

Contents

Introduction	xv
1 Insider Dealing Prohibition: Basic Construction, Economic and Ethical Perspectives	1
A Development of the Insider Dealing Regulation in the European Union and the United States of America	2
I Market Abuse Directive	3
1 From No Regulation to Market Abuse Directive	3
a) First Years of the European Communities	3
b) First Insider Dealing Directive	4
c) Market Abuse Directive	6
2 Insider Dealing Prohibition According to the Market Abuse Directive	8
a) Objectives of the Prohibition	9
b) Constitutive Elements	10
i. Inside Information	11
ii. Insiders	20
iii. Forbidden Practices	24
3 Territorial Application of the Market Abuse Directive	28
4 Exemptions	28
a) The State Bodies	29
b) Take-Over Bids	29
c) Realisation of Orders	30
d) Results of the Analysis	30
e) Buy-Back Programmes	31
f) Disclosure to a Person Bound by an Obligation of Confidentiality	32
5 Sanctions	32
6 The European Union's Competences in the Domain of Criminal Law	35

II	The American Regulation	36
1	Introduction of the Insider Dealing Prohibition	36
2	Evolution of the Prohibition of Insider Dealing	37
a)	Texas Gulf Sulphur Co.	40
b)	The <i>Chiarella</i> and <i>Dirks</i> Cases	41
c)	Misappropriation Theory	44
3	The Modern Shape of the Prohibition	46
a)	Scope of the Prohibition	46
b)	Procedure and Penalties	48
c)	Conclusions	49
B	Discussion on Ethical and Economic Justification of Insider Dealing Prohibition	50
I	Ethical Arguments	51
1	Unfairness and Harmful Character	51
a)	Advantage of Superior Knowledge	52
b)	Harm	53
i.	Market	53
ii.	Other Investors	54
iii.	Employer	56
iv.	Insiders	57
2	Fraud	57
3	Easy Gain	58
II	Economic Arguments	59
1	Distribution of Information	60
a)	Improvement of the Market Performance	61
b)	Negative Approach Towards Insider Dealing	64
i.	Delay in Internal Transmission of Information	65
ii.	Delay in Public Disclosure of Information	65
2	Influence on Distribution of Negative Information	66
3	Compensation	68
4	Reduction of Liquidity	70
5	Increased Volatility of Financial Instruments Price Oscillations ...	70
6	Property Value	71
7	Influence on Governance Mechanism	72
8	Link to Market Manipulation	73
9	Insider Dealing and Market Analysts	73
10	Burden Put on Companies and the Whole Society	75
11	Insider Dealing and the Financial Crisis?	75
III	Conclusions	76
2	Practical Issues Arising from the Transposition of the Market Abuse Directive into the Chosen Member States' Legal Systems	79
A	General Remarks Concerning the Character of the Market Abuse Directive	80
B	Presentation of the Selected Member States' Stock Exchange Markets ...	81
I	France	81
II	Luxembourg	82

III	England and Wales	84
IV	Poland	86
C	Main Notions of the Market Abuse Directive and Their Transposition into National Systems	88
I	Inside Information	88
1	France	88
2	Luxembourg	89
3	England and Wales	90
4	Poland	92
II	Insiders	93
1	France	93
2	Luxembourg	94
3	England and Wales	95
4	Poland	96
III	Forbidden Practices	97
1	France	98
2	Luxembourg	100
3	England and Wales	101
4	Poland	104
IV	Sanctions and Case-Law	106
1	France	106
a)	Administrative Sanctions	106
b)	Criminal Sanctions	107
c)	Coexistence of Criminal and Administrative Sanctions ...	109
d)	Judicial Decision	112
i.	Criminal Case	112
ii.	Administrative Case	114
2	Luxembourg	119
a)	Applicable Sanctions	119
b)	Judicial Decision	123
3	England and Wales	127
a)	Administrative Sanctions	127
b)	Criminal Sanctions	132
c)	Case-Law	132
i.	Criminal Case	132
ii.	Administrative Case	133
4	Poland	137
D	Conclusions	140
3	Principles-Based Application of the Criminal Law	143
A	Criminal Law and Other Branches of Law	144
I	Traditional Application of Criminal Law	146
II	New Domains of the Application of Criminal Law	147
1	Application of Criminal Law to Legal Entities	150

2	Overlapping of Criminal and Other Branches of Law	151
a)	Application of Criminal Law as a Civil Law Tool	151
b)	Criminal-Administrative Law	152
c)	Parallel Application of Criminal and Administrative Law	152
3	New Domains of Regulation	154
a)	Money Laundering	155
b)	Abuse of the European Union Funds	156
III	Overcriminalisation	157
1	Political Actions	158
2	Lobby of Interested Groups	162
B	Theories of Punishment	163
I	Deterrence: Negative General Prevention Theory	165
1	Principles and Historical Development	165
2	Concerns Arising from Application of the Theory	168
II	Rehabilitation: Positive Individual Prevention	171
III	Incapacitation: Negative Individual Prevention	172
IV	Restitution of a Norm: Positive General Prevention	173
V	Retribution	175
VI	Conclusion	178
C	Criminalisation	179
I	Distinguishing the Need to Undertake a Legislative Action	181
1	Legal Positivism	181
2	Moralism	183
3	Harm Principle Theory	185
a)	Definition of Harm	186
b)	Causation	188
c)	Intensity of Suffered Harm	189
d)	Victim's Identity	189
e)	Conclusion	190
4	Paternalism	191
5	<i>Rechtsgut</i> Theory	192
6	Liberal Theory of Wrongfulness	195
7	Conclusions	200
II	Principles of Criminalisation: Justifying Application and Determining the Proper Shape of the Criminal Law	201
1	Principle of Subsidiarity	205
2	Principle of Proportionality	208
a)	Principle of Usefulness or Rationality	209
b)	Principle of Necessity	210
c)	Principle of Proportionality <i>Sensu Stricto</i>	210
3	Principle of Legality	211
a)	Proper Formulation	212
b)	Proper Legislation	214

4 Principle of Culpability	216
5 <i>In dubio pro libertate</i>	217
6 Other Principles and Rules	218
a) The Cost-Benefit Analysis	219
b) Principle of Efficacy	220
c) Principle of Flexibility	220
D Conclusions	221
4 Alternative Models of Regulation of Insider Dealing	227
A Principles-Based Criminal law	229
I Wrongfulness	229
II Principles of Criminalisation	230
1 Principle of Subsidiarity	231
2 Principle of Proportionality	231
3 Principle of Legality	232
4 Principle of Culpability	233
5 <i>In dubio pro libertate</i>	234
III Decriminalisation	234
B Administrative Law	235
I Applicability of Administrative Sanctions	235
II Procedural Safeguards	238
III Parallel Application of Criminal and Administrative Sanctions	239
C Civil Law	240
I Contractual Liability	241
II Individual Redress and Class Actions	242
D No Regulation or “Soft” Law: Corporate Governance and Codes of Conduct	244
I Corporate Governance, Codes of Conduct	245
II Education	248
Conclusions	251
Annex 1	259
Bibliography	261