It-Tribunal Dwar Servizzi Finanzjarji

Pierre Lofaro LL.D – Chairman

Joseph Azzopardi FCCA, FIA, CPA, MBA (Warwick) – Membru

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FST3/2009

Christopher Pace

Vs.

L-Awtorità Għas-Servizzi Finanzjarji ta' Malta

Illum, 21 ta' Ottubru 2020

It-Tribunal,

Ra r-rikors ta' l-appell intavolat mill-appellant Christopher Pace, li permezz tiegħu huwa espona s-segwenti:

> Illi dan huwa appell mid-deċiżjoni tal-Awtorita' Għas-Servizzi Finanzjarji ta' Malta mogħtija fis-26 t'Ottubru 2009 li in forza tagħha il-Kunsill ta' Superviżjoni tal-Awtorita' appellata infliġġa penali ta' erba' w erbgħin elf u mitt euro (€44,100) kontra l-appellant wara li dan instab ħati mill-istess Kunsill talli huwa allegatament ikkommetta ksur tal-artikolu 6 tal-Att dwar il-Prevenzjoni tal-Abbuż fis-Swieq Finanzjarji. Dan l-allegat ksur kien, skond l-Awtorita' appellata, jikkonsisti filli l-appellant bħala direttur ta' GlobalCapital plc iddispona minn azzjonijiet fl-istess soċjeta' meta huwa kien fil-pussess ta' informazzjoni li kienet price sensitive u li ma kienitx għad-dispożizzjoni tal-pubbliku. Dan l-allegat abbuż twettaq bejn l-14 u s-27 ta' Diċembru 2007. Il-penali ġiet fissata mill-Kunsill fuq kalkolu ta' 3% tal-valur totali ta' ishma li ġew mibjugħin fil-perijodu suspett. Apparti dan hemm ukoll is-sanzjoni ukoll serja tal-pubblikazzjoni tas-sejba ta' ħtija.

l-Awtorita' appellata kienet kitbet lill-appellant fid-9 ta' Jannar 2009 fejn kienet qaltlu inter alia illi fir-rigward tal-attivita' hawn fuq imsemmija:

"this selling activity was undertaken during a period when you may have been in possession of potentially negative price sensitive information regarding GC, which had not yet been made public".

U qaltlu wkoll

"during the second half of 2007 you were aware that the overall performance of the GC Group was poor when compared to that of the previous year" and that "the negative performance of the GC Group during 2007 was made public through a *company announcement* which was issued on 3rd April 2008".

L-appellant kien wieġeb fl-20 ta' Jannar 2009 illi:

"Allow me to start by stating that I disagree completely with the statement that my selling activity was undertaken during a period when I may have been in possession of potentially negative price sensitive information regarding GC, which had not yet been made public. I would like to point out that in accordance with the requirements of the MFSA Listing Rules the market was informed in a timely manner that the overall performance of the GC Group in 2007 was poor and this well before the Company announcement of 3rd April 2008. At the same time my trades were made before the onset of the closed period which preceded the Company announcement of 3rd April 2008.

In the first place, the Company announcement issued in terms of the MFSA Listing Rules on 24 August 2007 in relation to the Interim Financial Statements for the six months ended 30 June 2007 pointed out that in the first six months of 2007 profit after tax was down to Lm388,919 from a corresponding result in 2006 of Lm735,180 while profit before tax was down to Lm143,880 from Lm1,074,667. This represents a drop in pre-tax profits of 86.61%. This announcement also pointed out significant fair value losses on securities held by the Company and its subsidiaries including the life insurance company, attributable to negative market conditions which prevailed during the first six months of 2007. It also noted that recent stock market volatility and global economic uncertainty may effect trading and investment performance in the latter half of 2007.

In the second place, the negative performance of GC was again highlighted in the Interim Director's statement issued on 15 November 2007 pursuant to the MFSA Listing Rules. This statement pointed out a decrease in investment fee income in the first nine months of 2007 when compared to the corresponding period in 2006 and noted that "the downturn in the local and international capital markets persisted during the third quarter of the current financial year and this has invariably had an adverse effect on the Group's portfolio of financial investments. This factor has led to a negative impact on the Group's profitability for the period under consideration and if the downturn in the financial markets persists it is expected to impact on this year's results".

Additionally, it is well known that the GC Group is heavily dependent on the performance of local and international capital markets. This has always been evident from GC's results, so much so that the published financial statements for 2006 also indicated that operating profit of Lm2.7 million included performance fees of Lm2.5 million. The downturn in the capital markets which had an adverse effect on the results and operating performance of GC in 2007 was public knowledge. As stated, however, it was also pointed out in the announcements issued on 24 August 2007 and 15 November 2007 which highlighted that the profitability of the GC Group will be negatively impacted by this downturn.

On a final note as can be noted from our exchange of correspondence in June 2008, my trading activity in GC shares was initiated earlier than the 14th December 2007 and was fluid during the second half of the year. It is also apparent that in November – December there was substantial interest in buying GC shares on the market as a result of which I availed myself of the opportunity to sell GC shares just like a number of other investors both large and small. Having said that I still retain a substantial interest in GC in which I hold approximately a 15% interest.

I trust that the Authority will consider my explanation and deem this to be satisfactory, however, should you have any further queries I remain available to provide any further clarification you may require."

L-Awtorita' appellata wieġbet għal din l-ittra b'ittra oħra tas-6 t'April 2009 fejn hi m'aċċettatx l-ispjegazzjoni mogħtija mill-appellant u semmiet dawn l-erba' punti fejn hi ma qablitx mat-teżi appellanti, mill-liema iż-żewġ punti ewlenin kienu dawn:

Fl-ewwel lok L-Awtorita' qalet il-*Company announcements* riferiti mill-appellant ma kienux suffiċjenti biex javvżaw lill-pubbliku bis-sitwazzjoni tal-kumpannija, fir-rigward ta' CA24.08.07, dan kien insuffiċjenti għaliex il-messaġġ li ta kien bilanċ ta' affarijiet pożittivi flimkien ma dawk negattivi, u fir-rigward ta' CA15.11.07 għaliex dan, skond l-Awtorita' appellata, kien "rather vague".

Fit-tieni lok qalet illi fil-laqgħat tal-bord tad-diretturi tal-grupp bejn l-4 ta' Diċembru u s-7 ta' Diċembru 2007, l-appellant ingħata informazzjoni li kienet "price sensitive" u mhux divulgata.

B'ittra taż-17 t'April 2009 l-appellant irrisponda hekk:

> "CA.24.08.07" stated the position exactly as it was at the time. If the company is in possession of two items of information, one positive and the other negative, surely it is obliged to disclose both! The implication in your letter is that it ought to have withheld the positive news. Surely this would have led to a charge of withholding the positive news. Moreover the main highlight of the announcement is the "bottom line" which, notwithstanding the positive information to which you refer, discloses a significant drop in profit after tax.

Apart from this, with respect to the future the announcement cautioned that "recent stock market volatility and global economic uncertainty may affect trading and investment performance".

CA.15.11.07. in this regard your letter states that in this announcement the content was vague. I quote "The downturn in the local and international capital markets persisted during the third quarter of the current financial year and this has invariably had an adverse effect on the Group's portfolio of financial investments. This factor has led to a negative impact on the Group's profitability for the period under consideration and if the downturn in the financial markets persists it is expected to impact on this year's results." We feel that this excerpt sent a very clear message to the public and to the market, and we take exception to your describing this announcement as "vague".

Your assertion that during the board meetings held between the 4th and 7th December 2007 my client was provided with updated price sensitive information which was not made available to the public is disputed.

B'ittra tad-9 ta' Ġunju 2009 l-Awtorita' appellata għarrfet lill-appellant illi wara li kkunsidrat l-ispjegazzjonijiet tiegħu hi xorta ħasset illi dan kien kiser l-art.6 tal-Kap. 476 talli dan ittrasferixxa ishma f'GlobalCapital plc meta kien fil-pussess *inside information*. L-awtorita' waslet għal din il-konklużjoni b'dan il-mod:

"9th June, 2009

Mr. Christopher J. Pace
(ID. 543765)
Plot 329,
Triq In-Nixxiegħa,
Santa Maria Estate,
Mellieħa
MLH 2755

Dear Mr. Pace,

Re: Trading activity on the Malta Stock Exchange

Reference is made to our letter dated 6th April, 2009 and Dr. Richard Galea Debono's reply on your behalf dated 17th April, 2009. Your letter has been carefully considered by the Authority's Supervisory Council on whose behalf I am writing.

Following a thorough consideration of the representations made in the letter dated 17th April, 2009, and a reconsideration of all the information at our disposal relating to this case, the Authority considers that you have breached Article 6 of the Prevention of Financial Markets Abuse Act, 2005 (**PFMA**'), by having traded in GlobalCapital Group ('GC') shares, when as an insider you were in possession of inside information of a significant nature. The following

are our observations in respect of the explanations provided in the letter dated 17th April, 2009:

Board meeting – 7th December, 2007

The Authority disagrees with the statement in the letter dated 17th April, 2009 that during the board meeting of the 7th December, 2007 you were not provided with updated price sensitive information which was not made available to the public. Indeed, the records at our disposal show that during the said board meeting, you were provided with inside information on the negative situation of GC when compared to the situation of the previous year, and the budgets for 2007. This information included specific information indicating an actual **loss before tax** for the period January to September 2007 of € 1,844,934, compared to: [i] a budgeted **profit before tax** for the same period of € 2,253,252; and (ii) and actual figure of **profit before tax** over the same period in 2006 amounting to € 4,913,378.

The above-mentioned inside information relating to the updated financial position of the GC Group for the period January to September 2007, was not available to the public when between 14th and 27th December 2007, you disposed of a total of 293,507 GC shares amounting to a total market value at the time of disposal of €1,470,633. For this reason the Authority considers you as having breached article 6 of the PFMA which *inter alia* stipulates that no person shall trade in a financial instrument whilst in possession of inside information relating to such financial instrument by virtue of his membership of the administrative management or supervisory bodies of the issuer.

Company Announcements

The Authority disagrees with your explanations relating to the two company announcements made by GC on the 24th August, 2007 and the 15th November, 2007, for the following reasons.

(A) Company Announcement – 24th August 2007 (CA24.08.07)

In your letter dated 17th April, 2009 you stated that our letter of the 6th April, 2009 implied that GC ought not to have disclosed positive news in CA 24.08.07. This is not correct. Our letter of the 6th April, 2009 simply re-iterated that the overall message which was conveyed through CA 24.08.07 was that GC was '*still faring well*', and this despite the unfavourable market conditions. The following is an outline of the rationale for this position:

(i) In the then current economic scenario, GC still managed to register 'a *profit after tax for the six months ended 30 June 2007 of Lm388,919 compared to a corresponding result last year (2006) of Lm735,180'*

(ii) Included as the main highlights of the reporting period's results were:

- *'Increase in operating profit of 21.9%'; and*
- *'portfolio of the Company and its subsidiaries.' Continued healthy returns on the international investment property*

(iii) The announcement states that: '*The directors expect that the levels of trading activity experienced during the six months to June 2007, which show an overall improvement in turnover over the corresponding period last year, should be sustained in the latter half of the current year.*' In the Authority's opinion this statement is demonstrably sending a signal that the GC directors were optimistic that the Company would sustain a good turnover throughout 2007.

(iv) The announcements included a very brief statement of the possible negative impact of the then current economic conditions, but in the Authority's opinion this was not given adequate prominence: '*However, recent stock market volatility and global economic uncertainty **may** [our emphasis] effect trading and investment performances.*' This statement in fact implies that there is a probability that the global economic uncertainly will not affect trading and investment performance.

(B) Company announcement – 15th November 2007 (CA 15.11.07)

The Authority rejects your statement that CA 15.11.07 sent "*a very clear message to the public and to the market*" regarding the negative situation of GC Group. This announcement failed to quantify, or at least to provide a more precise indication of the extent of the impact of the '*downturn in the local and international capital markets*' on the Group's profitability. On the basis of this company announcement, a reasonable investor could not possibly predict and was not sufficiently alerted that the effects on the profits for the year would be so severe and negative.

In fact, one may add that the information in C.A. 15.11.07 was not considered by the market as being valuable information, given that the price of the share did not vary further to the issue of this company announcement. On the day before GC issued C.A. 15.11.07, GC traded at prices ranging from Lm1.706 to Lm1.79; on the 19.11.07, when GC shares were first traded further to the issue of C.A. 15.11.2007 GC traded at Lm1.78.

When considering the above points, one can only conclude that further to 7th December 2007 board meeting of GC, you were privy to inside information regarding GC which was not contained in CA 24.08.07 and CA 15.11.07. Therefore, your trading activity in GC shares, which took place soon after the said board meeting, was carried out during a period when you were in possession of inside information about GC which was not available to investors. On this basis, the Authority considers you as having breached article 6 of the PFMA since you traded in GC shares in such circumstances. Given that this is the first time that you have allegedly breached the provisions of this article of the said Act, the Authority has decided to consider imposing an administrative sanction.

In light of the above, the Authority is considering taking administrative action against you in terms of article 22 of the PFMA. In this regard, the Authority is minded to impose an administrative penalty of €44,100, representing 3% of the total value of GC shares traded during the period between the 14th and the 27th December 2007.

You may wish to submit written representations to the Authority on this matter by not later than 30th June, 2009 setting out the reasons why the proposed regulatory action should not be taken and the Authority shall consider any representations so made before arriving at its final decision.

Sincerely,

Andrè J. Camilleri"

Għal din ittra tal-Awtorita' appellata, l-appellant reġa' wieġeb hekk:

"I wish to make full reference to my two previous letters of the 20th January 2009 and the 17th April 2009. In these two letters we believe that we had already given a full explanation of our position and had rebutted that any of the legal elements of the charge were at all founded. We have explained in detail why we believe that my client was not in possession of any specific information of a material nature as defined by law, which had not been fairly disclosed to the public. Our rebuttals are documented and it would be futile to repeat them.

What we do wish to counter however is the new element which has come to the fore in your last letter.

You state:

Indeed the records at our disposal show that during the said board meeting you were provided with inside information on the negative situation of GC when 'compared to the situation of the previous year, and the budgets for 2007. This information included specific information indicating an actual loss before tax for the period January to September 2007 of €1,844,934 compared to; (i) a budgeted profit before tax of the same period of € 2,253,252; and (ii) an actual figure of profit before tax over the same period in 2006 amounting to € 4,913,378'.

The new element here is your mention of budgets. The implication of your statement is that the information available to my client was more price sensitive because my client was able to compare it to a budget. My client contests this finding in the strongest manner. To begin with, budgets are not facts, they are projections based on what is considered desirable by the board, and as you are surely aware, are really a tool to drive the management and staff towards achieving the targets mentioned therein. Therefore being in possession of budgets is not the same as being in possession of specific information.

In the second place, budgets are never made available to the public. If your argument were taken to its logical conclusion, this would effectively preclude any director from trading shares at any time of the year. Budgets are normally made to cover a whole 12 month period, and a diligent director of a properly managed company would know on a continuing basis whether the company was meeting its budgets or not.

The final and logical, but mistaken conclusion, emanating from your premise, is that a director may never trade shares in the company on whose board he serves.

Finally you might note that as the company holds a substantial portfolio of investments in the region of EUR 60 million, even a variation of 5% in the stock markets which can happen on a single day could adversely or positively affect the company's results by EUR 1.5 million. One cannot predict the closing prices of stock markets as at the end of the year until that time has expired. Furthermore, GlobalCapital as has already been stated, relies heavily on the value of its investment portfolio to achieve its budgets and this is not a precise science.

It is our contention that the *company announcements* which were made in a timely manner gave proper and adequate and updated notice to the market. The argument which you use in your last page :

In fact, one may add that the information in C.A. 15.11.2007 was not considered by the market as being valuable information, given that the price of the shares did not vary further to the issue of this company announcement.

beggars belief! There is simply no way of assessing how and in what manner the public reacts to *company announcements*. The reasons why no activity (because that is the only manner in which a share price changes periodically) occurred after the announcement in question are too many to think of. To make a statement such as the one above, and use it as a ground to impose a heavy fine, is unheard of.

At this point my client feels that he has nothing further to add to the defence that he has proposed to clear his name. We now await your final decision."

L-Awtorita' appellata reġgħet wieġbet b'ittra oħra :

"17th August, 2009

Mr. Christopher J. Pace
(ID. 543765)
Plot 329,
Triq In-Nixxiegħa,
Santa Maria Estate,
Mellieħa
MLH 2755

Dear Mr. Pace,

Re: Trading activity on the Malta Stock Exchange

Reference is made to our letter dated 9th June, 2009 and Dr. Richard Galea Debono's reply on your behalf dated 30th June 2009. Your letter has now been carefully reviewed by the Authority's Supervisory Council which has engaged in a thorough consideration of the further representations made in the said letter and a reconsideration of all the information at our disposal relating to this case.

Following this fresh review, the Authority is still of the opinion that you have breached article 6 of the Prevention of Financial Markets Abuse Act 2005 ('**PFMA**'), by having traded in GlobalCapital Group ('**GC**') shares when, as an insider, you were in possession of inside information of a significant nature which was not available to the public. Indeed, as outlined in our letter of the 9th June 2009, it is the Authority's view that during the board meeting held on the 7th December, 2007, you were provided with inside information on the negative situation of GC when compared with the situation of the previous year and the budgets for 2007.

The above-mentioned information included specific information indicating an actual loss before tax for the period January to September 2007 of € 1,844,934 compared to: (i) a budgeted profit before tax for the same period of € 2,253,252; and (ii) an actual figure of profit before tax over the same period in 2006 amounting to € 4,913,378. This information had not been made available to the investing public. In this regard, whilst the general public was in the dark regarding the full financial situation of GC, you disposed of a material part of our holding in GC shares. As already explained, it is the Authority's view that this is a clear and unequivocal breach of article 6 of the PFMA.

The Authority notes that the representation made in Dr. Richard Galea Debono's letter fail to clearly justify why the said trading activity should not be considered as being in breach of article 6 once you were in possession of the inside information referred to above. In this regard, before making a final decision, the Authority is providing you with another opportunity to submit further representations. To avoid the need for necessary duplication the Authority hereby confirms its position as detailed in its previous letters to you regarding this subject. This present letter is therefore additional and without prejudice to these letters.

The following are our observations in respect of the representation provided in the letter dated 30th June 2009.

Budgets

In reaction to your comment regarding the extent to which budgets may be considered as inside information the Authority would like to draw your attention to section 1.15 of the *CESR Market Abuse Directive Level 3 – second set of CESR*

guidance and information on the common operation of the Directive to the market, dated July 2007, which lists possible inside information directly concerning the issuer. The list includes*: 'Change in expected earnings or losses'*. Accordingly, any changes to the expected earnings for the year, based in GC's case on discrepancies between interim **actual** and budgeted figures, is considered as **specific** inside information. Moreover, the variance between the budgeted profit and the actual loss for the period ending September 2007 was not a reasonable ordinary variance between actual and budgeted figures but a very significant one. Therefore, as explained above, you are considered to have breached provisions of the law because you traded during a period when you were in possession of the information which falls within the definition of inside information and which information was not available to the public. In this regard, it is relevant to clarify that a director who trades in the shares of an issuer during a period wherein he/she is not in possession of information which falls within the definition of inside information would not be in breach of article 6 of the PFMA.

In your letter you acknowledged that a budget is a piece of information which is available to an insider, and not to any other investor. In this regard, it cannot be excluded that budgets could contain information which could be useful to an investor for the making of an investment decision.

GC's Investment Portfolio and predictability of stock market prices

The Authority does not consider relevant: (a) the fact that: *the company holds a substantial portfolio of investment in the region of EUR 60 million* : (b) the fact that: *even a variation of 5% in the stock markets which can happen on a single day could adversely or positively effect the company's results by EUR3 million*; and (c) the statement in Dr. Galea Debono's letter that: *one cannot predict the closing prices of stock markets at the end of the year until that time has expired.* As indicated above, your breach of article 6 of the PFMA is a consequence of your trading in GC shares when as director of GC you were in a privileged position over other investors as you were in possession of inside information which was provided to you during the board meeting of GC which was held on the 7th December, 2007, which information was not available to the public.

Company Announcement

Company Announcement dated 15th November 2007 – ('CA 15.11.07')

The Authority re-iterates that it rejects your statement that: '*the company announcements which were made in a timely manner gave proper and adequate updated notice to the market*', since as explained in our letter dated 9th June, 2009 the information contained in the announcement was rather vague as this *announcement failed to quantify or at least to provide a more precise indication of the extent of the impact of the 'downturn in the local and international capital markets on the Group's profitability'.* 'Moreover, this announcement failed to quantify: (a) the size of GC's investment portfolio, (b) the adverse effect on the Group's investment portfolio of the downturn of the global and international

markets during the third quarter of 2007, and (c) the extent to which this '*adverse effect*' would impinge on the year's results.

As already indicated in our letter of the 9th June, 2009 in view of what it considers to be your breach of article 6 of the PFMA, the Authority is considering taking administrative action against you in terms of article 22 of the PFMA. In this regard, the Authority is minded to impose an administrative penalty of € 44,100, representing 3% of the total value of GC shares traded during the period between the 14th and the 27th December 2007.

You may wish to submit your final written representation to the Authority on this matter by not later than a week from the date of this letter setting out the reasons why the above mentioned regulatory action should not be taken and the Authority shall consider any representation so made before arriving at its final decision.

> You may wish to be aware that, as part of the Authority's standard enforcement policy, the above administrative sanction which the Authority is minded to impose, after having considered any representations made, will be posted on the Authority's web-site, as allowed under article 22 (3) of the PFMA, 2005. Given that the fine is more than €25,000, it is the Authority's policy that the notice relating to the said fine shall be removed from the web-site after ten years.

Sincerely

André J. Camilleri"

B'ittra tad-19 t'Awwissu 2009, l-appellant wieġeb hekk:

"Thank you for your letter and for your invitation for us to reply further to the points raised in yours. Needless to say that I shall limit my observations to the new element which has arisen from your latest letter, while reserving our position with regards to all the representations made previously in our letters of the 20th January 2009, 17th April 2009 and of the 30th June 2009.

The new element raised in your letter is the reference to the CESR Market Abuse Directive Level Three – Second Set of CESR Guidance On The Common Operation Of The Directive To the Market. I have reviewed the text of this document which is a guide rather than law. However one accepts that it is an authoritative guide.

You rightly point out that changes In Expected Earnings Or Losses is considered to be specific information. Of course the point that we are making is that the internal budgets of the company do not reflect the expectations of a company but rather its aims and rather than being an economic or financial tool or record, budgets are merely a manner of driving the management's focus to established aims. The synonyms for the word "expected" are "usual", "normal", "ordinary", "accepted" and "likely". The dictionary definition[1] of "expect" is to think or believe that something will happen.

I respectfully but adamantly disagree that the budget paper which you state were in my client's possession can be classified as containing information as to what was thought or believed would happen. At most they may have contained information as to what the company wished that it's staff would achieve. The difference may be subtle but substantial nonetheless. Also in a business as volatile and unpredictable as that of the Global Group, can anyone seriously consider the achievement of any profit (or the suffering of any loss) to be usual", "normal", "ordinary", "accepted" or "likely"? In this business what one may believe will have happened by the end of a business day, is usually a world apart from what actually does occur.

The above is not an exercise in semantics, but a reflection of what we believe to be applicable to most business situations, and certainly to that of the business in question.

At this point we have nothing further to add, and await your final decision."

L-appellant ħass li huwa utili illi jirriproduċi estensivament din il-korrispondenza kollha sabiex it-tribunal ikun jista' jara l-isvolġiment tal-argument kollu. Wieħed jista' preliminarjament josserva kif l-awtorita' wara li kienet tirċievi tweġiba tempestiva mingħad l-appellant, kienet iddum gimgħat sħaħ sabiex twieġeb, umbagħad toħroġ b'xi element ġdid. Di piu' umbagħad tesigi tweġiba fi żmien relattivament qasir.

Fl-ewwel ittra hi qalet sempliċiment illi l-appellant kellu *inside information* meta għamel it-trasferimenti indikati, u għalhekk dan kien passibbli għas-sanzjoni tal-liġi. Meta l-appellant wieġeb illi il-pubbliku kien avvżat permezz ta' żewġ *company announcements* ta' Lulju u ta' Novemberu 2007, l-Awtorita' wara ħafna żmien wieġbet b'interpretazzjoni mill-aktar soġġettiva fuq il-kontenut ta' dawn il-*company announcements*, biex tipprova tinnewtralizza l-ispjegazzjoni tal-appellant. Daħħlet ukoll l-element preċiż li fil-laqgħa tal-Bord tas-7 ta' Diċembru 2007 l-appellant kellu quddiemu figuri preċiżi dwar l-andament finanzjarju tal-kumpannijja. Fl-ewwel ittra l-Awtorita' qalet ili hu sar jaf b'din l-informazzjoni "during the second half of the year".

Wieħed jistaqsi il-għala din il-laqgħa preċiża ma ssemmietx mal-ewwel. Għaliex l-Awtorita' riedet b'xi mod tistagħad lill-appellant, jew għaliex affaċċjata bi tweġiba f'waqtha, din riedet a kull kost tara ma x'hiex iktar ser taqbad? Meta l-Apellant

[1] Oxford Advanced Learner's Dictionary 5th Edition.

ipprotesta illi il-kontenut tal-*company announcements* kien wieħed korrett li ta t-twissijiet meħtieġa lill-pubbliku, l-awtorita' dahlet f'dawn l-announcements linja b'linja bl-iskop preċiż illi ssib lill-appellanti ħati. Eżempju klassiku jinsab fl-ittra tad-9 ta' Ġunju 2007 fejn din qalet illi meta f'wieħed mill-announcements il-kumpannijja qalet illi *international volatility may affect our investments and performance*, l-Awtorita' qalet li din id-dicitura timplika illi hemm probabbilita' illi "*it may not*" affect performance!! Huwa każ ta' fejn wieħed jista' jgħid li t-tazza hi nofsha mimlija jew nofsha vojta. It-tnejn ikollom raġjun. Imma f'dan il-każ, l-Awtorita' kienet implakabbli u fuq kwistjoni ta' interpretazzjoni soġġettiva ta' żewġ *company announcements* sabet lill-appellant ħati. Iżda mhux biss hekk. L-Awtorita' żiedet il-punt illi f'dik il-laqgħa l-Appellant kien ingħata budgets illi fihom kellu informazzjoni preċiża ta' kif marret il-kumpannijja in konfront mal-budgets tagħha. L-appellant ipprotesta illi budget mhux dokument li jagħti informazzjoni ċerta. Huwa ġeneralment "wish list" tal-management. Kull direttur f'kull borad meeting ikollu aċċess għall-budgets. F'dan il-każ, direttur ta' listed company ma jista' allura qatt jixtri jew ibiegħ azzjonijiet shares f'kumpannijja fejn huwa direttur.

Hawn l-awtorita' iċċitat guidelines tal-UE biex tgħid illi *changes in expected earnings or losses* hija *specific information*. L-appellant wieġeb fuq il-fatt illi budgets m'humiex *expectations* imma huma "*targets*".

Ma dan irid jiżdied illi l-argument prodott mill-Awtorita' lanqas irieġi loġikament. L-appellant kellu f'idejh fis-7 ta' Diċembru 2007 ċifri li għal dak il-mument kienu irrilevanti. X'użu setgħu kienu ċifri li jqabblu l-performance tal-kumpannijja ma budgets li kienu saru aktarx is-sena ta' qabel, meta l-appellant kellu l-faċilita' li jqabbel il-performance mal-informazzjoni iktar riċenti, u cioe' dik li kienet ħarġet għall-pubbliku fil-*company announcement* ta' Novembru 2007? L-updated information ma kiientx it-tqabbil ma budgets antiki imma se mai it-tqabbil ma informazzjoni iktar riċenti, li kienet ġja ngħatat lill-pubbliku.

Dan kollu qed jingħad biex wieħed juri l-animu ċar tal-Awtorita' li din mill-ewwel ittra li bagħtet, mhux veru li kienet qegħda tikkonsidra l-każ, imma kienet ġja iddeċidietu. Il-każ tal-awtorita' mhux ibbażat fuq fatti speċifiċi imma fuq interpretazzjonijiet soġġettivi ta' xi fatti. Pero iktar minn hekk, il-proċess ta' korrispondenza huwa intiż biex jagħti apparenza ta' kemm l-Awtorita' qegħda timxi b'trasparenza u dwar kemm tagħti opportunitajiet lill-Appellant jagħmel il-każ tiegħu. Imma dan hu kollu bżar fl-għajnejn. L-Awtorita' iddeċidiet il-każ hekk kif kitbet l-ewwel ittra. Fil-korrispondenza sussegwenti kull m'għamlet huwa li iġġustifikat l-ewwel deċiżjoni tagħha.

Ma dawn il-fatti attwali tal-każ li fuqha l-akkuża hi msejsa, iridu jissemmew ċerti fatti preċedenti din l-akkuża, minħabba li dawn ser ikollom rilevanza speċifika fir-rigward tal-ewwel aggravju.

Jirriżulta illi fl-20 ta' Ġunju 2008, l-Awtorita' appellata kienet akkużat lill-appellant talli "***during the second half of 2007***[2], *a substantial number of GlobalCapital plc*

[2] Sottolinear tal-appellant

['GC'] shares were sold on your behalf by HSBC Stockbrokers (Malta) Limited. These shares were held with HSBC Bank Malta plc as Custodian and the sale of these shares was executed through various transactions on the market during the period June, 2007 to December, 2007. According to our records, it appears that you have failed to submit the required notification of these trades. In light of this, the MFSA considers you as having breached the requirements of article 10 of the Prevention of Financial Markets Abuse Act, 2005, and regulation 8 of Legal Notice 108 of 2005."

L-appellant kien skuża ruħu ta' dak li ġara u kien spjega illi billi l-ishma in kwistjoni kienu taħt custodionship agreement mal-HSBC, il-proċeduri normali ta' notification li kienu jieħdu ħsiebhom l-istrutturi tla-GC inqabżu billi dawn ma dehrux bħala trades tal-appellant imma bħala trades tal-HSBC. Hu talab maħfra li b'ittra tat-23 ta' Lulju 2008 ġiet miċħuda. L-Awtorita' qalet hekk:

"it transpires that during the second half of 2007 you sold a total of 389,239 shares of GC through 62 trades for an amount of EUR 1,858,128 which shares were held with HSBC as custodian. The volume and amount of the transactions with respect to which you failed to submit a PDMR notification is considered by the Authority as substantial. The Authority feels that given the significant amounts involved and the importance of PDMR notifications for reasons outlined above, your justifications for your non disclosure of the said transactions though noted cannot be deemed satisfactory and at the very least your responsibility for negligence and omission to abide by the law persists."

L-Awtorita' għalhekk infliġġiet multa ta' 0.5% tal-valur tat-trades €9,290 u ippubblikat il-ksur tal-liġi. Qaltlu wkoll li l-multa kienet tkun ferm ikbar li kieku hu ma kienx laħaq aċċetta ir-responsabbilita' għan-nuqqas tiegħu. Effettivament l-appellant ħallas il-multa hekk imposta, u ssubixxa il-pubblikazzjoni.

L-Aggravji

L-aggravji tal-appellant huma ċari u manifesti u jikkonsistu f'dan li ġej:

L-Ewwel Aggravju – Ne Bis in Idem

Jirriżulta illi fit-23 ta' Lulju 2008 l-appellant instab ħati ta' offiża in konnessjoni ma trades li saru during the second half of 2007. L-akkuża odjerna tirrigwarda preċiżament parti mit-trades li saru fl-istess perijodu, u kwindi it-trades illi fuqhom jinsab akkużat u misjub ħati l-appellant, huma trades li dwarhom ġja ġie akkużat u instab ħati.

Hawn huwa importanti illi wieħed jistabilixxi l-indoli eżatta tal-offiża li biha l-appellant huwa akkużat u li tagħha instab ħati mill-Awtorita'. Fil-każ taħt appell ma jista' jkun hemm l-ebda dubbju illi l-aġir inkriminat, jekk jirriżuta, huwa ta' natura kriminali. "Any person who contravenes or fails to comply with the provisions of articles 6....shall be guilty of an offence."[3] Issa l-kwistjoni hi jekk jistax jingħad l-

[3] Kap. 476 art.24(2)

istess tal-offiża l-oħra fir-rigward tal-istess fatt materjali taħt l-art.10 tal-istess Att. L-Att innifsu ma jikkaratterizzax ksur tal-art.10 bħala reat. Iżda tali ksur jirrendi lill-persuna responsabbli għalih passibbli għal-sanzjoni amministrattiva. Il-kwistjoni dwar il-karattru legali ta' sanzjoni amministrattiva mhix waħda ġdida.

Il-Qorti Ewropeja tad-Drittijiet tal-Bniedem żviluppat ġurisprudenza twila u illum kostanti in subieċta materia. Dik il-Qorti kellha kull opportunita' li teżamina jekk sanzjoni hix ta' indoli penali jew le, minħabba li sikwiet kienet affaċċjata b'sitwzzjonijiet fejn ir-rikorrent ikun talab il-protezzjoni tal-Konvenzjoni f'materja penali, filwaqt li l-istat konċernat jeċċepixxi li l-miżuri ilmentati kienu ta' natura amministrattiva. B'hekk dik il-Qorti, f'diversi sentenzi[4] elenkat tliet kriterji sabiex tistabilixxi il-karattru penali o meno ta' xi sanzjoni. L-ewwel hi d-deskrizzjoni li tagħti l-liġi stess. Fil-każ odjern, dan il-kriterju ġja hu soddisfatt. Imbagħad, fejn il-liġi tikkarakterizza sanzjoni bħala amministrattiva, il-Qorti tindaga in-natura vera tas-sanzjoni, u f'dan il-każ jidher ovvju li din hi sanzjoni imposta għal "ksur" ta' liġi, u għalhekk ta' indoli penali.

Fl-aħħar, il-Qorti tikkunsidra l-entita tal-piena. Fil-każ ta' Oztürk, multa ta' 250 Deutschemark (ċirka €100 illum) kienet biżżejjed biex tissoddisfha il-kriterju. Multo magis għandhu jkun soddisfatt il-kriterju f'każ ta' multa ta' €9,290. Għandu wkoll jiġi osservat illi fl-att imsemmi il-penali massima illi tista' tiġi mpsota fuq min jinstab ħati ta' dak ir-reat huwa ta' €93,174!![5]

Una volta assodat kemm din l-azzjoni kontra l-appellant, kif ukoll l-oħra li tagħha ġja instab ħati u ingħata piena, huma t-tnejn ta' karattru kriminali, jidħlu fix-xena id-drittijiet u l-garanziji li hu ntitolat għalihom kull min huwa akkużat b'reat kriminali.

Il-Kostituzzjoni ta' Malta tipprovdi fl-artiklu 39(9) hekk:

> (9) Ebda persuna li turi li tkun għaddiet proċeduri quddiem xi qorti kompetenti għal reat kriminali u jew tkun ġiet misjuba ħatja jew liberata ma għandha terġa tgħaddi proċeduri għal dak ir-reat jew għal xi reat kriminali ieħor li għalih setgħat tiġi misjuba ħatja fil-proċeduri għal dak ir-reat ħlief wara ordni ta' qorti superjuri mogħti matul il-kors ta' appell jew proċeduri ta' reviżjoni dwar id-dikjarazzjoni ta' ħtija jew liberazzjoni : u ebda persuna m'għandha tgħaddi proċeduri għal reat kriminali jekk turi li tkun ħadet il-maħfra għal dak ir-reat.

Hawn issa wieħed irid jeżamina id-duttrina kif ġiet evoluta fil-kamp kriminali sabiex wieħed jasal biex jara jekk tassew l-appellant f'dan il-każ hux tassew qed jiġi pproċessat għat-tieni darba għall-reat ieħor illi tiegħu setgħet ġiet misjuba ħatja fl-ewwel proċeduri.

Naturalment hawn ser jiġi objettat mill-Awtorita' appellata illi non si tratta tal-istess offiża imma ta' żewġ offiżi kompletament differenti li jirrisalu minn żewġ artikoli tal-

[4] Engel et vs The Netherlands 08.02.1976; Ozturk vs Federal Rep. of Germany, 21.02.1984; Demicoli vs Malta 26.06.1991.
[5] Kap.476 art.22(1)

att in kwistjoni. Iżda il-pożizzjoni legali hija differenti. Il-kostituzjoni titkellem mhux fuq l-istess offiża imma dwar "xi reat ieħor li setgħet tinstab ħatja għal xi reat kriminali ieħor fil-proċeduri għal dak ir-reat (qed tirreferi għar-reat li tiegħu ikun ġja ġie pproċessat l-imputat). Il-Kap.9 terġa' huwa iktar miftuħ.

> "Kif inhu risaput, ir-regola tan-ne bis in idem kif espressa fl-artikolu 527 tal-Kodiċi Kriminali hija aktar wiesgħa minn kif formulata fl-Artikolu 39(9) tal-Kostituzzjoni. Filwaqt li l-Artikolu 39(9) tal-Kostituzzjoni jitkellem dwar "reat kriminali" u japplika d-dottrina tan-ne bis in idem għal dak ir-"reat kriminali" partikolari li tiegħu dak li jkun ikun ġie misjub ħati jew illiberat u għal "reat kriminali" oħra kompriżi u involuti f'dak ir-reat kriminali partikolari, l-Artikolu 527 jitkellem dwar "l-istess fatt". L-Artikolu 527, infatti, jgħid hekk: "Wara sentenza li f'kawża tillibera imputat jew akkużat, dan ma jistax għall-istess fatt ikun suġġett għal kawża oħra" (sottolinear ta' din il-Qorti). Hu appena neċessarju li jiġi osservat li għalkemm din id-disposizzjoni titkellem dwar il-liberazzjoni ta' dak li jkun, u mhux ukoll dwar il-kundanna tiegħu, il-qrati tagħna dejjem interpretawha bħala li tinkludi wkoll il-każ fejn persuna tkun ġiet misjuba ħatja ta' l-istess fatt.[6]"

Fit-trattat awtorevoli ta' Sir Anthony Mamo dwar il-proċedura penali, joħroġ ċar il-kunċett illi sabiex tirnexxi id-difiża ta' ne bis in idem huwa meħtieġ mhux illi il-klassifikazzjoni tar-reat tkun l-istess waħda, iżda illi l-fatt materjali ikun l-istess wieħed.

> "Per giudicare se si tratti di fatti identici o diversi, bosogna esaminare se il corpo del delitto rimanga lo stesso, pur cambiandosene la qualificazione, o in altri termini, se la materialita' del fatto rimane inalterata malgrado la diversa qualificazione legale che gli venga attribuita. In other words if the fact on which the subsequent charge is made is the same as that in which the previous judgment was given, the plea lies notwithstanding that the subsequent charge is an offence different from that charge in a previous trail."[7]

Ma jistgħax ikun kontestat illi il-fatt materjali illi huma soġġetti għal dawn il-proċeduri huma preċiżament l-istess fatti materjali li dwarhom l-appellant ġja instab ħati mill-Awtorita' kif fuq spjegat, u cioe "trades in GC shares in the second half of 2007". Inutili illi l-Awtorita' tipprova tgħid illi ż-żewġ "breaches" kienu differenti. Il-kostituzzjoni, il-Kodiċi kriminali u d-duttrina w il-ġurisprudenza huma konformi fuq l-ideja illi biex tirnexxi din id-difiża biżżejjed illi l-fatt materjali jkun l-istess. "Quando non trattasi di fatti posteriori ma di quel fatto preciso su cui cadde l'assoluzione, io non ammetterei mai che potesse tornarsi a proporre l'accusa, ne sotto il pretesto di circostanze novellamente scoperte, ne sotto il pretesto di una qualificazione giuridica nella prima accusa...con tali sottigliezzesi puo' molestare forse dieci volte un cittadino per la stessa azione."[8]

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[6] L-Pulizija vs Taek Mahoud Abu Mehdi.Q.App.Krim 26/07/2002
[7] P.44
[8] Ditto – jikkwota il-Carrara

Mingħajr preġudizzju għas-sottomissjoni preċedent irid jiżdied dak illi jingħad fl-art.22 tal-Kap.476:

> (5) The imposition by the competent authority of an administrative sanction in terms of this article shall be without prejudice to any other consequences of the act or omission of the offender under civil or criminal law:
> Provided that in all cases where the competent authority imposes an administrative sanction consisting of a fine in respect of anything done or omitted to be done by any person and such act or omission also constitutes a criminal offence, no proceedings may be taken or continued against the said person in respect of such criminal offence.

Minn dan is-subinċiż u mill-proviso jirriżulta ostakolu ċar u lampanti għal din il-proċedura meħuda mill-Awtorita'. Filwaqt illi proċeduri taħt l-artikolu 10 tal-Kap.476 m'humiex reati (skond l-istess att minkejja li mill-prinċipji fuq enunċjati xorta għandhom indoli ta' reati u l-garanzijji iridu japplikaw għalihom ukoll) l-akkużi taħt l-art.6 huma reati zgur. Għalhekk jekk l-istess fatt huwa ksur tal-art.10 u l-art.6, u ġja ttieħdu passi skond l-art.10, issa ma jistgħux iktar jittieħdu passi skond l-art.6 in forza tal-proviso hawn fuq ċitat.

Għal dawn il-motivi it-Tribunal għandhu jiddikjara preliminarjament illi l-appellant ġie misjub ħati mill-Awtorita' appellata u issanzjonat b'multa għal darbtejn għall-istess fatt, u b'hekk għandhu jiddikara illi is-sanzjoni mertu ta' dan l-appell hija illegali u għandhu jħassar kemm il-pronunzjament ta' ħtija kif ukoll il-multa u s-sanzjoni tal-pubblikazzjoni.

<u>It-tieni Aggravju – L-Appellant Ma kienx fil-Pussess ta' *Inside information* Meta Biegħ</u>

Il-Kap.476 jiddisponi hekk:

> ***6.*** *(1) No person shall use inside information to trade in any financial instrument admitted to a regulated market or in any other way to acquire or dispose of, or attempt to acquire or dispose of such financial instrument, whether for his own account or for the account of a third party, either directly or indirectly, if he is in possession of information related to such financial instrument by virtue of :*
> *(a) his membership of the administrative, management or supervisory bodies of the issuer;*
> *(b) his holding in the capital of the issuer;*
> *(c) his having access to the information through the exercise of his employment, profession or duties; or*
> *(d) his criminal activities.*

Fl-art.2 Definizzjoni insibu:

> *"inside information" means information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers or to one or*

more financial instruments, including information regarding any takeover offer for a company, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instrument or on the price of related derivative financial instruments; being information which a reasonable investor would be likely to use as part of the basis of his investment decisions.

For the purposes of this definition, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instrument or related derivative financial instruments; for persons charged with the execution of orders concerning financial instruments, inside information shall also mean information conveyed by a client and related to the client's pending orders, which is of a precise nature, which relates directly or indirectly to one or more issuer or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments; being information which a reasonable investor would be likely to use as part of the basis of his investment decisions;

It-teżi tal-appellant dejjem kien konsistenti (mhux bħal dik tal-Awtorita') fis-sens illi il-pubbliku kien avvżat b'mod preċis u tempestiv dwar l-andament tal-kumpannija matul is-sena 2007. Dan il-proċess ta' informazzjoni lill-pubbliku kien jikkonsisti f'żewġ *company announcements*. Wieħed f'Awwissu 2007 u l-ieħor f'Novembru 2007. L-Awtorita' m'aċċettatx din id-difiża fuq żewġ punti:

1. Il-*company announcements* ma kienux qegħdin jagħtu twissijja qawwija biżżejjed dwar il-qagħda tal-kumpannijja;

2. Meta l-appellant effettwa il-bejgħ bejn l-14 us 27 ta' Diċembru 2007, huwa kellu informazzjoni iktar riċenti fuq il-kumpannijja li ngħatatlu f'laqgħa tal-Bord tad-diretturi tas-7 ta' Diċembru 2007.

   Biex jirribatti dawn il-preġudizzjali, l-appellant irid jagħamel rifenrenza preċiża għall-fatti. Għalhekk dwar l-ewwel preġudizzjali irid jiċċita verbatim il-*company announcements* in kwistjoni.

L-announcement t' Awwissu 2007 qal hekk:

"Half-yearly report for the period ended 30 June 2007

Interim Directors' Report

GlobalCapital plc. ('the Company') registered a profit after tax for the six months ended 30 June 2007 of Lm388,919 compared to a corresponding result

last year of Lm735,180. The main highlights of the reporting period's results were:

- Increase in operating profit of 21,9%;
- Continued healthy returns on the international investment property portfolio of the Company and its subsidiaries;
- Significant fair value losses on securities held by the Company and its subsidiaries, including the life insurance company, attributable to negative market conditions which prevailed during the year to date.

The directors expect that the level of trading activity experienced during the six months to June 2007, which show an overall improvement in turnover over the corresponding period last year, should be sustained in the latter half of the current year. However, recent stock market volatility and global economic uncertainty may effect trading and investment performance.

The directors do not recommend the payment of an interim dividend."

Minn dan l-announcement immedjatament jidher lampanti illi l-andament tal-kumpannijja ma kienx dak tas-sena preċedenti għax l–announcement jibda billi jispjega kif il-profitti tal-kumpannijja għall-perijodu komparabbli tas-sena preċedent, kien in-nofs ta' dak li kien fis-sena preċedenti. Hemm elementi pożittivi fir-rapport għaliex sa dak il-mument, dik kienet ir-realta'. Iżda kull azzjonist, jew potezjali investitur ta' intelliġenza medja kien jinduna b'waqgħa talment drastika fil-profitti. Il-fatt ukoll illi d-diretturi ma rrakkomandawx interim dividend kellu jkun sinifikkattiv, kemm għal min hu azzjonist kif ukoll għal investitur raġjonevoli, għaliex proprju id-dividend jew in-nuqqas tiegħu huwa tagħrif fondamentali għal dawn il-persuni.

Ma dan irid jingħad illi il-kontijiet soċjali tal-kumpannijja ġew ukoll pubblikati ma dan l-announcement. Minn dawn jirriżulta illi "earnings per share" niżlu minn 5c6 għal 2c9. Cash and cash equivalents at the end of the interim period niżlu minn Lm3,681,343 f'Ġunju 2006 għal Lm1,332,297 f'Ġunju 2007. Għalhekk dan l-announcement kien qed juri biċ-ċar illi il-kumpannijja kienet għaddejja minn tendenza negattiva ħafna paragunata mas-sena ta' qabel.

Hawn wieħed irid ukoll jifhem illi il-kumpannijja hija dipendenti b'mod uniku fuq kif jimxu is-swieq tal-investituri madwar id-dinja. Ġimgħa, xi drabi anki ġuranta waħda taf iġġib tidwir fil-komportament tas-swieq li jkollu effett immedjat, drammatiku u imprevvist fuq l-andament finanzjarju tal-kumpannija. Dan ġie spjegat lill-Awtorita' fil-korrispondenza fuq riferita dwar dan il-każ, iżda l-Awtorita' għażlet li ma tagħtix każ.

Niġu issa għall-*company announcement* tal-15 ta' Novembru 2007.

The following is a Company announcement issued by GlobalCapital p.l.c. pursuant to Malta Financial Services Authority Listing Rule 9.51.
Quote
Interim Directors' statement

GlobalCapital p.l.c. (the 'Group') hereby announces that during the period between 1 July 2007 and the date of this announcement, no material events and transactions have taken place that would have an impact on the financial position of the Group, such that would require specific mention, disclosure or announcement pursuant to the applicable Listing Rules.

During the first nine months of the year the Group registered increased turnover levels, over the corresponding period last year, predominately on its life insurance business and property portfolio, whilst investment fee income has experienced a decrease compared to the corresponding first nine months of 2006. The Group's health Insurance division has also registered positive results which, barring any unforeseen circumstances, are expected to be sustained throughout the remaining months. The downturn in the local and international capital markets persisted during the third quarter of the current financial year and this has invariably had an adverse effect on the Group's portfolio of financial investments. This factor has led to a negative impact on the Group's profitability for the period under consideration and if the downturn in the financial markets persists it is expected to impact on this year's results.

GlobalCapital Investments Limited, one of the Group's subsidiaries, has recently acquired a financial institutions licence in terms of the Financial Institutions Act, 1994. It is anticipated that this new licence will help further diversify GlobalCapital's revenue streams and is expected to start contributing to the Group's results during 2008.

Hija s-sottomissjoni preċisa tal-appellant illi din l-aħbar fissret ċar 'lill-pubbliku illi il-kumpannijja kienet qegħda tistenna riżultati ħżiena fuq il-portfolio tal-investimenti tagħha, li jikkomponi perċentwali għolja mit-turnover tagħha. B'dana, azzjonist jew investitur potenzjali kellu informazzjoni għad-dispożizzjoni tiegħu sabiex ikun jista' jasal għal deċiżjoni infurmata dwar jekk ibiegħx jew iżommx l-ishma li għandu jew jekk jixtrix.

Kwindi, meta xahar wara dan l-aħħar announcement, l-appellant biegħ parti mill-ishma tiegħu, dan kien qed jagħmlu f'perijodu meta il-pubbliku kien ġja ġie avvżat b'mod tempestiv dwar it-tendenza negativa li kienet għadejja minnha il-kumpannijja. Kwindi, l-informazzjoni li huwa kellu għad-dispożizzjoni tiegħu, ma kienitx sostanzjalment differenti minn dik li kienet ġja għad-dispożizzjoni tal-pubbliku. Għalhekk huwa f'dak il-mument ma kienx qiegħed fil-pussess ta' *inside information (information of a precise nature which has not been made public)*. Għalhekk huwa qatt ma seta' jinstab ħati ta' din l-offiża, u kellu jiġi liberat minnha.

Il-kontro argument l-ieħor tal-Awtorita' huwa li fis-7 ta' Diċembru 2007, l-appellant kellu informazzjoni iktar riċenti dwar l-istat tal-Kumpannijja, minn dak li intqal fl-announcements. Dan huwa argument perikoluż, kaptzjuż u soġġettiv għall-aħħar. Direttur ta' kumpannijja huwa fid-dover illi jkun aġġornat dwar l-andament tal-istess. Huwa għalhekk mistenni li direttur ikollu informazzjoni mill-aktar riċenti dwar l-istat finanzjarju jew kummerċjali ta' kumpannijja li jservi fuq il-bord tagħha.

Jekk wieħed jieħu il-kejl li evidentement qegħda tuża l-Awtorita', wieħed jasal biex jikkonkludi illi direttur ma jista' qatt ibiegħ jew jixtri ishma tal-kumpannijja tiegħu stess, għaliex dan dejjem huwa mistenni li jkun għal kurrenti. Naturalment il-livell u dettall ta' informazzjoni li jkollu direttur ma jkunx tal-istess dettal u kwalita' li jkollu l-pubbliku.

Dan qabel xejn għal raġunijiet prattiċi, għaliex huwa impossibbli li kumpannija iżomm l-pubbliku informat b'dak kollu li jkun għaddej. Iżda hemm raġunijiet oħrajn bħal per eżempju il-konfidenzjalita' ta' ċerta informazzjoni. L-intrapriżi għandhom ukoll interess leġittimu li ma jiżvelawx wisq informazzjoni li tkun tista' tiġi użata mill-kompetituri tagħha.

Kif ġja rajna, il-liġi, meta qed tikkwalifika n-natura ta' *inside information* tkompli hekk:

> "including information regarding any takeover offer for a company, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments; being information which a reasonable investor would be likely to use as part of the basis of his investment decisions."

Hawn m'għandniex każ fejn direttur ta' kumpannijja kien jaf informazzjoni privileġġjata, li ma kienitx disponibbli għall-pubbliku. Il-każ huwa iktar sottili minn hekk. Il-pubbliku matul is-sena 2007 kien infurmat mhux darba imma darbtejn illi il-kumpannija kienet għaddejja minn perijodu negattiv paragunat mas-sena preċedenti.

Dan jirriżulta, u ma jistgħax jiġi kkontestat. Il-punt kardinali huwa dan. Il-pubbliku kien infurmat, iżda wara li ħarġet din l-informazzjoni, l-appellant qed jingħad li ingħata informazzjoni iktar eżatta. Għall-Awtorita' dan jikkostitwixxi *inside information*. L-appellant jissottometti illi ġja la darba l-informazzjoni li huwa ngħata fis-7 ta' Diċembru 2007 kienet tikkonferma u tissostanzja l-informazzjoni li ngħatat fl-announcements, dik l-informazzjoni l-ġdida ma setgħet qatt tikkwalifika bħala *likely to have a significant effect on the prices of those financial instruments.*

Kien dan l-istess tribunal illi kien interpreta il-kelma "significant" b'dan il-mod:

> "It is relevant to point out that the law uses the word 'significant' meaning that it is not concerned with trivial information which only slightly affects the price"[9]

F'dan ir-rigward wieħed irid iżomm quddiem għajnejh illi r-regola ta' interpretazzjoni hija li appellant irid jitqies dak li ħaseb l-appellant "ex ante"[10]

[9] MSE vs Hadelsfinanz 06/10/2000

[10] Market Abuse Directive Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market

> "*CESR considers that those with potential inside information need to assess on an ex ante basis whether or not information is likely to have a significant price effect. It is a question of determining the degree of probability with which at that point in time such an effect could reasonably have been expected. The Directive test is "likely" so on the one hand the mere possibly that a piece of information will have a significant price effect is not enough to trigger a disclosure requirement but, on the other hand, it is not necessary that there should be a degree of probability close to certainty.*"

Hawn għalhekk irid jiġi indagat jekk l-Appellant kellux raġjonevolment l-aspettattiva illi – fid-dawl ta' dak kollu li ġie spjegat – l-hekk imsejjaħ *updated information* ma kienitx *likely to have a significant price effect*, minħabba li din kienet tikkonferma informazzjoni ġja disponibbli għall-pubbliku.

Jinkombi lill-Awtorita' illi tipprova illi din l-informazzjoni li allegatament kellu l-appellant, li l-pubbliku ma kellux, kellha effett sinifikattiv fuq il-prezz. L-Awtorita' ħasset illi hija skarigat dan l-obbligu billi qalet li meta fit-8 t'April 2008, ftit jiem wara li l-accounts tas-sena 2007 ġew ippubblikati, il-prezz tal-ishma fil-kumpannijja waqa' b'43%. L-Awtorita' għalhekk ħasset illi il-każ tagħha kien b'hekk ġie ppruvat.[11]

> Reasonable investors base their investment decisions on information already available to them, "that is to say, on ex ante available information. Therefore, the question whether, in making an investment decision, a reasonable investor would be likely to take into account a particular piece of information should be appraised on the basis of the ex ante available information. Such an assessment has to take into consideration the anticipated impact of the information in light of the totality of the related issuer's activity, the realiability of the source of information and any other market variables likely to affect the related financial instrument or derivative financial instrument related thereto in the given circumstances.
>
> (2) Ex post information may be used to check the presumption that the ex ante information was price sensitive, but should be used to take action against someone who drew reasonable conclusions from ex ante information available to him[12]"

Iżda, kif ser jintwera, din kienet konstatazzjoni illi apparti li hi totalment superfiċjali u insinifikanti, skond id-direttiva lanqas hi biżżejjed biex tistabilixxi il-ħtija, għaliex it-test jibqa' dejjem wieħed "ex ante" u mhux "ex post".

B'danakollu l-Appellant ser janalizza dawn l-addebiti wkoll. Fil-bidu tas-sena 2008 kien hemm trade bil-prezz ta' €5.15. Sa April l-ishma ma ġew negozjati xejn, umbagħad fit-8 t'April 2008, il-prezz niżel minn €5.15 għal €2.90. Dan seħħ wara l-pubblikazzjoni tal-accounts, u allura ictu oculi, jekk wieħed ma jidħolx sew fil-

[11] Ittra tad-9 ta' Jannar 2009
[12] COMMISSION DIRECTIVE 2003/124/EC Of 22 December 2003

kwistjoni (kif suppost jagħmel regolatur serju), wieħed jista' jaħseb illi kien hemm effett drammatiku fuq l-prezz meta ħarġet din l-informazzjoni fil-pubbliku.

Iżda minn eżami iktar akkurat tal-fatti wieħed jibda jara ċirkostanzi oħrajn.

Meta kien hemm trade fit-22 ta' Jannar 2008, il-prezz dakinhar kien waqa' b'€0.45. mela mingħajr ma kien hemm pubblikazzjoni tal-informazzjoni ġdida, il-prezz mingħjar xi intervent sinistru jew illegali, waqa' bi 8%.

Meta ħarġet l-informazzjoni inkriminata, il-prezz reġa waqa' b'43% fuq trade ta' 1200 azzjoni. Hawn wieħed irid iżomm f'moħħu illi il-kumpannijja għandha 13,207,548 fuq is-suq! Dawn huma t-trades mll-ewwel ta' jannar 2008 sal-aħħar ta' mejju 2008 (cioe' sa qisu xahar wara li ġew pubblikati l-accounts ta' 2007).

	Numru Ta' Ishma	Ċaqliq Fil-Prezz	Prezz Finali
Data			
22/01/2008	100	-0.45	5.15
08/04/2008	1200	-2.5	
09/04/2008	500	-	
11/04/2008	329	0.03	
14/04/2008	1100	-0.20	
18/04/2008	4350	0.70	
21/04/2008	3420	0.20	
22/04/2008	13240	0.18	
13/05/2008	500	-0.18	
22/05/2008	401	-0.08	
29/05/2008	1920	-0.10	2.85
Total	27060		
perċentwali mit-total tal-ishma tal-kumpannija		0.20%	

Ma dawn iċ-cifri illi juri iċ-ċaqliq fil-prezz kien wieħed rifless f'numru għal kollox eżigwu tal-ishma tal-kumpannijja ma jistgħax zgur jingħad li ġie ppruvat illi l-informazzjoni inkriminata b'xi mod kellu *a significant effect on the price.* Lanqas jista' jingħad illi perċentwali ta' bejn 0.009% (l-1,200 sehem negozjati fit-08/04/2008) jew, fl-għar ipoteżi għall-esponenti, 0.20% (il-27,060 sehem negozjati bejn 22/01/2008 u d-29 ta' 05/05/2008) jistgħu ikunu rappreżentattivi tal-perċezzjoni tas-suq fl-ishma tal-kumpanija GlobalCapital.

Fl-aħħar irid jingħad ukoll illi ma hemm l-ebda prova konkludenti li it-telf fil-valur (avolja fuq kwantita' negliġibbli ta' ishma) kienet ir-riżultat tal-performance tal-kumpannijja fis-sena 2007 meta dan ir-rendimet ġie għall-għarfien tal-pubbliku. Il-verita' illi f'dak il-perijodu is-suq kollu kien nieżel, u minn figuri tal-Borża ta' Malta jirriżulta illi il-Market Capitalization nieżlet b'mod enormi fis-sena 2008 għal dak li

kienet fis-sena 2007. Fl-għeluq tal-2007 il-valur tas-suq kollu kien ta' Lm 1,654,513,481 jew in kella € 3,854,023,703. Fl-għeluq tas-sena 2008 dan kien ta' €2,566,689,430. Dan irrappreżenta TELF ta' xejn inqas minn 33.4%!!

Ma dan irid jiżdied argument ieħor. Jekk l-Awtorita' qiset illi l-informazzjoni mogħtija lid-diretturi tal-Bord fis-7 ta' Diċembru 2007 kienet tikkwalifika bħala *inside information* mela allura il-għala l-Awtorita' ma ħaditx passi kontra il-kumpannijja taħt l-Art.9 tal-Kap476? jekk veru l-informazzjoni kienet *inside information*, il-kumpannijja kellha jew l-obbligu illi tagħmel dik l-informazzjoni immedjatament aċċessibbli lill-pubbliku, u jekk le, minħabba l-operat tas-subinċiż 2 ta l-istess artiklu, l-istess kumpannijja kienet obbligata illi skond ir-regolament 5(2) tal-A.L.108 tal-2005 li immedjatament tagħti raġjunijiet lill-Awtorita' il-għala hija kienet qegħda ddum milli tirrilaxxja din l-informazzjoni. Il-fatt illi l-Awtorita' wara dan iż-żmien kollu ma ħaditx azzjoni f'dan is-sens jixhed li hi stess ma temminx li l-informazzjoni in kwistjoni kienet *inside information* affattu.

Dan qed jingħad għaliex ir-regolatur irid jimxi b'konsistenza assoluta. Jekk jara ksur tal-liġi, m'għandhux għażla jew diskrezzjoni jieħux azzjoni jew le. Il-fatt li ma ħax azzjoni skond l-artikolu 9 tal-Kap.476 jippreġudika l-azzjoni tiegħu f'dan il-każ.

Inotlre irid jiżdied ma dan, illi jekk wieħed jieħu l-interpretazzjoni li qegħda tagħti l-Awtorita' tat-tifsira ta' *inside information* ad litteram, dan iwassal għall-konklużjoni illi kull listed company, wara kull laqgħa tal-bord tad-diretturi tagħha trid bilfors toħroġ *company announcement* dwar x'intqal f'dak il-Bord. Huwa assjomatiku illi f'laqgħa tal-bord tad-diretturi, il-membri ser jingħataw l-aħħar tagħrif dwar il-kumpannijja, u ser invarjabbilment ikunu aġġornati bl-aħħar figuri dwar ir-rendiment tal-kumpannijja. Skond l-Awtorita' dawn awtomatikament huma inside information u wara kull laqgħa ta' kull bord, kull kumpannijja trid jew toħroġ *company announcement*, jew trid tikteb lill-Awtorita' skond ir-regolament 5(2) tal-Avviż Legali 108/2005 biex tispjega il-għala ma ħarġitx tali announcement.

L-appellant jistieden lill-Awtorita' tiżvela kemm il-ittra taħt ir-regolament 5(2) irċieviet u kemm il-investigazzjoni bdiet dwar nuqqas taħt dawn l-artikoli.

In vista ta' dawn l-aggravji, it-Tribunal għandhu jsib illi bil-ksur tar-regola ne bis in idem l-Awtorita' kisret mhux biss il-provvediment tal-liġi imma saħansitra anki tal-Kostituzzjoni, u bil-mod kif użat id-diskrezzjoni tagħha sabiex tinterpreta l-fatti kif deherilha hi, mingħajr ma ħadet kont tal-ispjegazzjonijiet mogħtija, u mingħajr ma tat l-appellant il-benefiċċju tad-dubju raġjonevoli, hi ħadet deċiżjoni ivvizzjata b'abbuż ta' diskrezzjoni u li hija manifestament inġusta; ukoll illi fl-interpretazzjoni soġġettiva tagħha dwar x'jikkostitwixxi *inside information*, liema interpretazzjoni mhix sorretta mill-fatti, l-Awtorita' applikat ħażin il-provvediment tal-liġi.

Għal dawn il-motivi, dan it-Tribunal huwa mitlub illi iħassar u jirrevoka id-deċiżjoni appellata tas-26 t'Ottubru 2009, u jillibera lill-Appellant mis-sejba ta' ħtija ta' insider trading kif definita mill-Awtorita', u cioe a bażi tal-informazzjoni allegatament lilu mogħtija fis-7 ta' Diċembru 2007, u teħilsu wkoll minn kull sanzjoni amministrattiva u kull piena jew miżura oħra prospettata mil-Awtorita' f'dan il-każ.

Ra r-risposta intavolata mill-Awtorita' appellata, permezz ta' liema hija esponiet is-segwenti:

1. **Eċċezzjonijiet Preliminari**

a) Ebda ksur tal-prinċipju tan-ne bis in idem

L-Awtorita' tirrespinġi l-allegazzjoni tal-appellant li b'xi mod inkiser il-prinċipju ta' ne bis in idem. Anzi jidher li l-appellant qiegħed jissuġġerixxi interpretazzjoni skoretta ta dan il-prinċipju. L-appellant kien ġie mmultat għax kiser id-dispożizzjonijiet tal-artikolu 10 tal-Att dwar il-Prevenzjoni ta' Abbuż fis-Swieq Finanzjarji, u ċioe' li bħala persuna li twettaq responsabbiltajiet ta' ġestjoni f'entita' emittenti strumenti finanzjarji naqas mill-obbligu li jinnotifika lill-Awtorita' meta biegħ ishma tal-Global Capital fit-tieni parti tal-2007. Fuq il-bażi ta dan il-ksur li per altru kien ġie ammess mill-appellant, l-appellant issa qiegħed jipprova joħroġ minn akkuża ferm differenti u distinta.

Kontrarjament għal dak li jgħid l-appellant, l-fatt li jkun hemm ksur tal-liġi punibbli b'sanzjoni amministrattiva ma jfissirx awtomatikament illi dik il-liġi jew is-sanzjoni imposta hija ta' natura penali. Il-liġi mhux hekk tgħid. Multa amministrattiva imposta mill-Awtorita' u f'dan il-kas aċċettata mill-appellant stess u imħallsa minnu hija bla dubju materja ta' sanzjoni amministrattiva, u m'hijiex sanzjoni penali. Infatti, l-artikolu 24(1) tal-Att dwar il-Prevenzjoni ta' Abbuż fis-Swieq Finanzjarji jelenka id-dispożizzjonijiet tal-istess Att illi huma ta' natura penali b'mod eżawrjenti. L-artikolu 10 tal-Att mhux wieħed mill-artikoli hekk elenkati. Ladarba l-liġi ma tgħidx li min jikser l-artikolu 10 huwa ħati ta' reat, mela allura l-ksur ta' dan l-artikolu u s-sanzjoni li dan il-ksur iġib miegħu ma jistgħux jiġu meqjusa ta' natura penali. Kieku l-liġi riedet li min jikser l-artikolu 10 ikun ħati ta' reat, dan l-artikolu kien ikun elenkat fl-artikolu 24(1) tal-Att.

Għandu jingħad ukoll illi l-liġi tagħmel distinzjoni netta bejn sanzjoni amministrattiva mill-Awtorita' u proċeduri kriminali imressqa quddiem qorti ta ġurisdizzjoni kriminali. L-artikolu 24(5) tal-Att dwar il-Prevenzjoni ta' Abbuż fis-Swieq Finanzjarji jipprovdi li min jinstab ħati ta' reat taħt l-artikolu 6 tal-istess Att jista' jeħel multa sa € 931,749.36 jew sa tlett darbiet il-profitt li sar jew it-telf evitat bis-saħħa tar-reat (skond liema somma tkun l-akbar), u massimu ta' seba' snin priġunerija jew it-tnejn. Mill-banda l-oħra, l-artikolu 22 tal-istess Att jippermetti lill-Awtorita' timponi sanzjoni amministrattiva li ma teċċedix is-somma komplessiva ta' € 93, 174.94, cioe' somma ħafna iżgħar, u dan isir bil-miktub u mingħajr il-bżonn għal smiegħ f'Qorti. Is-sanjzoni penali hija bla dubju aktar serja u gravi. F'dan il-każ ma kien ebda sanzjoni penali, kontrarjament għal dak li allega l-appellant fl-argumenti tiegħu.

Apparti dan, il-ksur tal-artikolu 10 u l-ksur tal-artikolu 6 huma konċettwalment diversi u distinti. L-artikolu 10 jistabilixxi obbligu ġenerali li għandu jiġi osservat kull meta jkun hemm "...l-eżistenza ta' operazzjonijiet imwettqa għalihom [għal persuni li jwettqu responsabbilitajiet ta' ġestjoni] dwar azzonijiet ta' l-entita' emittenti msemmija...". Għalhekk, ikun hemm ksur tal-artikolu 10 kull darba li uffiċjal li għandu xi rwol fil-ġestjoni ta' kumpannija (bħal ma huwa l-appellant) jonqos milli jirrapporta xi tranżazzjoni f'ishma ta' dik l-istess kumpannijja li tkun saret għalih lill-Awtorita'. Mill-banda l-oħra, l-artikolu 6 jipprojbixxi l-użu ta' informazzjoni minn ġewwa ta' natura preċiża.

Huwa ċar li meta l-appellant kiser id-dispożizzjonijiet tal-artikolu 10, il-fatt materjali kien in-nuqqas tal-istess appellant li jinnotifika lill-Awtorita' bit-tranżazzjonijiet li għamel. Minn-naħa l-oħra, meta kiser id-dispożizzjonijiet tal-artikolu 6, il-fatt materjali kien l-użu illeċitu ta' informazzjoni minn ġewwa. Bir-rispett kollu, l-asserzjoni tal-appellant illi l-fatt materjali huwa "trades in GC shares in the second half of 2007" kemm fil-ksur tal-artikolu 10 u kif ukoll fil-ksur tal-artikolu 6 hija sempliċistika u konvenjenti aktar milli hija korretta stante li huma għal kollox distinti.

Mingħajr preġudizzju għas-suespost, għandu jingħad ukoll illi matul il-perijodu li fih l-apellant kien qiegħed jikkorrispondi mal-Awtorita' biex jispjega l-pożizzjoni tiegħu, dan fl-ebda ħin ma kien qajjem il-kwistjoni tan-ne bis in idem. Anzi, wara li spjega l-pożizzjoni tiegħu fuq il-mertu għal darba darbtejn, l-avukat tal-appellant kiteb ċar u tond li "... my client feels that he has nothing futher to add..." kif jirriżulta mill-ittra tiegħu datata 30 ta' Ġunju 2008 ippreżentata kontestwalment ma din ir-risposta. L-Awtorita' jidrilha li dan il-punt daqstant importanti messu qajjmu mill-ewwel, u mhux f'dan l-istadju quddiem forum differenti bħala speċi ta after-thought wara li ma rnexxilux jikkonvinċi lill-Awtorita' bl-ispjegazzjonijiet tiegħu.

Fid-dawl tal-fatti kif suesposti, l-Awtorita' jidhrilha li l-eċċezzjoni tan-ne bis in idem imqajjma mill-appellant hija insostenibbli u għandha tiġi miċħuda.

b) Ċirkostanzi li fihom id-diskrezzjoni tal-Awtorita' tista' tkun mistħarrġa

Skond l-artikolu 21 tal-Att dwar Awtorita' għas-Servizzi Finanzjarji ta' Malta, it-Tribunal dwar Servizzi Finanzjarji ma jistax jistħarreġ id-diskrezzjoni tal-Awtorita' sakemm din tkun ġiet eżerċitata b'mod xieraq. It-Tribunal jista' biss jikkunsidra jekk l-Awtorita' tkunx applikat ħażin xi dispożizzjoni tal-liġi, jekk deċiżjoni tkunx manifestament inġusta, jew inkella jekk l-Awtorita' tkunx abbużat mid-diskrezzjoni tagħha.

L-Awtorita' jidhrilha illi fir-rikors tal-appell tiegħu l-appellant naqas milli jiġġustifika b'mod sodisfaċenti l-allegazzjoni tiegħu li l-Awtorita' applikat ħażin id-dispożizzjonijiet tal-liġi, fejn abbużat mid-diskrezzjoni tagħha u/jew kif jew fejn ħadet deċiżjoni manifestament inġusta. Għalhekk, dan l-appell huwa bla bażi u null u għandu jiġi miċħud.

2. **Eċċezzjonijiet fuq il-mertu**

Mingħajr preġudizzju għas-suespost, fuq il-mertu, il-fatti kif preżentati mill-appellant ma jirriflettux ir-realta' tal-fatti jew il-pożizzjoni legali.

L-appellant qiegħed isostni li ma kienx fil-pussess ta' informazzjoni minn ġewwa kif rikjesta mil-liġi meta biegħ l-ishma tiegħu fil-Global Capital fil-perijodu bejn l-14 u s-27 ta' Diċembru 2007, u dan għaliex f'Awwissu u f'Novembru tal-2007 rispettivament il-Global Capital ħarġet żewġ company announcements illi skond l-appellant infurmaw lill-pubbliku b'mod inekwivoku li l-kumpannija kienet fi stat finanzjarju ħażin. Bir-rispett kollu, l-Awtorita' jidhrilha illi il-fatti juru mod ieħor.

Jekk wieħed iħares lejn il-company announcement tal-24 ta' Awwissu 2007, wieħed jinnota li huwa miktub b'tali mod li l-informazzjoni negattiva ma tingħatax il-prominenza mistħoqqa. Fil-fatt il-company announcement jenfasizza li l-Global Capital irreġistrat profitt wara t-taxxa, u b'mod partikolari żieda fl-operating profit ta 21.9 fil-mijja, u jkompli biex jgħid illi "The directors expect that the levels of trading activity experienced during the six months to June 2007, which show an overall improvement in turnover over the corresponding period last year, sould be sustained in the latter half of the current year."

Meta imbagħad wieħed iħares lejn il-company announcement tal-15 ta' Novembru 2007, wieħed jaqra li mhux talli "...during the period between 1 July 2007 and the date of this announcement, no material events and transactions have taken place that would have an impact on the financial position of the Group, such that would require specific mention..." iżda wkoll illi "...Global Capital Investments Limited ... has recently acquired a financial institutions licence ... it is anticipated that this new licence will help further diversify Global Capital's revenue streams and is expected to start contributing to the Group's results during 2008."

Mill-fatti kif spjegati hawn fuq, jirriżulta ċar illi dawn iż-żewġ company announcements taw stampa biss parzjali u mhux kompleta tal-qagħda finanzjarja kompelssiva li kienet tinsab fiha il-Global Capital. L-insiders kienu jafu aħajr minn hekk. Wara dawn iż-żewġ company announcements, is-sitwazzjoni finanzjarja tal-Global Capital kompliet tiddeterjora sal-punt li ġie rreġistrat telf qabel it-taxxa ammontanti għal € 1, 844,934 meta kien ipproġettat profitt qabel it-taxxa ta € 2,253, 252, (distakk ta' kważi € 4 miljuni). Bla dubju din iċ-ċirkostanza għandha titqies għall-liġi bħala li tammonta ghal informazzjoni ġdida, li hija minn ġewwa (inside information) u li kienet ta natura preċiża.

Dan huwa l-pern kollu tal-kwistjoni, u l-Awtorita' hi tal-fehma li informazzjoni bħal din bl-ebda mod ma tista titqies li "...ma kienitx sostanzjalment differenti minn dik li kienet ġja għad-dispożizzjoni tal-pubbliku." Dawn il-figuri kienu baqgħu disponibbli għal Global Capital biss u jikkostitwixxu stat ta' fatt inekwivokabbli, u ma kienx – kif prova ipenġihom l-appellant b'użu ta' lingwaġġ kulurit – eżerċizzju "perikoluż, kaptzjuż u soġġettiv". L-investitur ta' intelliġenza medja baqa jinżamm fi żvantaġġ, b'informazzjoni inkompleta u parzjali li ma ħallietux jikkompeti fis-suq finanzjarju "on a level playing field" ma insider li kien konxju b'mod aktar preċiż dwar id-

deterjorament finanzjarju tal-kumpannija. Dan l-insider gawda permezz ta' aċċess għal informazzjoni negattiva aktar aġġornata u preċiża , u b'hekk ħa vantaġġ illeċitu minn fuq il-bqija tas-suq.

Kuntrarjament għal dak li ppropona l-appellant, mhux li kellu inside information li hi kontra l-liġi, imma li l-appellant innegozja meta kellu inside information. Mhux daqshekk relevanti għal dan il-każ jekk il-kumpannija kellhiex jew le toħroġ company announcement wara il-meeting ta' Diċembru. Il-kwistjoni hi aktar sempliċi minn hekk u tikkonċerna deċiżjoni pożittiva da parti taċ-Chairman tal-Bord tad-Diretturi li jbiegħ shares f'dawk iċ-ċirkostanzi. Kien meta pproċeda bil-bejgħ li nkwadra ruħu preċiżament f'att illeċitu ta' insider dealing.

Bir-rispett kollu, l-allegazzjoni tal-appellant illi bil-kejl tal-Awtorita', direttur ma jista' qatt ibiegħ jew jixtri ishma tal-kumpannija tiegħu stess, hija żbaljata. Huwa biss meta jkollu inside information li ma tkunx disponibbli lis-suq, li direttur jew Chairman eċċ ma jkunx jista' jwettaq negozju fuq l-azzjonijiet tal-kumpannija tiegħu stess. Il-liġi ma tridx li insider jieħu vantaġġ fuq investituri oħra. It-timing tan-negozji f'dan il-każ ikkonċida ma informazzjoni ġdida dwar l-istat ħażin tal-kumpannija.

Għandu jiġi enfasizzat ukoll li l-Global Capital għadha status ta' kumpannijja llistjata (jew ikkwotata) fuq suq regolat (il-Malta Stock Exchange) u li tagħmel attivitajiet regolati. Dawn il-fatturi jirrekjedu minn kumpannija bħal Global Capital u mill-uffiċjali tagħha livelli ta' trasparenza iżjed min-normal sabiex jiġu żgurati trasparenza xierqa u standards għola ta' protezzjoni u informazzjoni għall-investituri (Ara recitals 2 u 7 tad-Direttiva tal-UE dwar ir-rekwiżiti ta' trasparenza u kif ukoll il-Listing Rules maħruġa mill-Awtorita').

Meta l-kumpannijja internament ipproġettat profitt qabel it-taxxa ta' € 2, 253, 252, iżda minflok sfat b'telf attwali ta' € 1, 844,934, din m'hix xi diskrepanza minuri, jew żball amministrattiv, iżda kristalliżżazzjoni ta miri finanzjarji għas-sena 2007 li mhux biss ma ntlaħqux, iżda ma intlaħqux b'mod grossolan. Informazzjoni ta' din il-portata żgur m'hix informazzjoni ta' kuljum, jew addirittura kunfidenzjali, kif donnu qiegħed jipprova jiġġustifika b'mod sempliċistiku l-appellant.

L-impressjoni li ngħatat mill-kumpannija fiż-żewġ company announcements illi nħarġu matul l-2007 hi li għalkemm il-Global Capital ma marritx tajjeb daqs fl-2006, ma kienx hemm xi raġuni partikolari għalfejn l-investitur ta' intelliġenza medja kellu jallarma ruħu. Li ġara iżda kien li wara l-company announcement ta' April 2008, il-prezz tal-ishma tal-Global Capital naqas minn € 5.15 kull sehem għal € 2.90 kull sehem, jiġifieri naqas b'43.69 fil-mija. Din il-waqa fil-prezz kompliet fix-xhur ta wara u dan jindika li dik l-informazzjoni kienet price sensitive u kif.

Għandu jiġi enfasizzat illi l-Awtorita' fl-ebda ħin ma bbażat id-deċiżjoni tagħha fuq ir-reazzjoni tal-pubbliku wara l-company announcement ta' April 2008. Fuq dan il-punt, tajjeb illi wieħed jgħid illi l-appellant biegħ l-ishma tiegħu ftit jiem biss wara li sar jaf bis-sitwazzjoni finanzjarja diżastruża tal-Global Capital, u kważi erbgħa xhur qabel ma din l-informazzjoni saret pubblika. Ir-reazzjoni tal-pubbliku wara dan il-company

announcement huwa merament konferma tar-raġunament tal-Awtorita' li l-informazzjoni li kellu f'idejh l-appellant kienet fil-fatt price sensitive.

Bir-rispett kollu, li l-appellant jintilef janalizza l-performance tal-ishma tal-Global Capital fid-dettal huwa eżerċizzju inutli intiż biex jiżvijja lil dan it-Tribunal mill-punt kruċjali ta din il-kwistjoni, u ċioe' li informazzjoni bħal dik li kellu f'idejh l-appellant hija fiha nfisha kjarament price sensitive. Il-mistoqsijja li wieħed irid jistaqsi lilu nnifsu hija waħda: Il-fatt illi l-Global Capital reġistrat telf konsiderevoli ta kważi € 4 miljuni, huwa informazzjoni li ħa jkollha piż fuq id-deċiżjoni tal-investitur ta' intelliġenza medja dwar jekk għandux jixtri jew jiddisponi mill-ishma tal-Global Capital? It-tweġiba ma tistax ma tkunx 'iva'.

Għalhekk, għar-raġunijiet suesposti, l-Awtorita' titlob lil dan it-Tribunal jiddikjara t-talbiet kollha tal-appellant bħal infondati kemm fil-fatt u fid-dritt u jikkonferma d-deċiżjoni tal-Awtorita' għas-Servizzi Finanzjarji ta' Malta, bl-ispejjeż kontra l-appellant.

Ra l-verbal tat-22 ta' Marzu 2010 li permezz tiegħu l-kontendenti qablu illi l-eċċezzjoni preliminari għandha tiġi deċiża flimkien mal-mertu.

Sema' x-xhieda mressqa mill-partijiet u qara t-traskrizzjoni tal-istess xhieda, kif ukoll qara l-affidavits illi ġew ippreżentati.

Ra u eżamina d-dokumenti kollha illi ġew esibiti mill-kontendenti.

Ra l-atti kollha tal-appell, inkluż il-verbali u d-deċiżjoni mogħtija mit-Tribunal fit-28 ta' Settembru 2012 li permezz tagħha ċaħad it-talba tal-appellant li jżied aggravju ieħor fl-appell tiegħu.

Sema' t-trattazzjoni tad-difensuri tal-partijiet u qara t-traskrizzjoni relattiva.

Ra li l-appell ġie mħolli għal-lum għall-prolazzjoni tad-deċiżjoni.

Ikkunsidra:

Illi ma jkunx inopportun li qabel xejn, jiġu riepilogati l-fatti saljenti li jikkostitwixxu l-pern ta' din il-proċedura.

Illi l-kumpannija GlobalCapital plc għandha kapital azzjonarju ta' 13,207,548 ishma fuq is-suq[13].

Illi mill-provi jirriżulta illi l-appellant matul is-sena 2007 kien *Chairman* u direttur tal-kumpannija GlobalCapital plc. Is-soċjeta' GlobalCapital plc ġiet konvertita f'kumpannija b'azzjonijiet pubbliċi fis-sena 2001, f'liema żmien l-appellant kellu 90% ta' l-azzjonijiet. Matul iż-żmien, l-appellant baqa' jbiegħ uħud mill-azzjonijiet tiegħu lil terzi, biex b'hekk naqqas is-sehem azzjonarju tiegħu fl-istess kumpannija. Fil-bidu tas-sena 2008, l-appellant kellu 11.42% tal-kapital azzjonarju ta' din il-kumpannija[14].

Illi l-fatti li huma l-mertu ta' dan l-appell seħħew proprju matul is-sena 2007.

Illi fl-24 t'Awwissu 2007, il-Bord tad-Diretturi tal-kumpannija GlobalCapital plc approva l-*interim financial statements* għas-sitt xhur li ntemmu fit-30 ta' Ġunju 2007. Dina l-approvazzjoni ġiet pubblikata permezz ta' *company announcement* meħtieġ ai termini tal-*Listing Rules* 8.7.4 u 8.7.21[15]. Tajjeb li jiġi hawnhekk riprodott l-*Interim Directors' Report*:

> "GlobalCapital p.l.c. ('the Company') registered a profit after tax for the six months ended 30 June 2007 of Lm388,919 compared to a corresponding result last year of Lm735,180. The main highlights of the reporting period's results were:
>
> - Increase in operating profit of 21.9%;
> - Continued healthy returns on the international investment property portfolio of the Company and its subsidiaries;
> - Significant fair value losses on securities held by the Company and its subsidiaries, including the life insurance company, attributable to negative market conditions which prevailed during the year to date.

[13] Ara x-xiehda ta' Stephanie Galea mogħtija fl-udjenza tad-29 ta' Novembru 2010.
[14] Ara x-xiehda ta' l-appellant mogħtija waqt l-udjenza tas-26 t'April 2010.
[15] Eżebita f'dawn l-atti u mmarkata bħala "CPX2".

The Directors expect that the levels of trading activity experienced during the six months to June 2007, which show an overall improvement in turnover over the corresponding period last year, should be sustained in the latter half of the current year. However, recent stock market volatility and global economic uncertainty may affect trading and investment performance.

The directors do not recommend the payment of an interim dividend."

Illi fil-15 ta' Novembru 2007, il-Bord tad-Diretturi tal-kumpannija GlobalCapital plc wettqet *Company Announcement* oħra, din id-darba ai termini tar-Regola 9.51 tal-*Listing Rules*. Dan l-*Announcement* kien jgħid kif ġej:

Quote

Interim Directors' Statement

GlobalCapital p.l.c. (the 'Group') hereby announces that during the period between 1 July 2007 and the date of this announcement, no material events and transactions have taken place that would have an impact on the financial position of the Group, such that would require specific mention, disclosure or announcement pursuant to the applicable Listing Rules.

During the first nine months of the year the Group registered increased turnover levels, over the corresponding period last year, predominately on its life insurance business and property portfolio, whilst investment fee income has experienced a decrease compared to the corresponding first nine months of 2006. The Group's health Insurance division has also registered positive results which, barring any unforeseen circumstances, are expected to be sustained throughout the remaining months. The downturn in the local and international capital markets persisted during the third quarter of the current financial year and this has invariably had an adverse effect on the Group's portfolio of financial investments. This factor has led to a negative impact on the Group's profitability for the period under consideration and if the downturn in the financial markets persists it is expected to impact on this year's results.

GlobalCapital Investments Limited, one of the Group's subsidiaries, has recently acquired a financial institutions licence in terms of the Financial Institutions Act, 1994. It is anticipated that this new licence will help further diversify GlobalCapital's revenue streams and is expected to start contributing to the Group's results during 2008.

Unquote

Illi fil-perjodu bejn l-4 u s-7 ta' Diċembru tas-sena 2007, inżammu xi laqgħat tal-Bord tad-diretturi tal-kumpannija GlobalCapital plc. Jirriżulta inkontestat li f'dawn

il-laqgħat l-appellant, flimkien mad-diretturi l-oħra tal-kumpannija, ingħata l-*management accounts* riferibbli għall-perjodu tas-sena 2007 li ntemm f'Settembru. Dawn l-*accounts*, li m'humiex disponibbli għall-pubbliku[16], kienu juru telf ta' aktar minn €1.8 miljun.

Illi jirriżulta li fil-perjodu bejn l-14 u s-27 ta' Diċembru tas-sena 2007, l-appellant wettaq numru ta' *trades* bl-ishma tiegħu – dan kemm fir-rigward ta' ishma li hu kien qed iżomm fuq ismu proprju, u kemm fir-rigward ta' ishma oħra li kienu miżmumin fl-interess tiegħu permezz ta' *custodian accounts*, u preċiżament permezz ta' MSE Account Number 728764 u MSE Account Number 9481800, entrambi miżmumin mis-soċjeta' bankarja HSBC Bank Malta plc[17].

Illi jirriżulta inkontestat li l-appellant naqas milli jissottometti ma' l-Awtorita' appellata in-notifikazzjonijiet meħtieġa fir-rigward ta' tranżazzjonijiet imwettqa minn persuni b'responsabbilitajiet maniġerjali ('PDMRs'), u dan kif meħtieġ mill-Artikolu 10 ta' l-Att dwar il-Prevenzjoni ta' Abbuż fis-Swieq Finanzjarji[18] (minn hawn 'l quddiem imsejjaħ 'l-Att'), kif supplementati bl-Avviż Legali 108/2005[19]. Fil-fatt matul l-aħħar nofs tas-sena 2007, l-appellant biegħ total ta' 389,239 ishma permezz ta' tnejn u sittin tranżazzjoni, u dan għall-konsiderazzjoni komplessiva ta' €1,858,128. In-nuqqas ta' l-appellant li jissottometti n-notifikazzjoni statutorjament meħtieġa minnu ma kienetx tirrigwarda l-ishma kollha minnu trasferiti, iżda parti minn dawn l-ishma li l-Awtorita' appellata qieset li kien sostanzjali[20]. L-appellant fil-fatt spjega, kemm lill-Awtorita' *a tempo vergine* u kemm lil dan it-tribunal, li n-notifikazzjonijiet ommessi kienu jirrigwardaw dawk l-ishma minnu trasferiti permezz ta' l-imsemmija *custodian accounts*. Huwa ammetta n-nuqqas tiegħu ma' l-Awtorita' appellata, u attribwixxa dan in-nuqqas għal żball ġenwin, u konsegwentement l-Awtorita' ikkundannat lill-appellant iħallas multa

[16] Ara x-xiehda in kontro-eżami ta' l-appellant mogħtija fl-udjenza tat-8 ta' Novembru 2010.
[17] Ara x-xiehda ta' Chris Buttiġieġ mogħtija fl-udjenza tal-31 t'Ottubru 2011.
[18] Kapitlu 476 tal-Liġijiet ta' Malta.
[19] Prevention of Financial Markets Abuse (Disclosure and Notification) Regulations.
[20] Ara l-affidavit ta' Chris Buttiġieġ.

amministrattiva fl-ammont ta' €9,290. Din il-multa ġiet fil-fatt imħallsa mill-appellant, li m'appellax dik id-deċiżjoni[21].

Illi f'Jannar tas-sena 2008, sar *trade* ta' mitt sehem tal-kumpannija GlobalCapital plc, f'liema mument il-prezz ta' dawk l-ishma waqa' bi 8%[22]. L-informazzjoni pertinenti għall-istat finanzjarju tal-kumpannija, u li kienet diskussa fil-laqgħat tad-Diretturi li nżammu fil-bidu ta' Diċembru 2007, ġiet reża pubblika f'April tas-sena 2008. Din l-informazzjoni kienet tindika tnaqqis fil-qliegħ tal-kumpannija, stante li l-qliegħ qabel it-taxxa għas-sena 2007 ġie ndikat bħala ammontanti għal Lm151,862, komparat għall-qliegħ qabel it-taxxa fl-ammont ta' Lm3,171,685 dikjarat għas-sena 2006[23].

Illi l-ewwel *trade* ta' ishma li seħħ wara din il-pubblikazzjoni kienet fit-8 t'April 2008 u konsistenti essenzjalment f'żewġ tranżazzjonijiet rigwardanti ħames mitt sehem u seba' mitt sehem, ċioe' komplessivament elf u mitejn sehem, fejn jidher li l-prezz ta' l-istess ishma reġgħa waqa' bi 43%[24], u ċioe' fi kliem ieħor, il-prezz ta' l-ishma minn €5.15 sar €2.95 imbagħad €2.90, fl-istess jum[25].

Illi rriżulta wkoll mill-provi li matul is-sena 2008, il-prezzijiet ta' l-ishma fis-suq relattiv niżlu b'xejn inqas minn 33.4% mill-valuri tas-sena preċedenti. B'hekk, fejn il-valur kapitalizzat tas-suq kien jilħaq iċ-ċifra ta' Lm1,654,513,481 fl-għeluq tas-sena 2007, dan il-valur niżel għaċ-ċifra ta' €2,566,689,430 fl-għeluq tas-sena 2008[26].

Wara l-pubblikazzjoni ta' l-istat finanzjarju tal-kumpannija f'April tas-sena 2008, il-prezz ta' l-ishma tagħha qatt ma eċċedew l-ammont ta' €3.176[27].

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[21] Ara l-affidavit ta' Chris Buttiġieġ.
[22] Ara x-xiehda ta' Stephanie Galea mogħtija fl-udjenza tad-29 ta' Novembru 2010.
[23] Ara d-dokument immarkat bħala 'CPX2'.
[24] Ara x-xiehda ta' Stephanie Galea mogħtija fl-udjenza tad-29 ta' Novembru 2010.
[25] Ara l-affidavit ta' Chris Buttiġieġ.
[26] Dawn iċ-ċifri, li huma ċitati fil-paġna numru 26 tar-rikors ta' l-appell, ġew konfermati bħala korretti minn Stephanie Galea, rappreżentanta tal-Malta Stock Exchange plc, waqt l-udjenza tad-29 ta' Novembru 2010.
[27] Ara l-affidavit ta' Chris Buttiġieġ.

Ikkunsidra:

Illi l-appellant fir-rikors ta' l-appell tiegħu jissolleva żewġ aggravji distinti. L-ewwel aggravju huwa wieħed prettament legali u preliminari, konsistenti fis-sottomissjoni li s-sejbien ta' ħtija pronunzjat mill-Awtorita' appellata fil-konfront tiegħu f'okkażjoni preċedenti iżda rigwardanti l-istess fatt materjali li wassal għal dan il-proċediment, hija ta' xkiel għall-validita' tad-deċiżjoni ta' l-Awtorita' mpunjata b'dan l-appell, u dan in virtu' tal-massima *ne bis in idem*, liema massima ġiet ormai elevata għall-istat ta' norma ta' dritt kostituzzjonali, kif ukoll statutorja.

Illi fit-tieni aggravju tiegħu, mogħti bla ħsara għall-aggravju preliminari, l-appellant jikkontendi li d-deċiżjoni appellata hija vizzjata minn applikazzjoni ħażina tal-liġi, b'abbuż ta' diskrezzjoni u li tali deċiżjoni hija manifestament inġusta. Fi kliem ieħor, l-appellant b'dan l-aggravju qed jindirizza l-mertu tad-deċiżjoni appellata.

Illi fl-udjenza tat-22 ta' Marzu 2010, il-kontendenti qablu li iż-żewġ aggravji ta' l-appellant jiġu trattati u deċiżi flimkien, u hekk se jsir permezz tad-deċiżjoni preżenti. Pero' huwa biss loġiku li l-ewwel aggravju li għandu jokkupa ruħu dwaru dan it-tribunal huwa proprju l-ewwel wieħed, billi dan l-aggravju jsostni li d-deċiżjoni mpunjata ma setgħet qatt tingħata.

Ikkunsidra:

Illi l-kontendenti, kemm fis-sottomissjonijiet magħmulin minnhom fil-proċeduri tal-kitba, u kemm oralment fit-trattazzjoni ta' l-għeluq, iddibattew vigorożament dwar il-fondatezza o meno ta' dan l-aggravju. Dan mhux biss għal dak li jirrigwarda l-mertu ta' l-aggravju *ut sic*, iżda anke għal dak li jirrigwarda l-proponibilita' ta' l-istitut ta' *ne bis in idem* fil-fattispeċi prospettati f'dan il-każ.

Illi l-Awtorita' appellata fil-fatt tikkontendi li dan l-istitut ma jsib l-ebda applikabilita' fil-każ odjern, stante li l-proċeduri odjerni jirrigwardaw l-impożizzjoni ta' sanzjonijiet amministrattivi permezz ta' proċessi li huma amministrattivi, u li m'għandhomx xejra penali. L-appellant min-naħa l-oħra, filwaqt li jirreferi għall-ġurisprudenza tal-Qorti ta' Strasburgu, jsostni li l-impożizzjoni ta' penali da parti ta' l-Awtorita' appellata hija fil-verita' ta' natura penali, u dan minkejja li l-liġi tattribwixxi lill-istess mansjoni ta' l-Awtorita' appellata karattru amministrattiv.

Illi t-tribunal jibda l-eżami tiegħu ta' dan l-aggravju billi qabel xejn jikkunsidra n-natura proprja ta' l-istitut ta' *ne bis in idem*.

Illi huwa paċifiku li dan l-istitut legali sab rikonoxximent statutorju, tant li huwa l-oġġett ta' normi pożittivi tal-liġi mhux biss fil-Kodiċi Kriminali, iżda saħansitra fil-Kostituzzjoni.

Illi l-Artikolu 39(9) tal-Kostituzzjoni jipprovdi kif ġej:

> "Ebda persuna li turi li tkun għaddiet proċeduri quddiem xi qorti kompetenti għal reat kriminali u jew tkun ġiet misjuba ħatja jew liberata ma għandha terġa' tgħaddi proċeduri għal dak ir-reat jew għal xi reat kriminali ieħor li għalih setgħat tiġi misjuba ħatja fil-proċeduri għal dak ir-reat ħlief wara ordni ta' qorti superjuri mogħti matul il-kors ta' appell jew proċeduri ta' reviżjoni dwar id-dikjarazzjoni ta' ħtija jew liberazzjoni; u ebda persuna ma għandha tgħaddi proċeduri għal reat kriminali jekk turi li tkun ħadet il-maħfra għal dak ir-reat:
>
> Iżda ebda ħaġa f'xi liġi ma għandha titqies li tkun inkonsistenti ma' jew bi ksur ta' dan is-subartikolu minħabba biss li tawtorizza xi qorti li tagħmel proċeduri kontra membru ta' korp dixxiplinat għal reat kriminali nonostanti kull proċeduri u dikjarazzjoni ta' ħtija jew liberazzjoni ta' dak il-membru skont il-liġi dixxiplinarja ta' dak il-korp, imma hekk illi kull qorti li tkun hekk tiġġudika dak il-membru u li hekk issibu ħati għandha meta tikkundannah għal xi piena tieħu kont ta' kull piena mogħtija lilu skont dik il-liġi dixxiplinarja"

Illi l-Artikolu 527 tal-Kodiċi Kriminali min-naħa l-oħra jiddisponi hekk:

> "Wara sentenza li f'kawża tillibera imputat jew akkużat, dan ma jistax għall-istess fatt ikun suġġett għal kawża oħra"

Illi l-garanzija kostituzzjonali ipprovduta fid-disposizzjoni supra ċitata tal-Kostituzzjoni tiskatta malli persuna tkun ġiet proċessata dwar reat kriminali minn qorti kompetenti u tkun instabet ħatja jew ġiet liberata mill-istess. L-effett tal-garanzija in diżamina hija li ma tippermettiex li dik il-persuna terġa' tiġi proċessata "għal dak ir-reat jew għal xi reat kriminali ieħor li għalih setgħat tiġi misjuba ħatja fil-proċeduri għal dak ir-reat".

Illi l-istitut ta' *ne bis in idem* ġie fortifikat ulterjorment fl-ordinament ġuridiku tagħna hekk kif pajjiżna inkorpora l-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem fil-kotba statutorji tagħna, u dan bis-saħħa tal-Kapitlu 319 tal-Liġijiet ta' Malta. Fil-fatt l-Artikolu 4 tas-Seba' Protokoll tal-Konvenzjoni jimponi dawn il-garanziji:

> "1. Ħadd ma jista' jkun ipproċessat jew jerġa' jiġi kkastigat għal darb'oħra fi proċedimenti kriminali taħt il-ġurisdizzjoni tal-Istess Stat għal xi reat li dwaru jkun diġà ġie finalment liberat jew misjub ħati skont il-liġi u l-proċedura penali ta' dak l-Istat.
>
> 2. Id-disposizzjonijiet tal-paragrafu preċedenti ma għandhomx iżommu milli l-każ jerġa' jinfetaħ skont il-liġi u l-proċedura penali tal-Istat inwistjoni, jekk ikun hemm provi ta' xi fatti ġodda jew li jkunu għadhom kif ġew żvelati, jew inkella jekk ikun ħemm xi vizzju fondamentali fil-proċedimenti ta' qabel, li jista' jkollhom effett fuq kif jiżvolġi l-każ.
>
> 3. Ebda deroga minn dan l-artikolu ma għandha ssir taħt l-artikolu 15 tal-Konvenzjoni."

Illi t-tribunal huwa konxju tal-fatt li l-appellant m'għamel l-ebda referenza għad-disposizzjoni hawn ċitata tal-Konvenzjoni, minkejja li ċċita ġurisprudenza tal-qorti ta' Strasburgu dwar l-istess. Iżda t-tribunal huwa tal-fehma li la darba l-appellant qed jinvoka favur tiegħu l-istitut ta' *ne bis in idem*, huwa allura doveruż għall-istess tribunal li jiddetermina din id-difiża ta' l-appellant billi jieħu qies ta' kull manifestazzjoni leġislattiva ta' l-istess istitut fl-ordinament ġuridiku nostran, inkluż allura dik appena kaptata.

Illi m'għandux ikun materja ta' kontestazzjoni l-fatt li l-garanzija offruta mill-Artikolu 4 protokollari tal-Konvenzjoni hija aktar wiesgħa u mifruxa mill-garanzija mwettqa permezz ta' l-Artikolu 39(9) tal-Kostituzzjoni. Dan għaliex filwaqt li l-Kostituzzjoni tipprovdi eċċezzjoni riferibbilment għall-proċeduri relattivi għall-korpi dixxiplinarji, liema eċċezzjoni hija nieqsa mill-Konvenzjoni, l-istess Kostituzzjoni trid li biex tiskatta l-garanzija in diżamina huwa meħtieġ li l-individwu in kwistjoni jkun ġie qabel xejn proċessat minn "qorti", kif imfissra mill-Artikolu 47(1) tal-Kostituzzjoni[28].

Illi kif qalet tajjeb il-Prim'Awla tal-Qorti Ċivili (Ġurisdizzjoni Kostituzzjonali) fl-atti tar-referenza fl-ismijiet **Il-Pulizija vs. Anthony Zammit et** (30/12/2003)[29]:

> *"Illi mill-kliem tal-istess eċċezzjoni, jidher li l-fatt li l-proċeduri dixxiplinari ta' qabel quddiem tribunal li mhuwiex "Qorti" għall-finijiet tal-Kostituzzjoni kienu jitqiesu bħala proċeduri ta' għamla kriminali ma jfixklu xejn it-tmexxija 'l quddiem ta' proċeduri oħrajn quddiem Qorti kompetenti f'Malta. Dan għaliex dik il-Qorti għandha l-ewwel twettaq ħidmietha kif imiss fil-liġi u mbagħad, jekk tasal għall-fehma li kien hemm ħtija, tqis il-piena li setgħet ġiet mogħtija fil-proċeduri ta' qabel meta tiġi biex tagħti l-piena skond is-sejbien tal-ħtija min-naħa tagħha"*

Illi fil-każ odjern, l-appellant qed isostni li l-impożizzjoni ta' multa amministrattiva da parti ta' l-Awtorita' appellata tikkostitwixxi bażi għall-applikazzjoni ta' l-Artikolu 39(9) tal-Kostituzzjoni b'mod li ma tippermettiex lill-Awtorita' appellata timponi multa amministrattiva fuq l-istess fatt in segwitu. It-tribunal jidhirlu li d-diċitura ta' l-Artikolu 39(9) tal-Kostituzzjoni, kif interpretata mill-qrati ta' ġurisdizzjoni kostituzzjonali, ma tagħtix sostenn lit-teżi ta' l-appellant, għaliex l-Awtorita' appellata ma tidħolx fit-tifsira ta' "qorti" kif disposta fl-Artikolu 47 tal-Kostituzzjoni.

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[28] Fid-disposizzjoni in kwistjoni wieħed isib li "qorti" tfisser "*...kull qorti f'Malta li ma tkunx qorti mwaqqfa bi*
jew skont liġi dixxiplinarja u fl-artikoli 33 u 35 ta' din il-Kostituzzjoni tinkludi, dwar reat kontra liġi dixxiplinarja qorti hekk imwaqqfa".

[29] Il-kap tas-sentenza li kien jirrigwarda l-Artikolu 39(9) ma ġiex appellat.

Illi jmiss għalhekk li jiġi eżaminat l-istitut ta' *ne bis in idem* kif dispost fil-Konvenzjoni. L-Artikolu 4 huwa ritenut li japplika "... *to trial and conviction of a person in criminal proceedings. So it does not prevent an individual being subject to criminal proceedings and then, for the same act, to action of a different character (for example, disciplinary action in the case of an official)*"[30]. Huwa għalhekk kruċjali għall-interpretazzjoni u għall-applikazzjoni ta' l-Artikolu 4 li jiġi determinat x'inhuma "*criminal proceedings*". "*The notion of 'criminal' is however an autonomous one. So, when the Court is satisfied that the first decision before it is 'final', it must also address whether it was 'criminal' for the purposes of Article 4. Here it looks to the general principles concerning the corresponding words "criminal charge" and "penalty" respectively in Articles 6 and 7 of the Convention'. It has regard to such factors as the 'legal classification of the offence under national law; the nature of the offence; the national legal characterisation of the measure; its purpose, nature and degree of severity; whether the measure was imposed following conviction of a criminal offence and the procedures in the making and implementation of the measure*"[31].

Illi dwar id-diffikulta' li tista' tiġi riskontrata meta tiġi allegata vjolazzjoni ta' l-Artikolu 4 minħabba proċediment amministrattiv, intqal li:

> "There have been few significant cases in this area. Those there are mainly establish that administrative proceedings which penalise the same conduct in issue in a criminal trial will offend the prohibition, notwithstanding the differing designations and the allegedly different purpose of the proceedings. In *Gradinger v Austria*, the applicant, who killed a cyclist while driving, was convicted of causing death by negligence rather than the more serious crime of being under influence of alcohol since his level was below the prescribed limit. The administrative authorities proceeded to fine him for driving under the influence of drink on the basis of a medical report which deduced that in fact he was over the limit. Since both decisions were based on the same conduct, there was a violation of Art.4 of Protocol No.7"[32].

Illi għalhekk m'huwiex determinanti l-klassifikazzjoni espressa fil-liġi domestika għall-proċediment li dwaru qed tiġi allegata l-vjolazzjoni, u ċioe' jekk dan hux

[30] Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights, 2nd Edition, pġa.751.
[31] Harris, O'Boyle & Warbrick, op cit, pġa.751-752.
[32] Karen Reid, A Practitioner's Guide to the European Convention on Human Rights, 4th Edition, pġa.137.

deskritt bħala "amministrattiv" jew mod'ieħor[33]. Dak li jiswa hu li l-individwu jkun ġie proċessat dwar "reat".

Illi kif qal tajjeb l-appellant, il-Qorti ta' Strasburgu, permezz ta' ġurisprudenza ormai kopjuża, elenkat kriterji sabiex jiġi determinat jekk sanzjoni għandhiex tiġi kkunsidrata bħala kriminali jew le. Dawn il-kriterji, komunement magħrufa bħala "the Engel criteria" stante li ġew pronunzjati fid-deċiżjoni *Engel and Others v The Netherlands* (8/6/1976), huma "*The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not rule out a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see Jussila v. Finland [GC], no. 73053/01, §§ 30-31, ECHR 2006-XIV; and Ezeh and Connors v. the United Kingdom [GC], nos. 39665/98 and 40086/98, §§ 82-86, ECIIR 2003-X)*"[34].

Illi għalhekk it-tribunal se jgħaddi biex iħares lejn l-ewwel kriterju, u ċioe' il-klassifikazzjoni ta' l-offiża skont il-liġi domestika.

Illi permezz ta' l-ewwel deċiżjoni, l-appellant kien instab ħati talli kiser l-Artikolu 10 ta' l-Att. Din id-disposizzjoni tipprovdi hekk[35]:

> "Any person discharging managerial responsibilities within an issuer of financial instruments and, where applicable, persons closely associated with them, shall notify to the competent authority the existence of transactions conducted on their own account relating to shares of the said issuer or to derivatives or other financial instruments linked to them"

Illi d-disposizzjoni li tipprovdi dwar il-penalizzazzjoni ta' l-Att hija l-Artikolu 24(1), li tipprovdi li, "*Any person who contravenes or fails to comply with any of*

[33] Ara Storbråten v. Norway (deċiżjoni nru. 12277/04).
[34] Ara paragrafu 38 tad-deċiżjoni Häkkä v Finland (20/5/2014).
[35] Billi skont l-Artikolu 2(2) ta' l-Att, huwa t-test ingliż ta' din il-liġi li jipprevali, it-tribunal sejjer jiċċita t-test ingliż.

the provisions of articles 6, 8, 14, 15, 16, 18 or 19 shall be guilty of an offence". Huwa evidenti li l-Artikolu 10 mhux fost dawk id-disposizzjonijiet elenkati bħala kostitwenti offiżi kriminali taħt l-Att. Għalhekk l-ewwel kriterju mhux sodisfatt.

Illi dan pero' mhux biżżejjed, u huwa meħtieġ li jiġu eżaminati anki l-kriterji l-oħrajn[36].

Illi t-tieni kriterju huwa n-natura ta' l-offiża, u dan il-kriterju ġie deskritt bħala ta' mportanza prevalenti fuq l-ewwel kriterju. It-tielet kriterju jirrigwarda s-severita' tas-sanzjoni mposta.

Illi t-tribunal jirrileva li l-ksur ta' l-Artikolu 10 ta' l-Att jiġbed lejh sanzjoni amministrattiva a tenur ta' l-Artikolu 22. L-ewwel subinċiż ta' din id-disposizzjoni tipprovdi hekk:

> Where the competent authority is satisfied that a person's conduct amounts to a breach of any of the provisions of this Act, regulations or rules issued thereunder, the competent authority may by notice in writing and without recourse to a court hearing impose on any such person an administrative sanction, consisting of a fine which may not exceed one hundred and fifty thousand euro (€150,000) for each infringement or failure to comply, as the case may be.

Illi huwa evidenti li l-obbligu mpost fl-Artikolu 10 huwa wieħed mifrux fuq il-persuni kollha bi dmirijiet ta' instituri f'istituzzjoni li timmetti strumenti finanzjarji. Kif diġa' intqal, il-fatt li l-ksur ta' l-Artikolu 10 ta' l-Att ma huwiex kontemplat fl-atti bħala "offiża kriminali" ma jwassalx awtomatikament għall-konklużjoni li s-sanzjoni applikabbli għal dak il-ksur ma titqiesx bħala waħda "kriminali" għall-finijiet ta' l-Artikolu 4 protokollari tal-Konvenzjoni[37].

Illi meqjus il-fatt illi s-sanzjoni kontemplata għall-ksur ta' l-Artikolu 10 hija waħda li tista' tkun peżanti, tant li tista' titla sa ċ-ċifra ta' €150,000, u meqjus ukoll il-fatt li

[36] Ara Jussila v Finland (deċiżjoni nru. 73053/01).
[37] Ara wkoll Maresti v Croatia (25/6/2009).

l-impożizzjoni ta' din is-sanzjoni hija ċertament waħda ta' natura punittiva u mhux retributorja jew min-natura ta' riżarċiment, it-tribunal huwa sodisfatt li s-sanzjoni kkontemplata fl-Artikolu 22 hija suffiċjenti biex trendi ksur ta' l-Artikolu 10 "kriminali" ai termini tat-tifsira awtonoma mħaddna mill-Konvenzjoni, tant li testendi l-protezzjoni ta' l-Artikolu 4 tas-Seba' Protokoll tal-Konvenzjoni anke għall-proċedimenti li jittieħdu bil-għan ta' l-impożizzjoni ta' dik is-sanzjoni.

Illi dwar il-proċediment odjern, m'hemmx dubju li l-appellant qed jiġi proċessat dwar offiża kriminali, tant li l-ksur ta' l-Artikolu 6 ta' l-Att huwa espressament kontemplat bħala tali mill-Artikolu 24(1) ta' l-Att. Huma wkoll ugwalment applikabbli l-konsiderazzjonijiet magħmula rigward proċediment dwar ksur ta' l-Artikolu 10 ta' l-Att, u għalhekk it-tribunal, a skans ta' ripetizzjoni, jagħmel ampja riferenza għall-istess.

Illi għalhekk it-tribunal jaqbel ma' l-appellant li l-istitut ta' *ne bis in idem* huwa ugwalment applikabbli fil-każ odjern.

Illi jmiss għalhekk li jiġi eżaminat jekk l-aggravju ta' l-appellant dwar dan l-istess istitut huwiex fondat fil-mertu tiegħu.

Illi t-tribunal, eżaminati l-fatti u s-sottomissjonijiet tal-kontendenti, jista' jikkonkludi mingħajr ebda eżitazzjoni li l-aggravju ta' l-appellant ifalli fil-mertu. Huwa ormai assodat li skont l-Artikolu 4, sabiex tirriżulta vjolazzjoni huwa meħtieġ li persuna tiġi proċessata jew kastigata darbtejn għall-istess "reat". L-awtriċi **Karen Reid** tikkummenta hekk:

> "However the fact that a person is convicted of separate offences arising out of a particular event was not found incompatible with this provision where, as in *Oliveira v Switzerland*, the applicant was convicted first of failing to adapt her speed to road conditions, and then, in a separate procedure relating to the same road traffic accident, of negligently causing injury. The Court commented, however, that it would have been more consistent with the principles governing the proper administration of justice for a sentence in respect of the two offences to be passed by the same court in a single set of proceedings. In later cases, this was distinguished from the situation where

> the essential elements of two offences based on one act are the same, for example where one offence encompasses all the elements of the other plus an additional one, in which case two prosecutions will in fact concern the same essential elements and a violation will arise (Franz Fischer v Austria, May 29, 2001).
>
> In *Zolotukhin v Russia* (February 10, 2009), the Grand Chamber sought to harmonise the varying approaches summarised above. It held that the focus should not be on "the essential elements" of the respective offences or the legal characterisation of the different offences, which it regarded as too restrictive an interpretation of a fundamental right. Instead, the focus should be on whether the offences are based on the same facts, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings. Thus where the applicant was sanctioned administratively for minor disorderly acts (swearing at a public employee and breach of public order in a police station by pushing an official) and then convicted for the same incident of swearing and misbehaviour in the police station, substantially the same facts were at the base of both offences, disclosing a violation. It was not relevant that the latter offence also took into account the element of threatening violence"[38].

Illi kif l-appellant qal tajjeb, wieħed ma jridx iħares lejn l-identiċita' tar-reat addebitat fiż-żewġ proċedimenti kriminali, imma jrid iħares u jfittex l-identiċita' tal-fatt attribwit lill-persuna mixlija. Il-fatt huwa "*La legge intende il fatto principale in quanto meritevole di pena, o come altri si espresse non intende semplicemente il fatto storico o naturale nei suoi diversi momenti ma il fatto giuridico nel suo complesso*"[39].

Illi fil-każ odjern, l-appellant instab ħati mill-Awtorita' appellata talli ma nnotifikahiex bit-tranżazzjonijiet magħmulin minnu. F'dan il-proċediment, l-appellant jinsab mixli li għamel tranżazzjonijiet meta kellu tagħrif li kien legalment jimpedih milli jagħmel l-istess tranżazzjoni. Fl-ewwel proċediment, il-fatt materjali li kien qed jiġi sanzjonat kien in-nuqqas ta' notifika ta' tranżazzjoni, mentri fil-proċediment odjern, il-fatt materjali huwa it-tranżazzjoni nnifisha. Il-fatt materjali fl-ewwel proċediment ma ġiex kostitwit bit-tranżazzjoni nnifisha, imma b'nuqqas li segwa t-tranżazzjoni.

[38] A Practitioner's Guide to the European Convention on Human Rights, 4th Edition, pġa.137.
[39] Rex v Rosaria Portelli (23/2/1904, Appell Kriminali).

Illi għalhekk il-fatt materjali rilevanti fl-ewwel proċediment huwa differenti mill-fatt materjali mertu ta' dan il-proċediment, u huwa nieqes l-element ta' identiċita' li huwa ndispensabbli għas-suċċess ta' dan l-ewwel aggravju ta' l-appellant.

Illi għalhekk it-tribunal qed jirrespinġi l-ewwel aggravju ta' l-appellant.

Ikkunsidra:

Illi fadal issa li jiġi kkunsidrat it-tieni u l-aħħar aggravju ta' l-appellant. L-appellant isostni li d-deċiżjoni mpunjata għandha tiġi revokata, billi hija vizzjata b'abbuż ta' diskrezzjoni u hija manifestament inġusta, u kif ukoll hija vizzjata b'applikazzjoni ħażina tal-provvedimenti tal-liġi. Essenzjalment l-appellant isostni li huwa ma wettaq l-ebda *insider trading*, u jagħti raġunijiet estensivi għal dan.

Illi t-tribunal qabel xejn iqis li ma jkunx inopportun li jirreferi għall-Artikolu 21(9) tal-Kapitlu 330 tal-Liġijiet ta' Malta. Din id-disposizzjoni hija dik li tirradika l-kompetenza tat-tribunal, u li tistabilixxi l-parametri tad-diskrezzjoni tiegħu. It-tribunal se jiċċita din id-disposizzjoni għall-faċilita' ta' referenza.

> (9) The question for the determination of the Tribunal shall be whether, for the reasons adduced by the appellant –
>
> (a) the competent authority has, in its decision wrongly applied any of the provisions of this Act; or
> (b) the decision of the competent authority constitutes an abuse of discretion or is manifestly unfair:
>
> Provided that the discretion of the competent authority may not, so long as it has been exercised properly, be queried by the Tribunal.

Illi t-tieni proviso ta' din id-disposizzjoni mhux rilevanti għall-każ odjern. Kwindi l-liġi tagħti tlett raġunijiet għaliex deċiżjoni ta' l-Awtorita' tista' tiġi mwarrba, u dawn huma:

(a) applikazzjoni ħażina tad-disposizzjonijiet tal-Kapitlu 330 tal-Liġijiet ta' Malta (u mhux ta' l-Att);

(b) li d-deċiżjoni tkun manifestament inġusta;

(c) li d-deċiżjoni tkun tikkostitwixxi abbuż ta' diskrezzjoni.

Illi għalhekk huwa ċar li l-liġi riedet tirrestringi d-diskrezzjoni tat-tribunal, b'mod li l-istess tribunal jiġi prekluż milli jissostitwixxi d-diskrezzjoni tiegħu għal dik ta' l-Awtorita' appellata, ħlief fejn tikkonkorri waħda mir-raġunijiet appena elenkati.

Illi t-tribunal jgħid minnufih li l-appellant ma jista' jsib l-ebda konfort abbażi tal-mottiv li d-deċiżjoni tkun il-frott ta' applikazzjoni ħażina tal-provvedimenti tal-liġi. Dan għaliex l-applikazzjoni ħażina fil-każ odjern trid tkun tirrigwarda d-disposizzjonijiet tal-Kapitlu 330 tal-Liġijiet ta' Malta, u mhux ta' xi liġi oħra. Dan huwa ċar mid-diċitura ta' l-Artikolu 21(9) ta' l-istess Kapitlu 330. L-appellant la allega u wisq inqas sostna ksur ta' disposizzjoni tal-Kapitlu 330. Għalhekk il-kawżali kontemplata fl-Artikolu 21(9)(a) m'hijiex applikabbli għall-każ odjern.

Illi dwar it-tieni mottiv u ċioe' l-abbuż ta' diskrezzjoni, it-tribunal huwa tal-fehma li hawnhekk il-liġi qiegħda tirreferi għall-kunċett appartenenti għall-kamp tad-dritt amministrattiv. Fil-fatt l-abbuż ta' diskrezzjoni ilu minn żmien twil meqjus bħala raġuni u bażi ta' l-istħarriġ ġudizzjarju ta' għemil amministrattiv. Jinsab mgħallem illi "*Judicial review of administrative action was founded upon the premise that an inferior tribunal or administrative public authority is entitled to decide wrongly, but is not entitled to exceed the jurisdiction it was given by statute. The statutory jurisdiction (later referred to also as "vires") permitted the public authority to make errors of fact, or errors of law* within *its jurisdiction, provided that such an error of law was not "manifest on the face of the record". In this respect, judicial review is to be distinguished from an appeal. It was largely restricted to review for* excess *of jurisdiction, while an appeal would usually enable errors either of fact or of law to be rectified. Ultra vires, or excess of jurisdiction, in the narrow or strict sense, was thus the organising principle which both justified judicial review (by*

declaring all power to be derived power) and constrained it (by permitting a degree of autonomy to the reviewed public authority)"[40]. "*In essence, the doctrine of ultra vires permits the courts to strike down decisions made by bodies exercising public functions which they have no power to make*"[41]. Minn dawn il-prinċipji, jitnissel ukoll il-prinċipju, illum paċifiku, li "*In requiring statutory powers to be exercised reasonably, in good faith, and on correct grounds, the courts are still working within the bounds of the familiar principle of ultra vires. The analysis involves no difficulty or mystique. Offending acts are condemned simply for the reason that they are unauthorised. The court assumes that Parliament cannot have intended to authorise unreasonable action, which is therefore ultra vires and void*"[42].

Illi kif ġie ritenut mill-Qorti ta' l-Appell fil-kawża **Frank Pace vs. Kummissarju tal-Pulizija et**[43], "*Il-poter delegat mill-liġi lill-Kummissarju – bħal kull delegazzjoni u kull mandat – huwa strettament ċirkostrett mit-termini preċiżi li bihom dik id-delegazzjoni, dak il-mandat, huma espressi*". Ifisser dan illi wieħed irid iħares u jixtarr sew il-kliem li permezz tiegħu inħolqot dik is-setgħa sabiex jiddetermina il-portata, il-parametri u konsegwentement il-limiti ta' dik is-setgħa. Kif jgħidu **Wade & Forsythe** [op cit, pg.219], "*Public administration is carried out to a large extent under statutory powers, conferred upon public authorities by innumerable Acts of Parliament. Statutory duties, imposed similarly, also play their part, but it is a minor one in comparison with powers. This is because powers confer discretion to act or not to act, and also, in many cases, what action to take, whereas duties are obligatory and allow no option. It is the element of discretion which raises the most numerous and most difficult problems in the law. When the question arises whether a public authority is acting lawfully or unlawfully, the nature and extent of its power or duty has to be found in most cases by seeking the intention of Parliament as expressed or implied in the relevant Act*".

[40] DeSmith's Judicial Review, 6th Edition, Sweet & Maxwell 2007, para.4-002.
[41] Ibid, para.4-011.
[42] Wade & Forsyth, Administrative Law, Oxford University Press, 8th Edition, pg.346-347.
[43] 18/11/1994.

Illi għalhekk, biex tirriżulta fondata raġuni ta' appell lil dan it-tribunal u bażata fuq il-mottiv ta' abbuż ta' diskrezzjoni, irid jirriżulta li l-Awtorita', fid-deċiżjoni tagħha, tkun abbużat mis-setgħa tagħha billi tkun eċċediet il-limiti mposti fuqha mil-liġi għall-eżerċizzju ta' dik id-diskrezzjoni. Hija ġurisprudenza assodata li l-eċċess tal-limitu tas-setgħa ikun jissussisti anke fejn id-diskrezzjoni tkun ġiet eżerċitata b'mod irraġjonevoli, u dan stante li l-ebda setgħa ma tista' titqies eżerċitata skont il-liġi meta tiġi eżerċitata b'mod irraġjonevoli, jew fejn ma jkunux ġew osservati l-prinċipji ta' ġustizzja naturali[44].

Illi dwar il-mottiv ta' nġustizzja manifesta, it-tribunal iqis li dan jista' jkun sodisfatt biss jekk l-appellant juri għas-sodisfazzjoni tat-tribunal, sintendi, li d-deċiżjoni tkun waħda li, fiċ-ċirkostanzi, it-teħid tagħha ma jistax ħlief isarraf f'inġustizzja ċara. B'referenza għall-fattispeċi tal-każ odjern, it-tribunal iqis li d-deċiżjoni mpunjata tkun manifestament inġusta jekk l-appellant juri li l-Awtorita' ma kellhiex raġjonevolment u legalment tasal għall-konklużjoni li waslet għaliha, u dan qed jingħad anke tenut kont tal-fatt illi dak addebitat lill-appellant ma huwa xejn għajr reat kriminali, *ut sic*. Huwa biss f'każ li l-Awtorita' tkun waslet għall-konklużjoni li tkun legalment u raġjonevolment eskluża li tkun saret inġustizzja manifesta.

Illi eżaminati l-parametri tad-diskrezzjoni ta' dan it-tribunal, se jiġi issa eżaminat l-aggravju proprju ta' l-appellant.

Ikkunsidra:

Illi permezz tad-deċiżjoni appellata, l-Awtorita' sabet lill-appellant ħati ta' *insider trading*, ai termini ta' l-Artikolu 6 ta' l-Att[45]. L-ewwel subinċiż ta' din id-disposizzjoni tipprovdi li:

> No person shall use inside information to trade in any financial instrument admitted to a regulated market or in any other way to acquire or dispose of,

[44] Mary Grech vs. Ministru tax-Xogħlijiet et (Appell, 29/1/1993).
[45] L-Artikolu 6 ta' l-Att huwa mudellat fuq l-Artikolu 2 tad-Direttiva 2003/6/EC.

> or attempt to acquire or dispose of such financial instrument, whether for his own account or for the account of a third party, either directly or indirectly, if he is in possession of information related to such financial instrument by virtue of:
>
> (a) his membership of the administrative, management or supervisory bodies of the issuer;
> (b) his holding in the capital of the issuer;
> (c) his having access to the information through the exercise of his employment, profession or duties; or
> (d) his criminal activities.

Illi l-liġi għalhekk tipprojbixxi persuna milli tagħmel użu minn *inside information* biex jinnegozja fi strument finanzjarju jew biex jakkwista jew jiddisponi, jew jipprova jakkwista jew jiddisponi, minn tali strument finanzjarju, kemm għalih innifsu u kemm fl-interess ta' terz, kemm direttament jew indirettament, jekk huwa jkun fil-pussess ta' tagħrif relatat ma' dak l-istrument bis-saħħa ta' waħda miċ-ċirkostanzi elenkati fl-istess subinċiż.

Illi huwa paċifiku li l-appellant kien persuna li nnegozja fi strumenti finanzjarji fl-interess tiegħu innifsu, u li l-appellant kien diriġent importanti fit-tmexxija tal-kumpannija GlobalCapital plc. L-appellant faċilment jikkwalifika bħala waħda mill-persuni li rċeviet tagħrif minħabba l-fatti elenkati fil-paragrafi (a) u (c) ta' l-ewwel subinċiż ta' l-Artikolu 6 ta' l-Att. Dan kollu huwa paċifiku.

Illi dak li huwa kontestat huwa li l-appellant għamel użu minn *inside information* sabiex innegozja fl-istrumenti finanzjarji in kwistjoni. M'hemmx dubju li dan l-element huwa wieħed indispensabbli sabiex ikun jista' jinstab ksur ta' l-Artikolu 6, u kien proprju dan l-element li fuqu kkonċentraw il-partijiet matul is-smiegħ ta' dan l-appell.

Illi biex dan l-element ikun sodisfatt irid jintwera mhux biss li l-persuna mixlija kellha *inside information*, imma anke li dik il-persuna tkun **<u>użat</u>** dik l-informazzjoni biex wettqet in-negozju projbit. Dan kuntrarjament għat-tieni subinċiż ta' l-Artikolu 6, li jipprojbixxi atti li persuna tista' tagħmel meta tkun fil-pussess biss ta' *inside information*. Pero' t-tieni subinċiż ma jiċċentra xejn mad-deċiżjoni mpunjata, billi l-

appellant ġie mixli u kkundannat b'konsegwenza ta' tranżazzjonijiet li huwa għamel għalih innifsu, u mhux għall-atti elenkati fl-imsemmi tieni subinċiż.

Illi huwa biss ovvju li trid tiġi eżaminata t-tifsira ta' *inside information*. L-Att fil-fatt jipprovdi definizzjoni, li se tiġi hawn taħt kaptata għall-faċilita' ta' referenza:

> "inside information" means information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, including information regarding any takeover offer for a company, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments; being information which a reasonable investor would be likely to use as part of the basis of his investment decisions.
>
> For the purposes of this definition, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments; for persons charged with the execution of orders concerning financial instruments, inside information shall also mean information conveyed by a client and related to the client's pending orders, which is of a precise nature, which relates directly or indirectly to one or more issuer or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments; being information which a reasonable investor would be likely to use as part of the basis of his investment decisions

Illi l-ewwel paragrafu ta' din id-definizzjoni hija meħuda kelma b'kelma mid-definizzjoni ta' *inside information* provduta fl-Artikolu 1(1) tad-Direttiva 2003/6/EC, b'dan li l-leġislatur malti żied il-frażi "*being information which a reasonable investor would be likely to use as part of the basis of his investment decisions*", liema frażi hija meħuda mill-Artikolu 1(2) tad-Direttiva 2003/124/EC.

Illi l-proviso rigwardanti x'għandu jitqies bħala "preċiż", huwa mudellat fuq l-Artikolu 1(1) tad-Direttiva 2003/124/EC.

Illi fid-deċiżjoni appellata, l-Awtorita' qieset illi l-appellant kien fil-pussess ta' *inside information* meta fil-laqgħat tal-Bord tad-Diretturi tal-kumpannija GlobalCapital plc, huwa sar jaf, mill-*management accounts* tal-kumpannija, li kien sar telf ta' madwar 1.8 miljun Ewro. Għalhekk l-ewwel kwistjoni li t-tribunal irid jeżamina hija jekk l-Awtorita' setgħetx raġjonevolment tasal għall-konklużjoni li dik l-informazzjoni kienet tikkostitwixxi *inside information* kif imfissra fl-Att.

Illi l-elementi identifikati mil-liġi sabiex informazzjoni titqies *inside information* huma s-segwenti:

(a) li tkun preċiża min-natura tagħha;
(b) li ma tkunx saret pubblika;
(c) li tkun tirrigwarda, direttament jew indirettament, strument finanzjarju jew mittent ta' strument finanzjarju;
(d) li tkun tali li jekk tiġi reża pubblika, probabbilment ikollha effett sinjifikanti fuq il-prezz ta' dak l-istrument finanzjarju;
(e) li tkun tali li investitur raġjonevoli probabbilment jagħmel użu minnha bħala bażi tad-deċiżjonijiet tiegħu dwar investiment.

Illi l-informazzjoni rigwardanti t-telf magħmul mill-kumpannija GlobalCapital plc sa Settembru tas-sena 2007 ċertament tirrigwarda strument finanzjarju kif ukoll il-mittent ta' strument finanzjarju. Jirriżulta ippruvat ukoll li dak it-tagħrif partikolari ma kienx disponibbli għall-pubbliku, kif *del resto* jistqarr l-appellant stess[46].

Illi dwar l-element tal-pubbliċita', l-appellant jikkontendi li bl-avviżi maħruġin mill-kumpannija GlobalCapital plc, u diġa' ċitati *verbatim* fil-korp ta' din id-deċiżjoni, huwa nieqes l-element ta' indisponibilita' għall-pubbliku li huwa ndispensabbli biex informazzjoni tiġi ritenuta *inside information*. It-tribunal iħoss li huwa doveruż għalih li jeżamina bir-reqqa dawn l-avviżi.

[46] Ara x-xiehda in kontro-eżami ta' l-appellant mogħtija fl-udjenza tat-8 ta' Novembru 2010.

Illi fl-24 t'Awwissu 2007, sar is-segwenti *company announcement* meħtieġ ai termini tal-*Listing Rules* 8.7.4 u 8.7.21:

> "GlobalCapital p.l.c. ('the Company') registered a profit after tax for the six months ended 30 June 2007 of Lm388,919 compared to a corresponding result last year of Lm735,180. The main highlights of the reporting period's results were:
>
> - Increase in operating profit of 21.9%;
> - Continued healthy returns on the international investment property portfolio of the Company and its subsidiaries;
> - Significant fair value losses on securities held by the Company and its subsidiaries, including the life insurance company, attributable to negative market conditions which prevailed during the year to date.
>
> The Directors expect that the levels of trading activity experienced during the six months to June 2007, which show an overall improvement in turnover over the corresponding period last year, should be sustained in the latter half of the current year. However, recent stock market volatility and global economic uncertainty may affect trading and investment performance.
>
> The directors do not recommend the payment of an interim dividend."

Illi t-tribunal huwa tal-fehma li dan l-*announcement* bl-ebda mod ma jista' jinftiehem jew jiġi nterpretat bħala l-ekwivalenti tal-pubblikazzjoni ta' l-informazzjoni li l-kumpannija għamlet telf ta' €1.8 miljun. Qabel xejn, jiġi nnutat li dan l-avviż jiftaħ b'dikjarazzjoni fis-sens li l-kumpannija għamlet profitt, purche' huwa ndikat espressament li dan il-profitt huwa inqas minn dak reġistrat fil-perjodu korrispondenti tas-sena preċedenti. Dikjarazzjoni li sar profitt ma tistax tinftiehem li hija ammissjoni li sar telf, *multo magis* telf f'ammont sinjifikanti.

Illi anke d-dikjarazzjonijiet li l-kumpannija soffriet *fair value losses* jew li mhux rakkommandat li jitħallas *interim dividend* ma jistgħux jitqiesu bħala ekwivalenti għall-informazzjoni li l-kumpannija soffriet telf sostanzjali. Dan għaliex dawn id-dikjarazzjonijiet ma humiex biżżejjed ċari biex jagħtu l-istampa ċara li titnissel mill-informazzjoni li kien hemm telf fl-ammont ta' €1.8 miljun. F'din il-konklużjoni, it-tribunal huwa ulterjorment fortifikat mill-fatt li meta wieħed iqis dawn id-dikjarazzjonijiet flimkien mad-dikjarazzjoni li l-kumpannija għamlet

profitt (anke jekk inqas mis-sena preċedenti), qarrej ta' intelliġenza ordinarja ma jistax jasal għall-konklużjoni li l-kumpannija għamlet it-telf sostanzjali in kwistjoni.

Illi fil-15 ta' Novembru 2007, il-Bord tad-Diretturi tal-kumpannija GlobalCapital plc wettqet *Company Announcement* oħra, din id-darba ai termini tar-Regola 9.51 tal-*Listing Rules*. Dan l-*Announcement* kien jgħid kif ġej:

> **Quote**
>
> **Interim Directors' Statement**
>
> GlobalCapital p.l.c. (the 'Group') hereby announces that during the period between 1 July 2007 and the date of this announcement, no material events and transactions have taken place that would have an impact on the financial position of the Group, such that would require specific mention, disclosure or announcement pursuant to the applicable Listing Rules.
>
> During the first nine months of the year the Group registered increased turnover levels, over the corresponding period last year, predominately on its life insurance business and property portfolio, whilst investment fee income has experienced a decrease compared to the corresponding first nine months of 2006. The Group's health Insurance division has also registered positive results which, barring any unforeseen circumstances, are expected to be sustained throughout the remaining months. The downturn in the local and international capital markets persisted during the third quarter of the current financial year and this has invariably had an adverse effect on the Group's portfolio of financial investments. This factor has led to a negative impact on the Group's profitability for the period under consideration and if the downturn in the financial markets persists it is expected to impact on this year's results.
>
> GlobalCapital Investments Limited, one of the Group's subsidiaries, has recently acquired a financial institutions licence in terms of the Financial Institutions Act, 1994. It is anticipated that this new licence will help further diversify GlobalCapital's revenue streams and is expected to start contributing to the Group's results during 2008.
>
> **Unquote**

Illi dan it-tieni avviż jibda billi jiddeskrivi li l-kumpannija kellha dħul aħjar minn dak tas-sena preċedenti fil-kamp tal-proprjeta' u ta' l-assikurazzjoni fuq il-ħajja u fuq is-saħħa, filwaqt li kellha tnaqqis fir-rigward ta' dħul minn *investment fees*. L-istess avviż ikompli jgħid li l-profitabilita' tal-kumpannija ġiet affettwata mill-kundizzjonijiet negattivi tas-suq, u jingħad li dan il-fattur hu mistenni li jaffettwa r-

riżultati għal dik is-sena. Jingħad ukoll li waħda mis-sussidjarji tal-kumpannija akkwistat liċenzja ġdida li kienet mistennija li tikkontribwixxi għad-dħul tal-Grupp matul is-sena ta' wara. Dan hu, fil-qosor, dak li qed jingħad f'dan l-avviż.

Illi t-tribunal hu tal-fehma li dan it-tagħrif huwa wisq ambigwu u ambivalenti sabiex jiġi nterpretat bħala ekwivalenti għat-tagħrif mogħti lill-appellant waqt il-laqgħat tal-Bord tad-Diretturi matul l-ewwel jiem tax-xahar ta' Diċembru 2007. Minn qari ta' dan l-avviż biss, anke jekk moqri fid-dawl ta' l-avviż pubblikat preċedentement u eżaminat *supra*, qarrej ta' ntelliġenza ordinarja ma jistax jasal biex jifhem l-entita' tat-telf li għamlet il-kumpannija f'dik is-sena, b'liema entita' ġie mgħarraf l-appellant qabel għamel it-tranżazzjonijiet in kwistjoni.

Illi għalhekk, it-tribunal iqis li t-tagħrif mogħti lill-appellant fil-laqgħat tal-Bord tad-Diretturi ma kienx disponibbli għall-pubbliku fit-termini tat-tifsira ta' *inside information* kif provduta fl-Att.

Illi t-tribunal iqis ukoll li dan it-tagħrif huwa tali li kieku ġie reż pubbliku, probabbilment ikollu effett sinjifikanti fuq il-prezz ta' dak l-istrument finanzjarju, u huwa wkoll tali li investitur raġjonevoli probabbilment jagħmel użu minnu bħala bażi tad-deċiżjonijiet tiegħu dwar investiment. Din il-konklużjoni qed tiġi raġġunta għaliex il-profitabilita' *o meno* ta' istituzzjoni finanzjarja hija, fil-fehma tat-tribunal, fattur li ċertament jiġi kkunsidrat minn persuna raġjonevoli qabel tagħmel deċiżjoni dwar l-investiment tagħha. Bl-istess mod, dik il-profitabilita' – anke għax tinfluwenza d-deċiżjoni ta' investituri prospettivi – tagħmel effett fuq il-prezz ta' l-istrumenti finanzjarji immessi minn dik l-istituzzjoni, b'mod li strument immess minn istituzzjoni li qed tagħmel it-telf ma jistax ikollu prezz ekwivalenti għal dak immess minn istituzzjoni li qed tagħmel profitti.

Illi t-tribunal wasal għal din il-konklużjoni wara li qies li l-liġi trid li l-possibbilita' ta' dawn l-effetti, appena menzjonati, ma tkunx waħda assoluta, imma biss probabbli, b'mod għalhekk li informazzjoni tista' titqies bħala *inside information*

jekk "probabbilment" ikollha dawk l-effetti, u mhux jekk ċertament ikun hemm dawk l-effetti. F'dan is-sens, is-sottomissjonijiet kollha ta' l-appellant dwar it-tnaqqis fil-prezz fis-suq rilevanti matul il-perjodu in kwistjoni huma kollha rrilevanti, għaliex huwa possibbli li informazzjoni tibqa' *inside information* anke fejn din effettivament jirriżulta li ma kellha l-ebda impatt fuq il-prezz, jew fejn din effettivament jirriżulta li ma tiġix ikkunsidrata minn investitur raġjonevoli. Il-mera probabbilita' li jkun hemm dawn il-konsegwenzi hija suffiċċjenti sabiex dik l-informazzjoni żżomm il-karattru tagħha ta' *inside information* ai termini ta' l-Att.

Illi jonqos biss l-element li dik l-informazzjoni tkun waħda "preċiża". Biex informazzjoni titqies li hija preċiża, trid tkun tali li "... *it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments...*". Dwar din it-tifsira, huwa nteressanti dak innutat mill-Qorti Ewropeja tal-Ġustizzja fis-segwenti bran:

> In the light of the foregoing considerations, the answer to the second question is that Article 1(1) of Directive 2003/124 must be interpreted as meaning that the notion of 'a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so' refers to future circumstances or events from which it appears, on the basis of an overall assessment of the factors existing at the relevant time, that there is a realistic prospect that they will come into existence or occur. However, that notion should not be interpreted as meaning that the magnitude of the effect of that set of circumstances or that event on the prices of the financial instruments concerned must be taken into consideration[47].

Illi għalhekk biex informazzjoni titqies preċiża, trid tkun tirreferi għal ċirkostanzi eżistenti jew li raġjonevolment għandhom jitqiesu li se jiġu fis-seħħ. Meta l-appellant sar jaf bit-telf tal-kumpannija f'Diċembru 2007, huwa kien qed jiġi nfurmat b'ċirkostanza eżistenti, u li f'dak il-perjodu tas-sena, kellha taffettwa mhux

[47] Markus Geltl vs. Daimler AG, C-19/2011, 28/6/2012.

bi ftit il-figuri finanzjarji tal-kumpannija. Din l-informazzjoni kellha l-karattru ta' ċertezza li l-liġi, fit-tifsira tagħha, tekwipara mal-kelma "preċiża", u għalhekk it-tribunal ma jistax ħlief jikkonkorri ma' l-Awtorita' appellata li l-informazzjoni li kellu l-appellant kellha titqies bħala *inside information*. Kif ingħad fid-deċiżjoni ċitata, mhux neċessarju, għal fini li informazzjoni titqies preċiża, li jiġi kkunsidrat l-effett li dawk iċ-ċirkostanzi jistgħu ikollhom fuq il-prezz ta' l-istrumenti finanzjarji kunċernati.

Illi stabbilit allura li l-appellant, fil-mument li wettaq it-tranżazzjoni fl-azzjonijiet tal-kumpannija GlobalCapital plc, kellu *inside information*, imiss issa li jiġi eżaminat jekk dak li għamel hu jinkwadrax ruħu fit-tifsira ta' *insider dealing*, kif spjegata fl-Artikolu 6(1) ta' l-Att.

Illi l-Artikolu 6(1) ta' l-Att jipprojbixxi persuna milli tuża *inside information* biex tinnegozja f'istrument finanzjarju, jew biex takkwista jew tiddisponi minn strument finanzjarju, kemm fl-interess tiegħu jew ta' terz.

Illi diġa' rajna li fil-fatt l-appellant kellu f'idejh *inside information*, u li huwa ddispona u nnegozja fi strumenti finanzjarju fl-interess tiegħu personali. Huwa stabbilit ukoll li l-informazzjoni nkriminanti ġiet ottenuta mill-appellant minħabba ċ-ċirkostanzi identifikati fl-Artikoli 6(1)(a) u 6(1)(c).

Illi kif diġa' rrileva t-tribunal, biex ikun hemm ksur ta' l-Artikolu 6(1) mhux biżżejjed li jintwera li persuna fil-pussess ta' *inside information* wettqet tranżazzjoni fi strumenti finanzjarji. Irid jintwera wkoll li dik il-persuna tkun, fit-tranżazzjoni nkriminanti, għamlet użu minn dik l-*inside information*. Fir-rigward ta' dan l-element ta' l-użu, it-tribunal isib li huwa siewi ħafna l-insenjament tal-Qorti Ewropea tal-Ġustizzja fir-rigward, u għalhekk se jiċċita estensivament mill-istess:

> 30 By its second and third questions, which need to be examined together and prior to the others, the referring court requests the Court of Justice to

interpret the expression 'use of inside information' in Article 2(1) of Directive 2003/6. That provision provides that the Member States are to prohibit any person referred to in the second subparagraph thereof (a 'primary **insider**') who 'possesses inside information from using that information by acquiring or disposing of, ... for his own account or for the account of a third party, either directly or indirectly, the financial instruments to which that information relates' or from trying to enter into such a transaction on the market. More precisely, the referring court seeks to determine whether it is sufficient, for a transaction to be classed as prohibited **insider** dealing, that a primary **insider** in possession of inside information trades on the market in financial instruments to which that information relates or whether it is necessary, in addition, to establish that that person has 'used' that information 'with full knowledge'.

31 Article 2(1) of Directive 2003/6 does not stipulate that prohibited transactions must be carried out 'with full knowledge of the facts' but merely prohibits primary insiders from using inside information when entering into market transactions. That article defines the constituent elements of such prohibited transactions by referring expressly to two such elements, namely, the persons likely to fall within its scope and the material actions which constitute that transaction.

32 By contrast, that provision does not expressly set out the subjective conditions in relation to the intention behind those material actions. Article 2(1) of Directive 2003/6 does not state whether the primary **insider** must have been driven by a speculative intention, must have had a fraudulent intention or must have acted either deliberately or negligently. That article does not expressly state whether it is necessary to establish that the inside information was decisive in the decision to enter into the market transaction at issue, or whether the primary **insider** had to be aware that the information in his possession was inside information.

33 In that regard, it should be noted that, in drafting Directive 2003/6, the Community legislature sought to fill in some of the gaps identified in Directive 89/592. Article 2(1) of Directive 89/592 sought to prohibit 'any person who ... possesses inside information' from entering into a market transaction in relation to the transferable securities concerned 'by taking advantage of that information with full knowledge of the facts'. The transposition of that provision into national law gave rise to variances in the interpretation by the Member States of the expression 'with full knowledge of the facts', which in certain national legal systems was assimilated to a requirement of a mental element.

34 In that regard, the Proposal for a Directive of the European Parliament and of the Council on **insider** dealing and market manipulation (market abuse) (2001/0118 (COD)), submitted by the Commission of the European Communities on 30 May 2001, was based on the wording of Article 2(1) of Directive 89/592 while removing the expression 'with full knowledge of the facts', on the ground that 'by nature [primary insiders] may have access to inside information on a daily basis and are aware of the confidential nature of the information that they receive'. In addition, the subsequent preparatory work referred to in point 58 of the Advocate General's Opinion shows that the Parliament, in accordance with the objective approach of the notion of **insider** dealing favoured by the Commission, sought to replace

the verb 'to take advantage of' with the verb 'to use' in order to remove any element of purpose or intention from the definition of **insider** dealing.

35 The above shows that Article 2(1) of Directive 2003/6 defines **insider** dealing objectively without the intention behind such dealing being referred to explicitly in its definition. This was done with a view to achieving uniform harmonisation of the law of the Member States.

36 The fact that Article 2(1) of Directive 2003/6 does not expressly provide for a mental element can be explained, first, by the specific nature of **insider** dealing, which enables a presumption of that mental element once the constituent elements referred to in that provision are present. To begin with, the relationship of confidence which links the primary insiders referred to in Article 2(1)(a) to (c) to the issuer of the financial instruments to which the inside information relates implies, on their part, a specific responsibility in that regard. Next, entering into a market transaction is necessarily the result of a series of decisions forming part of a complex context which, in principle, makes it possible to exclude the possibility that the author of that transaction could have acted without being aware of his actions. Finally, where such a market transaction is entered into while the author of that transaction is in possession of inside information, that information must, in principle, be deemed to have played a role in his decision-making.

37 The fact that Article 2(1) of Directive 2003/6 does not expressly provide for a mental element among the constituent elements of **insider** dealing can be explained, second, by the purpose of Directive 2003/6, which, as is pointed out, inter alia, in the second and twelfth recitals in the preamble thereto, is to ensure the integrity of Community financial markets and to enhance investor confidence in those markets. The Community legislature opted for a preventative mechanism and for administrative sanctions for **insider** dealing, the effectiveness of which would be weakened if made subject to a systematic analysis of the existence of a mental element. As pointed out by the Advocate General in point 55 of her Opinion, only if the prohibition on **insider** dealing allows infringements to be effectively sanctioned does it prove to be powerful and encourage compliance with the rules by all market actors on a lasting basis. The effective implementation of the prohibition on market transactions is thus based on a simple structure in which subjective grounds of defence are limited, not only to enable sanctions to be imposed but also to prevent effectively infringements of that prohibition.

38 Once the constituent elements of **insider** dealing laid down in Article 2(1) of Directive 2003/6 are satisfied, it is thus possible to assume an intention on the part of the author of that transaction.

Omissis

45 The establishment of an effective and uniform system to prevent and sanction **insider** dealing with the legitimate aim of protecting the integrity of financial markets has thus led the Community legislature to adopt an

objective definition of the constituent elements of prohibited **insider** dealing. The fact that Article 2(1) of Directive 2003/6 does not expressly provide for a mental element does not, however, mean that that provision needs to be interpreted in such a way that any primary **insider** in possession of inside information who enters into a market transaction, automatically falls within the prohibition on **insider** dealing.

46 As pointed out by the Italian and United Kingdom Governments, such an extensive interpretation of Article 2(1) of Directive 2003/6 would entail the risk of extending the scope of that prohibition beyond what is appropriate and necessary to attain the goals pursued by that directive. Such an interpretation could, in practice, lead to the prohibition of certain market transactions which do not necessarily infringe the interests protected by that directive. It is therefore necessary to distinguish 'uses of inside information' which are capable of infringing those interests from those which are not.

47 To that end, reference needs to be made to the purpose of Directive 2003/6. As is apparent from its title, that directive seeks to tackle market abuse. The second and twelfth recitals in the preamble thereto state that, following the example of Directive 89/592, it prohibits **insider** dealing with the aim of protecting the integrity of financial markets and enhancing investor confidence, a confidence which depends, inter alia, on investors being placed on an equal footing and protected against the improper use of inside information (see, by analogy, Case C-384/02 *Grøngaard and Bang* [2005] ECR I-9939, paragraphs 22 and 33).

48 Thus, the purpose of the prohibition laid down by Article 2(1) of Directive 2003/6 is to ensure equality between the contracting parties in stock-market transactions by preventing one of them who possesses inside information and who is, therefore, in an advantageous position vis-à-vis other investors, from profiting from that information, to the detriment of those who are unaware of it (see, by analogy, Case C-391/04 *Georgakis* [2007] ECR I-3741, paragraph 38).

49 In its explanatory memorandum accompanying the proposal which led to the adoption of Directive 2003/6, the Commission thus stated that 'market abuse may arise in circumstances where investors have been unreasonably disadvantaged, directly or indirectly, by others who … have used information which is not publicly available to their own advantage or the advantage of others … This type of conduct can create a misleading appearance of **trading** in financial instruments and undermine the general principle that all investors must be placed on an equal footing … in terms of access to information. Insiders are in possession of confidential information. Trades based on such information lead to unjustified economic advantages at the expense of "outsiders"'. Thus, the proposal for a directive was based on the will to prohibit insiders from drawing an advantage from inside information by entering into market transactions to the detriment of the other actors on the market who do not have access to such information.

50 Consequently, there is a close link between the prohibition on **insider** dealing and the concept of inside information, the latter being defined by Article 1 of Directive 2003/6 as 'information of a precise nature

which has not been made public', relating to issuers of financial instruments or to financial instruments and which, 'if it were made public, would be likely to have a significant effect on the prices of [the] financial instruments [concerned] or on the price of related derivative financial instruments'.

51 In order to strengthen legal certainty for market participants, Directive 2003/124 specified the definition of two key elements of inside information, namely the precise nature of that information and the extent of its potential impact on prices. Article 1(1) of that directive thus provides that information '[is to] be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments'. Article 1(2) of that directive defines information likely to have a significant effect on the price of financial instruments as information which 'a reasonable investor would be likely to use as part of the basis of his investment decisions'.

52 Owing to its non-public and precise nature and its ability to influence the prices of financial instruments significantly, inside information grants the **insider** in possession of such information an advantage in relation to all the other actors on the market who are unaware of it. It enables that **insider**, when he acts in accordance with that information in entering into a transaction on the market, to expect to derive an economic advantage from it without exposing himself to the same risks as the other investors on the market. The essential characteristic of **insider** dealing thus consists in an unfair advantage being obtained from information to the detriment of third parties who are unaware of it and, consequently, the undermining of the integrity of financial markets and investor confidence.

53 Consequently, the prohibition on **insider** dealing applies where a primary **insider** who is in possession of inside information takes unfair advantage of the benefit gained from that information by entering into a market transaction in accordance with that information.

54 It follows that the fact that a primary **insider** who holds inside information trades on the market in financial instruments to which that information relates implies that that person 'used that information' within the meaning of Article 2(1) of Directive 2003/6, but without prejudice to the rights of the defence and, in particular, the right to be able to rebut that presumption.

55 However, in order not to extend the scope of the prohibition laid down in Article 2(1) of Directive 2003/6 beyond what is appropriate and necessary to attain the goals pursued by that directive, certain situations may require a thorough examination of the factual circumstances enabling it to be ensured that the use of the inside information is actually unfair so as to be prohibited by the directive in the name of the integrity of financial markets and investor confidence.

56 It should be noted, in that regard, that the preamble to Directive 2003/6 provides several examples of situations in which the fact that a primary **insider** in possession of inside information enters into a transaction

on the market should not in itself constitute 'use of inside information' for the purposes of Article 2(1) of that directive.

57 Thus, the 18th recital in the preamble to Directive 2003/6 states that use of inside information 'can consist in the acquisition or disposal of financial instruments by a person who knows, or ought to have known, that the information possessed is inside information'. That hypothesis is expressly provided for in Article 4 of that directive, which extends the prohibition on **insider** dealing to persons who know, or ought to have known, that the information in their possession is inside information. None the less, the automatic application of those criteria to certain professionals in the financial markets, who are required to hold inside information relating to transactions carried out on the market by third parties, risks leading to a situation in which such persons are prohibited from carrying out their activity, an activity which is both legitimate and useful for the efficient functioning of the financial markets. The 18th recital in the preamble to that directive states, in that regard, that the assessment of what a reasonable person knows or should have known 'in the circumstances' is to be carried out by the competent authorities.

58 In addition, that recital states that the mere fact that market-makers, bodies authorised to act as counterparties, or persons authorised to execute orders on behalf of third parties with inside information confine themselves to entering into market transactions legitimately and dutifully 'should not in itself be deemed to constitute use of such inside information'.

59 The 29th recital in the preamble to Directive 2003/6 states that having access to inside information relating to another company and using it in the context of a public take-over bid or a merger proposal 'should not in itself be deemed to constitute **insider** dealing'. The operation whereby an undertaking, after obtaining inside information concerning a specific company, subsequently launches a public take-over bid for the capital of that company at a rate higher than the market rate cannot, in principle, be regarded as prohibited **insider** dealing since it does not infringe the interests protected by that directive.

60 The 30th recital in the preamble to Directive 2003/6 states that, since the carrying out of a market transaction necessarily involves a prior decision on the part of its author, the carrying out of that transaction 'should not be deemed in itself to constitute the use of inside information'. If that were not the case, Article 2(1) of that directive could, inter alia, lead to a situation in which a person who decided to launch a public take-over bid would be prohibited from executing that decision since it would constitute inside information. Such a result would not only go beyond what may be regarded as appropriate and necessary to achieve the goals of that directive, but could even adversely affect the efficient functioning of the financial markets by preventing public take-over bids.

61 It follows from the above that the question whether a primary **insider** in possession of inside information 'uses that information' within the meaning of Article 2(1) of Directive 2003/6 must be determined in the light of the purpose of that directive, which is to protect the integrity of the financial markets and to enhance investor confidence. That confidence is based, in particular, on the assurance that they will be placed on an equal footing and

protected from the misuse of inside information. Only usage which goes against that purpose constitutes prohibited **insider** dealing.

62 Therefore, the answer to the second and third questions must be that, on a proper interpretation of Article 2(1) of Directive 2003/6, the fact that a person as referred to in the second subparagraph of that provision, in possession of inside information, acquires or disposes of, or tries to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, the financial instruments to which that information relates implies that that person has 'used that information' within the meaning of that provision, but without prejudice to the rights of the defence and, in particular, to the right to be able to rebut that presumption. The question whether that person has infringed the prohibition on **insider** dealing must be analysed in the light of the purpose of that directive, which is to protect the integrity of the financial markets and to enhance investor confidence, which is based, in particular, on the assurance that investors will be placed on an equal footing and protected from the misuse of inside information.[48]

Illi għalhekk, skont il-Qorti Ewropeja tal-Ġustizzja, il-fatt li persuna tinnegozja fi strumenti finanzjarji fil-mument li tkun fil-pussess ta' *inside information*, joħloq preżunzjoni li dik il-persuna użat dik l-informazzjoni, b'dan pero' li l-mixli għandu jkollu kull opportunita' sabiex jirribatti dik il-preżunzjoni permezz ta' provi. Huwa ċar għalhekk li l-oneru tal-prova jinsab proprju fuq il-mixli. L-imsemmija Qorti waslet għal din il-konklużjoni billi qieset li l-iskop tal-projbizzjoni kontra *insider dealing* huwa li persuni li jkollhom vantaġġ fis-suq minħabba l-pożizzjoni tagħhom fi ħdan istituzzjoni finanzjarja ma jieħdux vantaġġ minn dik il-pożizzjoni meta jiġu biex jinnegozjaw ma' persuna karenti minn vantaġġ bħal dak jew vantaġġ ieħor konsimili. Dan bl-iskop li tiġi mantenuta l-fiduċja fis-swieqi finanzjarji, liema fiduċja tista' tiġi nieqsa fejn persuna f'pożizzjoni vantaġġjuża, kif spjegat, titħalla tinnegozja liberament meta tkun munita b'dik l-informazzjoni.

Illi t-tribunal jifhem illi l-iskop ta' l-Artikolu 6 ta' l-Att, kif interpretat mill-Qorti Ewropeja tal-Ġustizzja, huwa l-manutenzjoni tal-bilanċ bejn il-persuni kkunsidrati bħala *insiders* (u ċioe' l-persuni elenkati fis-subparagrafi (a) sa (d) ta' l-ewwel subinċiż ta' l-Artikolu 6) u l-persuni li m'humiex *insiders*. Bilanċ li jista' jiġi miżmum liberament billi l-persuni kkunsidrati bħala *insiders* jassikuraw ruħhom li

[48] Spector Photo Group NV, Chris Van Raemdonck vs. Commissie voor het Bank-, Financie-, en Assurantiewezen (CBFA), 23/12/2009, C-45/2008.

jipprovdu lill-pubbliku dik l-informazzjoni li tikkwalifika bħala *inside information*, liema informazzjoni proprju titlef dak il-karattru hekk kif tiġi esposta għall-pubbliku. Dan ma jfissirx li istituzzjoni finanzjarja għandha l-obbligu li tesponi lill-pubbliku kollox – pero' jekk tagħżel li ma tagħmilx tali espożizzjoni, l-uffiċċjali tagħha jkunu preklużi milli jinnegozjaw fl-istrumenti finanzjarji tagħha – sakemm ma jurux illi f'tali negozjati huma ma għamlux użu minn *inside information*.

Illi l-appellant, fix-xiehda tiegħu, spjega li t-tranżazzjonijiet li dwarhom qed jiġi addebitat lilu r-reat ta' *insider dealing* kienu parti minn sensiela ta' tranżazzjonijiet imwettqin minnu matul is-snin, bl-iskop li jillikwida l-interess tiegħu fil-kumpannija GlobalCapital plc sabiex jiddiversifika dak l-interess finanzjarju tiegħu f'oqsma oħra finanzjarji. Fil-fatt, jgħid l-appellant, filwaqt li fis-sena 2001 huwa kellu 90% tal-kapital azzjonarju tal-kumpannija, fis-sena 2008 dak is-sehem tiegħu niżel għal 11.42%. Minn dokument eżebit mill-appellant (Dok CJP1), u mhux kontradett mill-Awtorita' appellata, jidher li l-appellant kull sena mill-2001 sa l-2008, naqqas l-azzjonijiet appartenenti lilu. Filwaqt li l-akbar trasferimenti jidher li seħħew fis-sena 2002, l-appellant baqa' jwettaq trasferimenti varji ta' l-istess ishma matul is-snin sussegwenti, liema trasferimenti kienu jvarjaw minn 1% sa 4%.

Illi l-appellant xehed ukoll li matul l-aħħar nofs tax-xahar ta' Diċembru 2007, kien hemm 96 persuna li innegozjaw fl-ishma tal-kumpannija. Fil-fatt hu preżenta dokument (Dok CJP2), li wkoll ma ġiex kontradett mill-Awtorita' appellata, li jattesta għal dan il-fatt. Jidher li n-numru ta' azzjonijiet trasferiti fil-perjodu msemmi kien jammonta għal 955,186, li minnhom 392,507 kienu jappartjenu lill-appellant[49]. Jidher li għalkemm il-vendituri ta' l-ishma kienu numeruzi (96 kif ġia' rilevat), il-kumpraturi kienu ftit, u ċioe' 4 biss[50]. L-appellant in effetti spjega li huwa rriskontra likwidita' kbira fix-xahar ta' Diċembru 2007, u kien għalhekk li ħa vantaġġ minn dik il-likwidita' sabiex ibiegħ l-azzjonijiet tiegħu[51].

[49] Ara x-xiehda ta' l-appellant waqt l-udjenza tat-8 ta' Novembru 2010.
[50] Ara x-xiehda in kontro-eżami ta' l-appellant waqt l-udjenza tat-8 ta' Novembru 2010.
[51] Ara x-xiehda ta' l-appellant in kontro-eżami mogħtija fl-udjenza tat-8 ta' Novembru 2010.

Illi t-tribunal, fl-eżami tiegħu ta' din l-aspett tal-vertenza, iħoss li jkun opportun li jirrileva dak li l-appellant kien issottometta lill-Awtorita' appellata fl-iskambju tal-korrispondenza li ppreċeda d-deċiżjoni appellata.

Illi fl-ittra tiegħu ta' l-20 ta' Jannar 2009, l-appellant spjega hekk:

> "On a final note as can be noted from our exchange of correspondence in June 2008, my trading activity in GC shares was initiated earlier than the 14th December 2007 and was fluid during the second half of the year. It is also apparent that in November-December there was substantial interest in buying GC shares in the market as a result of which I availed myself of the opportunity to sell GC shares just like a number of other investors both large and small. Having said that I still retain a substantial interest in GC in which I hold approximately a 15% interest"

Illi t-tribunal iqis li kienet tkun prova rilevanti ferm li l-appellant iressaq prova li huwa kien ħa deċiżjoni li jbiegħ l-ishma tiegħu **qabel** saru l-laqgħat tal-Bord tad-Diretturi f'Diċembru 2007, kif donnu qed jindika fil-bran appena ċitat mill-ittra tiegħu lill-Awtorita'. Prova din li setgħet issir bix-xiehda ta' rappreżentant tal-HSBC Bank Malta plc, billi kien tramite l-operat ta' dan il-Bank li l-appellant biegħ 363,239 azzjonijiet li huwa kellu miżmumin permezz ta' *custodian accounts*[52]. L-appellant madanakollu naqas għal kollox milli jressaq provi dwar meta huwa wettaq l-ordnijiet tiegħu sabiex ibiegħ dawn l-azzjonijiet – prova din li fil-fehma tat-tribunal kienet tispetta lill-appellant u li kienet titfa' mhux ftit dawl fuq l-*iter* tad-deċiżjoni tiegħu li jbiegħ l-azzjonijiet in kwistjoni.

Illi l-fatti li lil dan it-tribunal jirriżultawlu ippruvati huma li l-appellant, ftit jiem wara li rċieva l-informazzjoni dwar it-telf sostanzjali tal-kumpannija, għażel li jbiegħ ammont mill-ishma tiegħu. Huwa rrilevanti jekk l-appellant biegħx ammont kbir jew żgħir mill-istess ishma. Huwa tant'ieħor irrilevanti li l-ammont ta' ishma trasferita mill-appellant jekwivalu għal ammont żgħir mill-kapital azzjonarju tal-kumpannija GlobalCapital plc, u dan stante li l-liġi ma teżenta l-ebda trasferiment skont id-daqs tiegħu. Dak li hu rilevanti, fil-fehma tat-tribunal, hu l-fatt li t-

[52] Ara x-xiehda ta' l-appellant mogħtija fl-udjenza tat-8 ta' Novembru 2010.

trasferiment in kwistjoni kien tant viċin iż-żmien meta l-appellant irċieva l-informazzjoni in kwistjoni, liema prossimita' tinduċi lil dan it-tribunal biex jifhem li ż-żewġ avvenimenti kienu marbutin, konnessi u konsegwenzjali.

Illi għalhekk, tenut kont tal-fatt li kien jinkombi fuq l-appellant li jipprova li huwa m'għamilx użu mill-*inside information* li kellu fil-pussess tiegħu meta nnegozja fl-azzjonijiet in kwistjoni, it-tribunal qed jikkonkludi li l-appellant ma ressaqx il-prova neċessarja.

Illi ikkunsidrat il-premess kollu, it-tribunal ma jsibx li d-deċiżjoni appellata hija manifestament inġusta, jew li l-istess deċiżjoni hija vvizzjata minn abbuż ta' setgħa. Għalhekk l-appell ma jistħoqqlux l-akkoljiment.

Għaldaqstant għall-mottivi kollha hawn fuq premessi, it-tribunal qiegħed jiddisponi mill-appell ta' Christopher Pace billi jiċħdu fl-intier tiegħu, bl-ispejjeż kollha ta' dan il-proċediment ikunu a karigu ta' l-istess appellant.