This also does not cover violations of other obligations, such as the notification requirement, combined with trading in securities and other instruments covered by the ban.
[77] See Art 17 of MAR on public disclosure of inside information.
[78] See Stordrange (n 76) 307. In the article, the author actually argues that there is no need to stretch the ban on market manipulation to these situations because of the provision on the issuer's disclosure obligation. The author, however, does not mention that these offenses usually do not entail the same sanctions. See, e.g., Jesper Lau Hansen, 'Når Tanken Tæller: Om Forholdet Mellem Oplysningspligt Og Kursmanipulation', *Festskrift til Jørn Vestergaard* (Djøf Forlag 2008) 196.

The reason for this distinction is, however, the wording of the verbal manipulation provision in the MAR, which specifically refers to 'dissemination of information'. In some instances, it is possible to commit an offense by doing nothing even though the provision describes a positive act and not omission. An example of such an offense is homicide, in which there is a requirement of one person causing another person's death without referring to specific methods.[79] Another example of this kind of description is the non-verbal part of the market manipulation definition, which refers to transactions, orders to trade and 'any other activity or behaviour' that has certain a consequence.[80]

The same does not apply to the verbal manipulation provision, which specifies precisely the behaviour element of the offense – the spreading of information. It is very difficult to imagine that this kind of behaviour can be done through anything other than a positive act and not through pure inaction.[81] The failure to disclose inside information would therefore be covered by the provision on the issuer's disclosure obligation[82] and not by the ban on market manipulation.

This conclusion that the ban on market manipulation does not cover full omission is further supported by the fact that nothing in the EU legislation regarding market manipulation, including proposals, reports or guidelines, indicates that the ban on market manipulation was supposed to cover full omission. Stordrange has pointed out, however, that CESR, the predecessor to ESMA, had in one of its guidelines interpreted the verbal manipulation provision in MAD as covering also full omission of price sensitive information. Stordrange then argued that such interpretation was not binding when applying the Norwegian ban on market manipulation.[83] The comment by CESR is as follows:

> This type of market manipulation involves dissemination of false and misleading information without necessarily undertaking any accompanying transaction. This could include creating a misleading impression by failure properly to disclose a price sensitive piece of information which should be disclosed. For example, an issuer with information which would meet the Directive definition of 'inside information' fails properly to disclose that information and the result that the public is likely to be misled.[84]

If CESR's comment is examined more closely, it seems that this was actually not the case and the authority was only emphasising that verbal manipulation does not cover only dissemination of false information but also dissemination of misleading information in which material facts, such as inside information, are omitted, as discussed in the next section. There is nothing in CESR's comment or in other places in the guidelines which suggests that CESR was proposing that the ban also covered full omission of material facts. On the contrary,

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[79] See AP Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th edn, Hart Publishing 2010) 76.
[80] See Art 12(1)(a)-(b) of MAR.
[81] See, e.g., discussion of this kind of provisions in Simester et al (n 79) 76. See discussion of the same conclusion regarding verbal manipulation in Norwegian legislation in Stordrange (n 76) 311–312, and Kjetil Wibe and André Michaelsen, 'Forbudet mot kursmanipulering' (2002) 8(1) Tidsskrift for forretningsjus 64, 97.
[82] See Art 17 of MAR.
[83] See Stordrange (n 76) 308–310.
[84] CESR/04-505b 13.

based on the headline of the section where this comment is made, which reads 'Dissemination of false and misleading information', it seems that this comment was only supposed to refer to partial omission.

A related point to consider with full omission is the relationship between verbal manipulation and the issuer's disclosure obligation. The question is whether breach of the disclosure obligation could in any instances also constitute market manipulation. Section 4.2 also concerns this issue.

4 DISSEMINATION OF TRUE INFORMATION BUT WITHHOLDING MATERIAL FACTS

4.1 PARTIAL OMISSION OF MATERIAL FACTS

Before discussing whether dissemination of true information can constitute market manipulation, it is necessary to outline the main facts of a 2019 criminal case from a Norwegian appeal court known as the *Funcom* case, in which this issue is dealt with.[85] The case involved a former CEO of Funcom N.V., a publicly listed company that developed multiplayer online role-playing games. The CEO, A, was charged with market manipulation for publishing false and misleading information during the development of the game *Secret World*, which impacted the game's expected success and the value of the company's shares. A was also, along with two other members of the company's management and one board member, charged with insider dealing for selling shares in the company while possessing inside information about the market manipulation as well as information about other matters relating to the company. The focus here is only the charge regarding market manipulation. The case took place before the adoption of MAR in Norway. The ban on market manipulation was located in Articles 3-8 of Act on Securities Transactions No 75/2007,[86] which was based on the MAD definition. As previously mentioned,[87] the core definition of market manipulation did not change materially from MAD to MAR.

A was charged with two counts of market manipulation. The *former* count concerned a stock exchange notice from Funcom on 2 July 2012 regarding restrictions on A's ability to sell shares in the company. The *second* count concerned information the company provided in its first quarterly report for 2012 on the level of pre-orders of the game, which aligned with Funcom's expectations. A was acquitted of the second count on the grounds that the information was neither incorrect nor misleading.[88] The first one concerns whether dissemination of true information can constitute market manipulation and is discussed further here.

The stock exchange notice from 2 July 2012 primarily addressed A's transition to a new role as chief strategy officer (CSO) at Funcom and the appointment of B as the new CEO, along with statements from both individuals. The notice ended with a concluding paragraph that read,

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[85] Judgment from Borgarting Court of Appeal No. Court of Appeal for Northern Norrland No. LB-2017-153037-3 from 9 May 2018.
[86] In Norwegian: 'Lov om verdipapirhandel'.
[87] See discussion in Section 2.2.
[88] See p 27-30 of the judgment.

> The shares and options in Funcom NV held by A and his wholly owned company [Company 1] AS will remain regulated as shares held by management in Funcom with respect to red and green periods of trading. As part of the transition to the new role, Mr. A will also leave the Management Board of Funcom.[89]

Following the stock exchange notice, A sold shares in Funcom that he owned himself and through his company in 18 transactions on 9 and 12 July. The total amount of the transactions was close to 4.5 million Norwegian krone (NOK). Despite the sales, A remained one of the largest shareholders in Funcom. After the sales, there were negative reactions from shareholders, who indicated that they had interpreted the 2 July stock exchange notice to mean that A was not permitted to sell shares at that time. The reason for this is the reference in the notice to 'red and green periods of trading' regarding management of Funcom.

As described in the judgment, Funcom had implemented a system of 'red periods', when individuals in the company had sensitive information that could potentially develop into inside information.[90] The system was stricter than the legal prohibition against insider trading, for it encompassed information that did not meet the requirements for being inside information. The purpose of this system was to exercise caution with information that could develop into inside information. Individuals with such knowledge were placed on 'red lists' as long as the information remained sensitive, and they were advised not to trade Funcom shares.

As a precautionary measure, Funcom introduced a red period on 29 June 2012 for those employees who could gain access to either sales data or player activity related to *Secret World*. A was placed on the list because as CEO, he received such sensitive information. He was removed from the list on 2 July because he no longer had access to sales data or other market-sensitive information about the computer game. There was no evidence suggesting that A had access to or received information about sales data or player activity after this point or that he received any other information indicating that he should remain on the 'red list'.

The parties in the case agreed that the information in the stock exchange notice on the restrictions on A's ability to sell shares was not incorrect. It was correct that A left the Management Board, and it was true that he remained subject to the company's internal system for red and green periods for shares owned by management provided that in his new role he had access to sensitive information that was or could have developed into insider information. The notice did not state that A was subject to internal restrictions regarding the sale of shares at the time of the notice, nor did it specify how likely he was to become subject to such restrictions. Furthermore, it was clear that A, after stepping down as CEO on 2 July 2012, was no longer a primary insider at Funcom and therefore was no longer subject to the restrictions and obligations that apply to such persons under the law. Information that he was no longer a primary insider had been publicly available since 2 July.

The Norwegian Appeal Court had to determine whether the stock exchange notice, which was not incorrect and in fact accurate on the points mentioned in the notice, could constitute market manipulation. As the court noted, it is not a requirement that the

[89] See p 25 of the judgment.
[90] See definition of inside information in Art 7 of MAR.

information be false or incorrect. It is sufficient that it is likely to give misleading signals regarding matters with potential effect on the share price.[91]

But how can correct information amount to market manipulation? The Appeal Court was correct that it is sufficient that the information is viewed as misleading to constitute market manipulation. The determining factor is whether material information was omitted.[92] As stated in recital 47 of MAR, spreading of false or misleading information may 'consist of manifestly false information, but also wilful omission of material facts'.[93] To determine whether material facts were omitted, thus making the statement misleading, a reasonable investor test can be applied[94] by asking whether a reasonable investor would take the omitted information into account when making an investment decision and whether the information that was provided was likely to mislead a reasonable investor about the actual circumstances involved.[95]

Even though the Norwegian court did not apply this test exactly, it appears it took a similar approach in determining whether the stock notice amounted to market manipulation. The court stated that the information in itself has limited informational value because the recipients would need to conduct further investigations to understand what the company's internal rules regarding red and green periods entail and what this specifically means for A in his new role. Given that the stock exchange notice nonetheless mentioned this, the court found it difficult to see that the purpose could have been anything other than to signal to the market that A would be subject to the same restrictions in this regard as the rest of the management after his departure.[96]

The court concluded that investors would interpret this to mean that A – and the rest of management – would not be able to sell shares during the crucial phase the company was in. It must have been obvious to reasonable investors,[97] according to the court, that the management would possess price-sensitive information about this until Funcom publicly disclosed the information. The court considered that the stock exchange notice was intended to reassure the market that he would apparently not be able to sell shares immediately, which was incorrect. The reality therefore was that A was free to sell shares from the moment he stepped down, which he did relatively shortly after. Therefore, the court concluded that it was clear that the information about restrictions on A's ability to sell shares was likely to give misleading signals about Funcom's share price.[98] Because A was the one who initially suggested to the board they include this content in the notice and he should have known that this information was likely to mislead the market, the court convicted him of market manipulation.[99]

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[91] See p 26 of the judgment.
[92] See, e.g., discussion in Hansen, *Informationsmisbrug* (n 16) 494–499.
[93] See also one of the examples of market manipulation in Section B of the Annex to the 2001 MAD Proposal, 'Making untrue statements of material facts' and 'Non-disclosure of material facts or material interests'. See Commission, 'Proposal for a Directive of the European Parliament and of the Council on insider dealing and market manipulation (market abuse)' COM (2001) 281 final.
[94] See, e.g., Rüdiger Veil, 'Market Manipulation' in Rüdiger Veil (ed), *European Capital Markets Law* (3rd edn, Hart Publishing 2022) 235.
[95] See discussion in Kalss (n 62) 176.
[96] See p 26 of the Judgment.
[97] In Norwegian: 'fornuftige investorer'.
[98] See p 26 of the judgment.
[99] See p 27 of the judgment.

This approach by the Norwegian court aligns with two other cases, one from the Icelandic Supreme Court and the other from the Danish Supreme Court. In the so-called *Al Thani* case from 2015, the Supreme Court of Iceland convicted three bank executives and the largest shareholder of the bank of verbal manipulation for withholding material facts when discussing with the media a large sale of the bank's own shares to a foreign investor.[100]

On 22 September 2008, Kaupthing Bank (Kaupthing) announced to the market it had sold 5.01% of its issued shares to a wealthy businessman from the Middle East related to the Qatar ruler al Thani. This was only 17 days before the Financial Supervisory Authority of Iceland intervened in the bank's operations and appointed a resolution committee for the bank in accordance with the so-called Emergency Act.[101]

A police investigation later revealed that the share purchase was fully financed with a loan from the bank through a relatively complicated corporate structure. The defendants[102] were convicted of two separate violations of the ban on market manipulation. The *first* was related to the share purchase and falls under non-verbal manipulation, under which the court deemed the transaction misleading because it was constructed in a way to give the false appearance that a well-known foreign investor was the sole investor and thereby concealing the involvement of the existing major shareholder (who was Icelandic) to enhance confidence in the bank in the weeks prior to Kaupthing's collapse.

The *second* violation, which is relevant here, regarded dissemination of misleading information through the media following the bulk sale. As the Supreme Court pointed out, it was no coincidence that the amount bought was just above the threshold (0.01% above), so the bank would be legally obliged to notify the market of the transaction. As part of the notification, a press release was sent out with more details of the transactions and then followed with some interviews with the defendants, during which they spoke about the business deal. The court was not able to pinpoint any false information, but it concluded that the information disseminated through the press release was misleading because there was no mention of the fact that the bank had fully financed the share purchase and the Qatar investor was not the only buyer – the largest existing shareholder in Kaupthing, who owned before the purchase almost 10% of the issued shares, was in reality buying half of the 5.01% of the shares.[103] The omission of such material facts in the notification, the press release and the interviews is what made the dissemination misinforming.

A Danish case from 2012 known as the *journalist* case, much like the *Al Thani* case and the *Funcom* case, demonstrates how verbal communication can amount to market manipulation, even when it does not contain any false information.[104] In the case, the journalist, who was also the magazine's financial editor, regularly published recommendations to invest in specific illiquid shares traded on the Copenhagen Stock Exchange. On thirteen occasions, the journalist bought a considerable number of shares in companies he then recommended to his readers to invest in in the long term. After these companies' share prices had risen, the journalist sold his shares for a considerable profit. In

[100] Judgment from the Supreme Court No 145/2014 from 12 February 2015 (*Al Thani*).
[101] See 'Report of the Special Investigation Commission. Chapter 21: Causes of the Collapse of the Icelandic Banks – Responsibility, Mistakes and Negligence' (English version) 87. The Emergency Act is No 125/2008.
[102] One of the defendants, the large shareholder, was only convicted of verbal manipulation.
[103] See Al Thani (n 100) p 83-85 of the judgment.
[104] Judgment from the Supreme Court of Denmark No U 2013.196 H from 18 October 2012 (*the journalist*).

most of his articles, the journalist disclosed that he owned shares in the recommended companies. Even though the reservation was missing in some of his articles, it was not his fault, according to the district court in the case.[105]

Despite his reservation in the end of most his articles, the Supreme Court considered his recommendation market manipulation. The court considered it a material fact that the journalist had a considerable stake in the price movement of the shares he recommended. The court concluded that he did not sufficiently disclose this conflict of interest in light of Article 12(2)(d) of MAR,[106] which requires conflicts of interest to be disclosed to the public in a proper and effective way, and Article 20(1) of MAR,[107] which requires everybody who makes investment recommendations to ensure that such information is objectively presented and to disclose their interests or indicate conflicts of interest concerning the financial instruments to which that information relates.[108]

By not disclosing this material fact and essentially doing the exact opposite in his recommendation of investing long-term in the shares (by selling his shares shortly after making the recommendation), he was misleading his readers, according to the court. The behaviour of buying illiquid shares, recommending his readers invest long-term in the same shares and then selling the shares for a profit demonstrated, according to the court, that his recommendations were influenced, at least partly, by his desire to influence the share price. Because the journalist profited from his recommendation, the special rule regarding journalists did not apply to him, so the traditional ban applied to his behaviour. The journalist was convicted of market manipulation.[109]

The court's argumentation in this case for applying the ban on market manipulation is interesting, but some might say the court was stretching the ban too far because the journalist's actual recommendations did not seem to have contained any false or misleading information and the journalist informed the readers of his conflict of interest. Therefore, it can be argued that the journalist did not disseminate any misleading information or at least did not omit any material information in his recommendation.

However, the most important point in the case is that the journalist did not sufficiently disclose how much interest he had in the shares, and he only seemed to have made the recommendation to affect the price of the shares. When combining these two factors (conflict of interest and the trading pattern), it does not seem that the Danish Supreme Court went too far in applying the ban on market manipulation to the journalist's behaviour.

4.2 RELATIONSHIP BETWEEN VERBAL MANIPULATION AND ISSUER'S DISCLOSURE OBLIGATION

Another point that is necessary to touch upon is the connection between verbal manipulation and the issuer's disclosure obligation. In section 3.2, the Danish case from 2016, *Neurosearch*, was discussed in relation to dissemination of false information. As an issuer of shares that were traded on the Copenhagen Stock Exchange, Neurosearch was obliged to disclose as

[105] See *the journalist* (n 104) p 201 of the judgment.
[106] Art 34(2)(1) of the Danish Securities Transactions Act.
[107] Art 28 b of the Danish Securities Transactions Act.
[108] See *the journalist* (n 104) p 205 of the judgment.
[109] See *the journalist* (n 104) p 205-206 of the judgment.

soon as possible to the public inside information which directly concerned the company.[110] When Neurosearch issued the company announcement about its research, it was complying with its disclosure obligation; therefore, it is natural to contemplate whether the dissemination could have been seen as a violation of the Neurosearch's disclosure obligation instead of applying the ban on market manipulation.

In this case, it would have been difficult to apply the disclosure obligation because it had been established that the primary endpoint in the research had not been reached, and consequently there was no inside information to disclose.[111] However, a public disclosure of inside information can be formulated in such a way that in theory such dissemination can constitute a breach of issuer's disclosure obligation and the ban on market manipulation (verbal misinformation).[112] It is therefore important to determine which rule applies, particularly because a violation of the ban on market manipulation typically entails stricter punishments.[113]

The distinction is most likely that the ban on market manipulation would apply to cases in which the issuer disseminates (action) information to the public and it has been established that the misinformation[114] was material, as was the case with Neurosearch.[115] However, the disclosure obligation would apply to cases in which there was no dissemination by the issuer (full omission). For example, if it had been established that Neurosearch had actually reached the primary endpoint in its research, which constituted inside information, and the company had not disclosed the information to the public, it would be seen as a violation of the disclosure obligation.

This assumption is mainly based on the fundamental difference in the wording of verbal manipulation and the issuer's disclosure obligation in MAR. The former forbids certain actions (the spreading of false or misleading information), which is violated if the action takes place, whereas the latter prescribes a certain duty to act (disclose inside information) and is violated if the duty is neglected.[116] The Supreme Court in the *Neurosearch* case seems to agree with that distinction when it stated that the disclosure obligation was not supposed to cover behaviour which spreads false or misleading information in violation of the ban on market manipulation.[117]

Furthermore, this distinction is in accordance with previous conclusions made that material misinformation is an essential element of the concept of market manipulation.[118] This element separates market manipulation in a clear and predictable manner from disclosure obligation, which aims at ensuring true and accurate information from the issuer

[110] See Art 17(1) of MAR. In the case of a Danish company, such as Neurosearch, the obligation was based on Art 27(1) of the Danish Securities Transactions Act. See reference in *Neurosearch – High court* (n 68) on p 658 in the judgment.
[111] If it is assumed that there was no other inside information directly concerning Neurosearch at the time.
[112] See, e.g., discussion in Hansen, 'Når Tanken Tæller: Om Forholdet Mellem Oplysningspligt Og Kursmanipulation' (n 78).
[113] A breach of disclosure obligation usually entails some administrative sanctions. See ibid 196.
[114] In the form of false and misleading information.
[115] Given that other objective and subjective elements of the offense are fulfilled.
[116] See, e.g., discussion of this difference between the two rules in Hansen, 'Når Tanken Tæller: Om Forholdet Mellem Oplysningspligt Og Kursmanipulation' (n 78) 200–201.
[117] See *Neurosearch – Supreme Court* (n 68) p 29 of the Supreme Court judgment.
[118] See discussion in Section 2.3.

is available to the market[119] whereas the ban on market manipulation aims at preventing false and misleading information being disseminated to the market.

5 CONCLUDING REMARKS

Even though market manipulation can be seen as another form of lying, it is possible to commit market manipulation by disseminating true information. As the behaviour is described in MAR, it is sufficient that the information is viewed as misleading to constitute market manipulation. The key factor is whether material information was omitted. To assess whether omissions render the information misleading, a reasonable investor test can be applied. This involves asking whether a reasonable investor would consider the omitted information relevant to an investment decision and whether the information provided was likely to mislead a reasonable investor about the actual circumstances. Using this approach, it is possible to determine when truthful information becomes misleading and could therefore violate the ban on market manipulation under MAR.

[119] See, e.g., Hansen, 'Når Tanken Tæller: Om Forholdet Mellem Oplysningspligt Og Kursmanipulation' (n 78) 195. See also Stordrange (n 76) 301.

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