Securities Law in the European Union and the United States: Comparing Apples and Oranges or Potayto, Potahto?

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The globalization of the securities markets and rapid technological advancement have made international financial markets law an increasingly important area of regulation, practice, and scholarly research. Yet more in-depth analysis of the differences of financial markets law and securities law, in particular, remains unexplored to explicate for underlying reasons for divergence. This study contributes to the stream of literature comparing securities law in the EU and the U.S. The findings suggest that differences in securities law arise from differing investor bases and different levels of integration of capital markets. Prohibition on trading on inside information in the EU is more recent but more extensive whereas the U.S. approach is older and more limited in scope.

1. INTRODUCTION

The globalization of the securities markets and rapid technological advancement have made financial markets law and securities law, in particular, in international context an increasingly important area of regulation, practice, and scholarly research. To study securities law in comparative context pegs the questions to what extent do we talk about the same phenomenon of ‘securities law’ in different jurisdictions and for the purpose of this study, in the EU and the U.S. Is an American ‘security’ sufficiently similar to its EU counterpart that

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a comparison of securities law yields sufficiently fruitful results or are we simply doomed to a comparison of ‘apples and oranges’? Related to this Lundmark has noted that, ‘it is hoped that future scholars will take a more nuanced view of [...] the supposed divide between the common law and the civil law worlds without forgetting that all legal systems in both of these traditions have far more in common with each other than not’. In the spirit of Lundmark’s exhortation to give heed to the similarities, this study attempts to map differences in securities law in the EU and the U.S. as well as to explicate for underlying reasons for divergence.

This study adds to the stream of comparative legal literature on financial markets by comparing securities law in the EU and the U.S. Previous studies have concentrated on comparing some aspects of securities law such as developments of internal capital markets and insider trading in comparative context. This study sheds light to previously unanswered questions by drawing conclusions about differences between securities law in the EU and in the U.S. The guiding research question of this study is following: to what extent do securities law in the European Union and in the United States differ? In addition to detecting differences concerning securities law, I also aim to address the following research question: what possible factors explain differences of securities law in the European Union and in the United States? Whereas the first research question mainly focuses on what are the differences, the second research question is about why, specifically, which reasons might explain the divergence. With such formulation of the research questions, both questions act in a symbiotic relationship complementing each other.

The main academic contributions of this study include systemizing differences of securities law in the two jurisdictions with an emphasis on attempting to explicate the findings drawing on a pool of possible explanatory factors at play. I find that some of the differences in securities law stem from differences in investor base and differing levels of integration of capital markets. Prohibition

on trading on inside information in the EU is more recent but more extensive whereas the U.S. approach is older and more limited in scope.³

Since securities law in the EU and the U.S. will be explored for differences, the very setting of this study is comparative. Without delving deeper into the scholarly debate on the exact nature of comparative law, in this study I will regard comparative law both as a research method and as an academic discipline.⁴ I will employ a comparative research method to align the aim and the research questions with the methodology of this study.⁵ To be more precise, I will follow a modified version of Siems’ four-phase model of a comparative study.⁶ Having first decided on the research questions and the legal systems under comparison, I will focus on some of main characteristics of securities law in the EU and in the U.S., namely what constitutes a security in each jurisdiction and how inside information is regulated. I will focus on written authoritative texts from the EU and the U.S. I will refer to legislation but also to court cases mostly from the European Court of Justice (CJEU) and the U.S. Supreme Court. To complement understanding of securities law and to avoid the pitfall of reducing the analysis to mere case law journalism, I will also review legal research covering doctrine on EU law and U.S. law when necessary.⁷ The description of the laws is followed by an analysis of possible reasons for detected differences.

2. SECURITIES LAW IN THE EU

Creating a single internal market by removing barriers to the free movement of goods, persons, services, and capital between EU member states constitutes

⁴ For a discussion on the nature of comparative law as a research branch or a method, see e.g. H. Gutteridge, ‘Comparative law: an introduction to the comparative method of legal study and research’, vol 1 (2nd edn, 1949), pp. 4–5, and more recently, J. Husa, ‘A New Introduction to Comparative Law’ (Hart Publishing 2015) p. 17.
⁵ Prominent legal scholars have emphasized that instead of a comparative law method, we should view comparative law as a bundle of comparative law methods (E. Örücü, ‘Methodology of comparative law’ in Smits, Jan (ed), Elgar Encyclopedia of Comparative Law, Second Edition (Edward Elgar Publishing 2006) pp. 445–446. The comparative law method deployed in this study is only one of many possible methods to label under ‘comparative law method’.
hallmark of EU law. Integrating financial markets in the EU began in the 1980s with attempts to harmonize the rules of member states. When this approach failed, in the 1990s EU legislators turned instead to harmonization of essential standards to pave the way for mutual recognition of home country rules in the area of securities and banking transactions to achieve the goal of the free flow of capital. Mutual recognition entails that a financial institution authorized in one EU member state can conduct business in any other EU state without additional authorization. A natural consequence of mutual recognition is the principle of home country control under which countries hosting a branch of another member state’s financial institution need to accept the institution’s home country rules and supervisory practices as controlling the bank branch operations and cross-border provisions of services. More recently, in 2015 the European Commission sought to increase investment in EU member states by creating a truly EU-wide single capital market through an initiative called the capital markets union (CMU).

Some commentators have suggested that since London, Europe’s financial center, no longer belongs to the EU securities market due to Brexit, the viability of the CMU can be seriously questioned. On a more positive note, Rosas and Armati have suggested that Brexit is unlikely to hinder the integration of the EU. On the contrary, they argue that amending EU primary and secondary law might be easier in a post-Brexit Union given the opposition of the UK to commit to deeper European integration.

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8 Treaty on the Functioning of the European Union (consolidated version) [2012] OJ C 326/47 [hereinafter TFEU], Articles 34, 45, 49, 57; A. Rosas and L. Armati, ‘EU constitutional law: an introduction’ (3rd edn, Hart 2018) p. 139 note that the interpretation and application of these economic freedoms has expanded since their inception when they merely enabled cross-border movements.
10 Commission of the European Communities, ‘Completing the Internal Market’ COM [1985] 310 final, at 6. The mutual recognition principle was first introduced in the Cassis de Dijon ruling, see Case C-120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, EU:C:1979:42, p. 665, point 16.
16 Ibid.
EU securities law has evolved significantly throughout the years since its inception in the 1960s.\textsuperscript{17} Currently it comprises a host of directives and regulations. Regulations have become the preferred legislative instrument of the Commission in recent years as opposed to directives in order to forego issues with national implementation and to increase the uniformity of the securities markets in the EU.\textsuperscript{18} I will focus here on some of the most central aspects of the EU securities regulatory framework, namely what constitutes a security under the EU securities regulation, the prospectus regime, and regulation on market abuse and insider dealing.

2.1 Defining Securities under EU Securities Law

EU financial legislation assigns substantial value to determining whether an instrument qualifies as a security, referred to as ‘transferable security’ in EU securities legislation.\textsuperscript{19} The main definition of securities under EU securities law can be found in Article 4(1)(44) of MiFID II, under which shares, bonds or options or similar financial instruments are ‘transferable securities’.\textsuperscript{20} To qualify as a security within the meaning of uniform definition under EU securities regulation, the instrument has to meet three formal statutory requirements of transferability, standardization, and negotiability.\textsuperscript{21} Securities are considered transferable when they do not contain obstacles that make their transfer impossible.\textsuperscript{22} Securities are negotiable on the capital market which implies that they are standardized instruments.\textsuperscript{23} Negotiability is not a legal requirement in the same manner as transferability but instead, it indicates the ease of exchange as a matter of fact.\textsuperscript{24} Although the statutory definition of a security under EU

\textsuperscript{17} For a more nuanced historical development, see N. Moloney, EU securities and financial markets regulation (3rd edn, Oxford University Press 2014) p. 706.
\textsuperscript{19} The Prospectus Regulation (Art. 1(1), 2(a)) but also other central legislation such as Council Regulation (EU) No 596/2014 on Market Abuse [2014] OJ L 173/1 [hereinafter MAR] and MiFID regime regulate securities.
\textsuperscript{23} G. Ferrarini and P. Giudici (2020) p. 132.
\textsuperscript{24} P. Hacker and C. Thomale (2018) p. 645.
securities law is seemingly unambiguous, new financial innovations such as initial coin offerings (ICOs), online-mediated offerings where tokens registered on a blockchain are offered in exchange for cryptocoins, have caused many legal scholars to question the limits of a security under current EU securities law.25 As of this writing, the CJEU has not given any decision regarding the definition of a security although such clarification might be warranted given the recent technological advancements in financial markets.26

2.2 Inside Information in the EU

Inside information under Article 7(1)(a) of MAR is regarded such information that is (1) precise, (2) non-public, (3), relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and (4) if it were made public, would be likely to have a significant effect on the prices of the financial instruments or on the price of related derivative financial instruments. These four cumulative conditions for information to qualify as inside information have caused challenges in their interpretation. Judicial interpretation of the CJEU has played an important role in shaping what constitutes inside information under EU law.27

The first element of inside information under MAR is the nature of information as 'precise'.28 The purpose of this criterion is to ensure that speculation, opinion, and rumors fall out of the scope of inside information.29 Precision of information is evaluated considering two factors. First, information is deemed to be precise under MAR Article 7(2) if the information indicates a set of circumstances which exist (or may reasonably be expected to come into existence) or an event that has occurred or may reasonably be expected to occur. Expression ‘events that may reasonably be expected to come into existence’ covers future events that based on an overall evaluation have a realistic prospect of coming into existence or an event to occur.30 Only information that

27 For instance in Case C-19/11, Markus Geltl v Daimler AG, EU:C:2012:397, paragraph 22, the ECJ ruled that intermediate states of a multi-stage process can be deemed to be precise information if such a stage could be used for basis of an investment decision. This expansion on the definition of inside information has since been codified in paragraphs 2 and 3 of Article 7 of MAR.
28 Article 7(1)(a), MAR.
relates to circumstances or events whose realization is unrealistic, unlikely or information concerning them otherwise vague falls out of the scope of the first factor of the precision requirement. Secondly, the precision of information is weighed against specificity: information is sufficiently specific if it would allow a reasonable investor to make an investment decision without or with low level of risk and if it would constitute knowledge that would most likely be exploited in the market immediately. Interestingly, the direction of the effect on prices does not need to be known for the information to meet the first requirement of precision. This interpretation has been criticized among others by Klöhn and Veil who view that without knowing whether the price effect will be negative or positive, investors cannot take advantage of the information in their investment decisions. On the other hand, Hansen has suggested that even without knowing the direction of the price effect, investors could still hedge against investment risk.

The second element of inside information is its non-public nature. MAR does not detail to what extent dissemination of information transforms information to public. Relying on market egalitarianism, where investors trade on an equal basis, would suggest that the price-formation process should reflect efficiently the available information; therefore for instance disclosing information to an influential group of institutional investors with the power to move the market price could suffice to make the information non-public. Decisive is then the extent to which the information has been de facto disseminated to the public regardless of the channel, even incorrect disclosures or media coverage can cause the information to become non-public. In addition to not explicating the exact process whereby information becomes public, MAR also does not specify a time period after which information no longer qualifies as inside information. Again, if we analyze this from the perspective of equality of access,
insiders should wait until all investors have had an opportunity within reason to access and react to the new information.39

Third, for information to be classified as inside information under Article 7(1)(a) of MAR, information should relate either directly or even indirectly to issuers or financial instruments. Fourth, Article 7(4) of MAR classifies information that might impact the price, material information, as inside information.40 Materiality requirement can be assessed by employing a probability/magnitude test: a piece of new information can be considered material if it would alter the existing mix of available material information and a reasonable investor would be likely to use it as a part of making an investment decision.41 Evaluation on whether the information fulfills the materiality requirement and would be taken into account by a reasonable investor needs to be conducted based on the relevant information available at the time of the alleged abuse of information took place, *ex ante*.42

Article 8(4) of MAR prohibits concern five categories of primary insiders in possession of inside information such as members of administrative or management bodies of the issuer. The list is, however, non-exhaustive as Article 8(4) of MAR extends the prohibition of inside information obtained by ‘any legal or natural person’ in circumstances other than mentioned in MAR and they ‘know or ought to know that it is inside information’. This extension to the so called secondary insiders is somewhat more limited than to primary insiders since secondary insiders must have acted intentionally or negligently.43 For primary insiders it suffices that they have been in possession of insider information and based their investment decision on that information.44

The prohibitions laid down in Article 14(a) of MAR relate to three types of behaviors: dealing, recommending/inducing, and disclosing.45 First, a primary insider must not engage or attempt to engage in ‘insider dealing’, that is, using the inside information by acquiring or disposing of financial instruments to which the information relates on his own account or for the account of a third

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40 Ibid.
41 S. Sedbom (2017) p. 853; See also Opinion of Advocate General Mengozzi Case C-19/11, Gelt, paragraph 101 and footnote 32. In this opinion Mengozzi refers interestingly to the U.S. Supreme Court case *Basic Inc. v. Levinson*, 485 S.Ct. 224 (1988), in which the conduct of a reasonable investor was evaluated using probability/magnitude test. The legal construct of reasonable investor as opposed to a macro market impact modeling the U.S. approach has since been codified into the EU insider dealing regulation (N. Moloney, 2014, p. 722). References to a reasonable investor are found in recital 14 and Article 7(4) of MAR.
44 Ibid.
45 Article 8, 10, 14, MAR.
party, either directly or indirectly. Secondly, it is also prohibited to recommend to another person that they engage in insider dealing or induce another person to engage in insider dealing under Article 14(b). If a person engages in inside dealing based on a recommendation or inducement and the person knew or ought to have known, acting intentionally or negligently, their conduct is prohibited as inside dealing under Article 8(3) of MAR. Lastly, improper disclosure is also forbidden; persons must not unlawfully disclose inside information to any other person unless the disclosure is a normal part of their employment, profession or duties.

3. SECURITIES LAW IN THE U.S.

The U.S. securities market is the largest in the world, largely due to the magnitude of the U.S. economy. Since regulation of securities markets in the U.S. falls primarily in the authority of federal law, I will exclude state securities (‘blue sky’) laws from the analysis. The primary focus of the U.S. securities regulation has been on the protection of the so-called ‘retail investors’, that is individuals and households buying stock and bonds to accumulate personal savings. However, the share of institutional investors such as investment, pension funds and insurance companies has been on the rise in the U.S. since the 1950s, although retail investor protection continues to hold importance in policy and politics. I will focus my analysis of the U.S. securities regulation on the two most prominent federal statutes governing securities transactions, enacted in the aftermath of the 1929 Stock Market Crash.

The Securities Act of 1933 (‘The 1933 Act’) regulates how companies issues corporate securities in the primary markets, markets for issuing new securities and the Securities Exchange Act of 1934 (‘The 1934 Act’) regulates the purchase and sale of securities in the secondary markets, markets for trading existing securities. The 1934 Act also established the federal agency Securities and Exchange Commission (the SEC) with broad authority over all aspects of the U.S. securities industry, _inter alia_, the power to enforce securities laws and

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46 Article 8(1), MAR.
47 Article 10(1), MAR.
to implement additional regulations. The primary legislative purposes of these acts can be summarized as the prevention of abuses in an unregulated securities market through requirements to disclose adequate information to investors and prohibition of fraudulent securities transactions.

3.1 Defining Securities under U.S. Securities Law

Determining whether a financial contract qualifies as a security under U.S. law is vital, as U.S. securities regulation does not apply to financial contracts not deemed as securities. Which financial contracts qualify as securities and are thus subject to securities regulation under the U.S. federal law has been a debated issue since the enactment of the 1933 and 1934 Act. The ambiguity around what constitutes a security stems from the broad statutory definition found both in the provision of the 1933 Act and the 1934 Act, what Cox, Hillman, and Langevoort have described as ‘a lawyer’s dream’. In the classic case Landreth Timber Co. v. Landreth on interpreting the breadth of the statutory definition of a security, the U.S. Supreme Court stated that courts should presume any financial instruments designated as a note, stock, bond, or other instrument named in the 1933 Act and 1934 Act to be a security.57 If the financial instrument in question is not specifically mentioned in the non-exhaustive list found in the acts, such as shares and bonds, the courts apply a four-part Howey test. In the 1946 case SEC v. W.J. Howey Co. the U.S. Supreme Court defined a security as: (1) an investment of money (2) in a common enterprise with the (3) reasonable expectation of profit gained (4) primarily or substantially from others’ efforts. It is thus its economic function that determines whether a transaction falls within the definition of a security. The Howey test also reflects a flexible
3.2 Insider Information under U.S. Law

The regulation of insider trading has been described as a ‘brand’ symbol for U.S. style securities regulation with the aim of promoting fair play in the stock markets. Under U.S. law, and more specifically under Section 10(b) of the 1934 Act and Rule 10b-5, insiders can be corporate officers, directors, employees, lawyers, consultants, accountants, majority shareholders, or any other individuals who receive private information regarding the trading of securities. The 1934 Act bans three types of insider trading: section 16 focuses prohibits on short-swing trading, section 10(b) bans classic insider trading, and misappropriation is a violation of § 10(b) of the 1934 Act.

Section 16 of the 1934 Act concerns statutory insiders; officers, directors, and controlling stakeholders with an ownership stake of the company exceeding 10%. Statutory insiders are required under section 16(a) to fulfill two separate requirements: first, they must report their ownership and trading of the company’s securities to the SEC. Secondly, they have to return all profits made from the sale of company stock within any six-month period to the company; short-swing profits, hence the name short-swing trading. Since section 16(b) imposes strict liability on statutory insiders earning profits from short-swing sales, even in the absence of market abuse or use of inside information the insiders have to turn over the profits to the company.

Section 10(b) includes a prohibition of classic insider trading. A corporate insider has engaged in insider trading if that person has material, nonpublic information and he or she breaches a fiduciary duty to their company by trading on the information regardless of whether they earn a profit or not. According to the SEC, insiders are subjected to ‘abstain or disclose’ rule in that an individual with material inside information should either refrain from using the information or disclose the information to the other parties involved in the transaction. Under the test laid down in \textit{Chiarella v. Unites States}, insiders not only include officers and directors of the company but also anybody entrusted with corporate information for a corporate purpose and the corporation has a


17 CFR § 240.10b-5.


proper purpose for keeping the information confidential. The U.S. Supreme Court held that the ‘abstain or disclose’ rule applies only to those who owe a fiduciary duty to the company, arguably not to make the prohibition too far reaching. Fiduciary duty can also be broken when an insider does not trade on insider information him or herself but instead passes on the information to somebody else, a tippee, who then in turn engages in insider trading. Insiders are liable as tippers if they reveal material, nonpublic information about their company violating their fiduciary duty (1) knowing that the information is confidential and (2) they benefit or expect to benefit directly or indirectly. Tippees can be held liable even if they have no fiduciary relation to the company if they (1) trade on the information, (2) they know it to be confidential, (3) they know it came from an insider violating their fiduciary duty, and the (4) insider benefited or expected to benefit.

In addition to prohibitions of short-swing trading and classic insider trading by corporate insiders, the U.S. securities regulation has expanded its scope to curb insider trading in accordance with the misappropriation theory. In United States v. O’Hagan the Supreme Court officially endorsed the misappropriation theory clarifying as its aim the promotion of investor confidence through honest securities markets and its applicability to rule 10b-5. Rule 10b-5 is a catch-all provision and the most central anti-fraud securities rule as it applies to ‘any person’ who ‘defrauds’ another person in the ‘purchase or sale of any security’. The misappropriation theory holds that it is illegal for individuals who have material nonpublic information but owe no fiduciary duty to the company’s shareholders to reveal or make use of insider information as this would constitute a breach of duty to the source of information. All in all, the U.S. securities black law and common law precedents prohibit a wide range of uses of insider information to achieve fairness in the securities markets.

66 Chiarella v. United States, 445 S.Ct. 222 (1980). See also Dirks v. SEC, 463 S.Ct. 646 (1983) where the Supreme Court held that even corporate outsiders such as underwriters, accountants, lawyers or consultants may have confidential nonpublic information that they must refrain from disclosing as a fiduciary duty to the shareholders.


69 Ibid.


73 Ibid. 916.
4. COMPARING SECURITIES LAW IN THE EU AND THE U.S.

Describing ‘black letter law’ and case law from the EU and the U.S. in securities law has laid the necessary groundwork for mapping the legal landscape concerning securities regulation in both jurisdictions. To further the analysis of this study next I will explore possible reasons explaining differences in securities law between the EU and the U.S. 

European securities markets have remained underdeveloped compared to those of the U.S. for a host of factors. Reasons include obstacles for cross-border transactions such as capital markets remaining a national issue regulated by national corporate law, tax codes, and conflict-of-laws principles. Moreover, EU pension funds have holdings amounting to only half of those of their U.S. counterparts that are key investors in the U.S. capital markets. Also the tendency among household investors to favor investing in one’s home country due to legal and linguistic barriers, the home country bias, has kept the EU securities markets less developed compared to the U.S. Measures identified in the CMU have the purpose of making the securities markets in EU more developed akin to the U.S. Additionally, in contrast to significant direct holdings by individuals in the U.S., European markets have been long dominated by institutions. This entails that the U.S. securities regulation has laid heavy focus on protecting retail investors whereas in Europe economic growth has been fueled largely by a tradition of bank financing. The European Commission has taken steps to create a stronger securities market in the EU by easing the process of

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78 The CMU identified nine regulatory priorities such as reducing regulatory barriers for going public and developing pan-European pension funds to achieve its goal of the EU wide capital market. See European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of The Regions on the Mid-Term Review of the Capital Markets Union Action Plan, SWD [2017] 224 final (8.6.2017).
80 Ibid. 298.
raising funds in the EU securities markets and by creating a CMU.\textsuperscript{81} Interestingly, the U.S. securities market is often viewed as a benchmark for the desired future development of the EU securities market, indicating Europeans’ yearn to approximate the EU securities market closer to the U.S. securities market.\textsuperscript{82}

Both in the EU and the U.S., it is essential to determine whether a financial vehicle qualifies as a security to know whether securities laws apply. Despite differences in historical developments leading to the formation of the legal concept security, semantically the definition of a security within the EU and the U.S. is fairly similar.\textsuperscript{83} However, the criteria whereby the nature of the financial instrument is evaluated differs significantly between these jurisdictions: in the U.S. the primary tool is the four-part \textit{Howey} test that emphasizes the outcome of a transaction rather than its legal form.\textsuperscript{84} In the EU the statutory requirements focus on the transfer of units in the secondary market rather than on the underlying investment characteristics. Since the statutory requirements in the EU are set out in detail, they minimize the possibility of discretion, which is in stark contrast to the more flexible, ‘substance over form’ approach chosen by the U.S. Supreme Court.\textsuperscript{85} Maume and Fromberger have sought to explain this difference by EU lawmakers’ aim to achieve a uniform interpretation of securities laws within all the member states by employing detailed criteria on a security.\textsuperscript{86} They further argue that whereas the black-letter approach of the EU can offer high level of legal certainty to the markets, applying a ‘substance over form’ approach of the U.S. in the EU context would result in regulatory divergences between the courts of different member states and thus impede harmonization.\textsuperscript{87}

By adopting a historical comparative perspective on the purpose and development of regulatory approaches to insider trading on both sides of the Atlantic, an understanding of possible reasons underlying the different legal approaches can be gained. Although the morally questionable nature of using confidential information for personal gain dates back to classical era, sanctioning its use through financial regulation is a more recent phenomenon in the U.S. and even more contemporary in the EU.\textsuperscript{88} However, the emphasis on what is to be protected varies: the ECJ has outlined the protection of the integrity of the financial markets, market egalitarianism, as the purpose of ban on insider

\textsuperscript{82} Examples of this tendency of benchmarking the U.S, see for instance Commission of the European Communities, ‘Completing the Internal Market’ COM [1985] 310 final, 46.
\textsuperscript{83} G. Castellano (2012) p. 480.
\textsuperscript{84} P. Maume and M. Fromberger (2019) p. 572.
\textsuperscript{85} Ibid. 566.
\textsuperscript{86} Ibid. 573.
\textsuperscript{87} Ibid. 573.
\textsuperscript{88} S. Mock, ‘The Concept of Insider Dealing’ in Market Abuse Regulation (2017) p. 16.
dealing whereas in the U.S. the focus lies on protecting certain corporate relationships of fiduciary kind.99 Interestingly, the rationale of the U.S. insider ban protects companies’ interests’ which is focus of micro economics whereas the European model is concerned with the integrity of the market, typically the focus of macroeconomics. Explanations drawing on cultural differences can be put forth as the U.S. is known to be the most individualistic country in the world judged by Hofstede’s cultural dimension of individualism versus collectivism.90 The American dream for personal freedom, success, and redemption characteristic of the early settlers of the U.S. soil continue to shape U.S. culture to this day whereas European values on average fall somewhere in between the extreme American individualism and Asian collectivism.91 Moreover, European countries tend to favor egalitarianism marked by commitment to others and equality.92 Since the two areas to be compared, Europe and U.S., are not both “apples” in the meaning that Europe is a continent and the U.S. is a country, we need to settle to deal with what is deemed to be “European” cultural values “on average” bearing in mind that even within an individual European country and or U.S. state sometimes even stark differences in culture are to be noted.

The EU has lagged behind the U.S. in sanctioning insider dealing, since the first EU-level regulatory measure prohibiting insider dealing was adopted as late as at the end of the 1980s.93 In contrast, the U.S. Supreme Court had already legitimatized ban on insider trading over a century earlier in 1817, justifying the title of the U.S. as first mover in sanctioning insider dealing.94 The U.S. doctrine of prohibitions of insider trading has since this decision been developed through statutory provisions, case law, and SEC regulations.95 The more stagnant progress of the EU insider dealing regime makes sense given the

90 See G. Hofstede, ‘Culture’s consequences: International differences in work-related values’ Newbury Park, CA: Sage (1984) p. 148. It is beyond the scope of this article to address the criticism that Hofstede’s work has received among others for its focus on sampling only within one organization and problems with methodology. I draw on Hofstede’s cultural dimensions even with their shortcomings since they have achieved the status of a paradigm within cross cultural studies.
94 See Laidlaw v. Organ, 15 S.Ct. 178 (1817).
slower development of market finance in the EU compared to the U.S. The decision-making mechanisms of the union have also played a role: EU member states, especially Germany, were reluctant to adopt a statutory prohibition on insider dealing since it was deemed to form a natural part of conducting business. This shift in “business as usual” both from a practical and ethical standpoint bears resemblance to charging interest on loans: what is now an inherent part of modern finance – perhaps notwithstanding Islamic banking with creative solutions to circumvent charging interest – was banned as usury by both theologians and jurists in the Middle Ages. Thus, by “zooming out” from our current standpoint chronologically and geographically, we can perceive that the current status quo regarding a regulated legal phenomenon in a certain geographical area is indeed only one of many options with the potential to form a legitimate part of financial law. Additionally, if we perceive geography as the horizontal dimension and time as the vertical dimension (painfully aware of how Western visualizing time as linear as opposed to e.g. cyclical), we could add a third dimension to mark what could have potentially been and what is ban on insider trading across legal cultures and time.

At the substantive level, the U.S. Supreme Court has based the prohibition of insider trading on the violation of fiduciary duties not to broaden the scope of insider trading in excess and to cause chilling effects on financial markets. The downside of the American approach is that defining boundaries for the existence of fiduciary relations leaves leeway for interpretation. In the EU, in contrast, the approach to prohibit insider dealing has been a straightforward rule embracing the parity-of-information approach: any person in possession of private, price-sensitive information, which qualifies as inside information, is banned from trading. Since the parity of information approach adopted by the EU is broader in its scope, some conduct violating European rules would be allowed under the U.S. doctrine on insider ban. The focus of the two approaches then varies: in the EU it is the price-sensitive information that is at

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the center of the prohibition regardless of who, even a bystander, is in the know whereas in the U.S. the focus is on the actor with fiduciary relation with the source of the information. This rather simplified distinction between the European and American approach does not still do justice even to the macroscopic differences: the misappropriation theory in the U.S. expands the prohibition to whoever, as long as they misuse information belonging to their principal.103 Had the U.S. pursued the parity of information approach set forth in its early legislation but later shifting to fiduciary-duty-based theory by the seminal case Chiarella, the legal approaches to insider trading in the U.S. and the EU might have converged significantly more than currently. Again, this reflects the decisive role of the U.S. Supreme Court in determining the scope of legislation, a hallmark of the American common law system.

To summarize, where the federal statutes governing the primary and secondary securities markets in the U.S. have been applied in the context of a unified, single nation with a vibrant securities market and historically a wide retail investor base, the EU has long sought to integrate the national securities markets of its member states into a single financial market through differing harmonizing approaches entailing a host of directives and more recently, a heavier focus on regulations to enable more uniform application of EU securities law. Prohibition on trading on inside information in the EU is more recent but more extensive whereas the U.S. approach is older and more limited in scope.104 I have sought to explain detected differences in ban on insider trading by tracing the differing historical and cultural developments regarding insider trading.

5. CONCLUDING REMARKS

Winston Churchill stated in a speech delivered in post-war Europe that the only way to achieve peace, safety, and freedom in Europe was through creating ‘a kind of United States of Europe’.105 More recently, Mario Draghi, the former president of the ECB, depicted EU financial supervision in the light of one of the aims of the U.S. Constitution, establishing ‘a more perfect Union’.106 Both Churchill’s and Draghi’s messages reflect the potential parallels between the EU and the U.S., while simultaneously the fact that Churchill’s vision remains

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unfulfilled, points to the vast differences in historical, linguistic, cultural, political, and economic context in the EU compared to the U.S.

In this study, I have analyzed securities law in the EU and the U.S. in comparative context. I find that differences in prohibitions of insider trading have been mostly developed through U.S. Supreme common law whereas in the EU prohibitions of insider dealing are set out by statutory requirements. The differences in financial markets law stem from differences in investors, differing levels of integration of capital markets, and regulatory authority. The U.S. has been ahead of the EU in terms of a more vibrant securities market overseen by a centralized securities regulator, the SEC, as well as having a long-standing doctrine on prohibitions of insider trading. In turn, the securities markets have remained less developed in the EU due to a host of impediments to cross-border transactions, long traditions of bank financing and the reluctance of member states to adopt statutory prohibitions of insider dealing. In the light of these findings, a comparison of securities law in the EU and the U.S. proved to be neither a hopeless endeavor of comparison of apples and oranges nor is the securities law so identical on both sides of the Atlantic as to warrant the label 'potayto, potahto'. Perhaps the most fruitful approach is found somewhere between these two extremes.