Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 21 March 2012[1]

Case C-19/11

Markus Geltl
v
Daimler AG

(Reference for a preliminary ruling from the Bundesgerichtshof (Germany))

(Freedom to provide services — Financial services — Insider dealing and inside information — Resignation of the chief executive officer of a public limited company — Account taken, for the purposes of assessing whether such information is of a precise nature, of various consultations and other activities which preceded occurrence of the event — Directive 2003/6/EC (Market Abuse Directive) — Directive 2003/124/EC implementing Directive 2003/6/EC)

I – Introduction

1. In the present proceedings, the Bundesgerichtshof of the Federal Republic of Germany has made a reference to the Court of Justice for a preliminary ruling on the interpretation of Directive 2003/6/EC[2] of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (Market Abuse Directive) and of Commission Directive 2003/124/EC[3] of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation.

II – Legal context

A – *Community law*

2. Point 1 of Article 1 of Directive 2003/6 provides:

‘For the purposes of this Directive:

1. “Inside information” shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments 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.

…’

1 — Original language: Italian.
2 — OJ 2003 L 96, p. 16.
3 — OJ 2003 L 339, p. 70.

3. Article 6 of Directive 2003/6 provides:

‘1. Member States shall ensure that issuers of financial instruments inform the public as soon as possible of inside information which directly concerns the said issuers.

Without prejudice to any measures taken to comply with the provisions of the first subparagraph, Member States shall ensure that issuers, for an appropriate period, post on their Internet sites all inside information that they are required to disclose publicly.

2. An issuer may under his own responsibility delay the public disclosure of inside information, as referred to in paragraph 1, such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead the public and provided that the issuer is able to ensure the confidentiality of that information. Member States may require that an issuer shall without delay inform the competent authority of the decision to delay the public disclosure of inside information.

…’

4. Article 1 of Directive 2003/124 provides:

‘1. For the purposes of applying point 1 of Article 1 of Directive 2003/6/EC, 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.

2. For the purposes of applying point 1 of Article 1 of Directive 2003/6/EC, “information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments” shall mean information a reasonable investor would be likely to use as part of the basis of his investment decisions’.

5. Article 2(3) of Directive 2003/124 provides:

‘Any significant changes concerning already publicly disclosed inside information shall be publicly disclosed promptly after these changes occur, through the same channel as the one used for public disclosure of the original information.’

6. Under Article 3 of Directive 2003/124:

‘1. For the purposes of applying Article 6(2) of Directive 2003/6/EC, legitimate interests may, in particular, relate to the following non-exhaustive circumstances:

(a) negotiations in course, or related elements, where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure. In particular, in the event that the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, public disclosure of information may be delayed for a limited period where such a public disclosure would seriously jeopardise the interest of existing and potential shareholders by undermining the conclusion of specific negotiations designed to ensure the long-term financial recovery of the issuer;

(b) decisions taken or contracts made by the management body of an issuer which need the approval of another body of the issuer in order to become effective, where the organisation of such an issuer requires the separation between these bodies, provided that a public disclosure of the

information before such approval together with the simultaneous announcement that this approval is still pending would jeopardise the correct assessment of the information by the public.

…'

B – *National law*

7. In implementing point 1 of Article 1 of Directive 2003/6 and Article 1(1) of Directive 2003/124, Paragraph 13(1) of the Wertpapierhandelsgesetz ('the WpHG'; the German Law on Securities Trading) establishes that inside information is 'precise information concerning circumstances not made public which relate to one or more issuers of *Insiderpapiere*[4] or directly to such *Insiderpapiere* themselves which, if it were publicly known, is capable (*geeignet*) of having a significant effect on trading in or on the market price of such *Insiderpapiere*. Information is capable of having such an effect where a reasonable investor would take it into account when making his investment decisions. Circumstances which may reasonably be expected to arise in the future are also relevant circumstances for the purposes of the rules in question …'

8. Paragraph 15(1) of the WpHG provides that 'all German issuers of financial instruments shall immediately disclose inside information which concerns them directly …'.

III – The facts and the questions referred

9. Following Daimler AG's Annual Meeting on 6 April 2005, Mr Schrempp, Chairman of the Board of Management, began considering the possibility of resigning his appointment before 2008, the date fixed for its normal termination. He first conveyed those thoughts to his wife, who was the manager in charge of his office.

10. On 17 May 2005, Mr Schrempp informed the Chairman of Daimler AG's Supervisory Board of his intentions.

11. On 1 June 2005, Mr Schrempp's plan was made known to two other members of the Supervisory Board and, on 15 June 2005 at the latest, to Mr Zetsche, who was to succeed Mr Schrempp as Chairman.

12. On 6 July 2005, the head of the secretariat was also informed.

13. On 10 July 2005, the head of communications, together with Mrs Schrempp and the head of the secretariat, began preparing a press release, a public statement and a letter to the company's employees.

14. On 18 July 2005, Mr Schrempp and the Chairman of the Supervisory Board agreed to propose Mr Schrempp's early retirement from duties and the appointment of Mr Zetsche as his successor at the meeting of the Supervisory Board, which had already been scheduled for 28 July 2005 without any mention of this having been made in the notice convening the meeting.

15. Furthermore, a meeting of the Presidential Committee of the Supervisory Board had already been scheduled for 5.00 p.m. on 27 July 2005, without any reference to Mr Schrempp's retirement from duties having been made in the notice convening that meeting.

4 — 'Insiderpapiere': securities which holders of inside information have no right to sell or to purchase.

16. On 25 July 2005, Mr Schrempp considered the issue with a member of the Supervisory Board who was also Chairman of the General Works Council and the Group Works Council.

17. On 27 July 2005, that member of the Supervisory Board, having spoken about the issue with the other staff representatives and with Mr Zetsche, informed Mr Schrempp that the staff representatives would vote in favour of the replacement of the Chairman of the Board of Management.

18. Again on 27 July 2005, the two other members of the Presidential Committee were informed of what was happening before their meeting commenced.

19. The Presidential Committee decided on 27 July 2005 to propose to the Supervisory Board meeting of the following day the approval of Mr Schrempp's early retirement at the end of 2005 and his replacement by Mr Zetsche.

20. On 27 July 2005, at 6.30 p.m., Mr Schrempp informed one of the three members of the Board of Management of the proposed change; at 7.00 p.m. he informed the other two members.

21. On 27 July 2005, at 7.30 p.m., a dinner was held for the shareholders' representatives on the Supervisory Board, during which the Presidential Committee's proposal was discussed.

22. On 28 July 2005, at approximately 9.50 a.m., the Supervisory Board resolved that Mr Schrempp would step down at the end of the year and that Mr Zetsche would replace him.

23. On 28 July 2005, at 10.02 a.m., Daimler AG sent an ad hoc communiqué about what had taken place to the stock market authorities and the Federal Office for the Supervision of Financial Services (Bundesanstalt für Finanzdienstleistungsaufsicht).

24. The communiqué was then published, at 10.32 a.m., in the database of the German ad hoc disclosure company (Deutsche Gesellschaft für Ad-hoc-Publizität).

25. The price of Daimler AG shares, which stood at EUR 36.50 at market opening on 28 July 2005, then rose, first to EUR 40.40 and subsequently to EUR 42.95.

26. Numerous investors who had sold shares prior to the resurgence sparked by the announcement of Mr Schrempp's retirement at the end of 2005 initiated proceedings for damages, insisting that the announcement had been made late.

27. In its judgment of 15 February 2007 in a test case, the Oberlandesgericht Stuttgart (Higher Regional Court, Stuttgart) held that, in the circumstances, inside information had not come into existence until the Supervisory Board took its decision, at approximately 9.50 a.m. on 28 July 2005, and that this information had promptly been made public.

28. By order of 25 February 2008, the Bundesgerichtshof quashed that judgment and referred the case back to the Oberlandesgericht Stuttgart.

29. By judgment of 22 April 2009, the Oberlandesgericht once again dismissed the claim for damages, holding that, in the period between 17 May 2005 and the resolution adopted by the Supervisory Board on 28 July 2005, there had been no inside information to the effect that Mr Schrempp had stated to the Chairman of the Supervisory Board that it was his intention unilaterally to abandon his duties.

30. In particular, in so far as is relevant here, the Oberlandesgericht Stuttgart did not, in reaching its decision, regard as inside information the various intermediate steps which had eventually led to the agreement to Mr Schrempp's resignation and his replacement by Mr Zetsche, since Mr Schrempp's actual retirement in reflection of his expressed intention, whilst capable of influencing share prices, could not be regarded as sufficiently probable in the eyes of a reasonable investor.

31. On being called upon to hear an appeal challenging the latter judgment of the Oberlandesgericht, the Bundesgerichtshof took the view that there was a problem concerning the interpretation of Directives 2003/6 and 2003/124, and referred the following two questions to the Court of Justice for a preliminary ruling:

(1) 'For the purposes of applying point 1 of Article 1 of Directive 2003/6 and Article 1(1) of Directive 2003/124, is account to be taken, in the case of a protracted process intended, over the course of a number of intermediate steps, to bring about a particular set of circumstances or to give rise to a particular event, only of whether that future set of circumstance or future event is to be regarded as precise information within the meaning of those provisions, with the consequence that it is necessary to consider whether that future set of circumstances or future event may reasonably be expected to occur, or, in the case of a protracted process of that kind, can intermediate steps which have already been taken and which are connected with bringing about the future set of circumstances or future event also constitute precise information for the purposes of the above provisions of the directives?

(2) Does reasonable expectation for the purposes of Article 1(1) of Directive 2003/124 require that the probability be assessed as preponderant or significant, or does the reference to sets of circumstances which may reasonably be expected to come into existence or events which may reasonably be expected to occur imply that the degree of probability required depends on the extent of the consequences for the issuer and that, where the likelihood of their affecting share prices is significant, it is sufficient that the occurrence of the future circumstance or event be uncertain but not improbable?'

IV – Procedure before the Court of Justice

32. Written observations have been lodged by the applicant in the main proceedings, by Daimler AG, by a third-party intervener and by the Portuguese, Czech, Estonian, Belgian, United Kingdom and Italian Governments and the European Commission.

33. The hearing on 2 February 2012 was attended by the applicant in the main proceedings, by Daimler AG, by the third-party intervener and by the Portuguese, Estonian and United Kingdom Governments and the Commission.

V – Question 1

34. By Question 1, the Bundesgerichtshof asks the Court, in substance, to clarify whether the types of information which issuers of financial products must disclose to the public, because they fall within the definition of inside information under point 1 of Article 1 of Directive 2003/6 and Article 1(1) of Directive 2003/124, include information relating to the specific events leading to the conclusion of a protracted process, and which therefore causally precede the occurrence of a future set of circumstances or future event as referred to in those directives, where such information is capable of significantly affecting the prices of those financial instruments or the prices of derivative financial instruments.

35. It can be inferred from the rules in question that, provided that the other conditions laid down in Directives 2003/6 and 2003/124 are also satisfied, even information relating to the intermediate phases of a process which brings into being future sets of circumstances and events capable of significantly affecting the prices of financial instruments or the prices of derivative financial instruments covered by those directives may be regarded as inside information, not only the future sets of circumstances and events themselves which, hypothetically, will come about.

36. First of all, consistently with recital 16 in the preamble to Directive 2003/6, the definition of insider information under point 1 of Article 1 of that directive emphasises, first and foremost, the fact that, in order for information to be regarded as inside information, it must be possible for it to be considered precise [5] and that, in addition to its not having been made public, it must be capable, if disclosed, of significantly affecting the prices of financial instruments or the prices of related derivative financial instruments.

37. It follows that the fact to be disclosed need not be the concluding fact: at any rate, the importance of sets of circumstances which come about in the course of a process involving several temporal phases cannot be ruled out *a priori*. What is required is simply that the public be informed of any fact which — clearly even in the case of a protracted process — is precise in nature and capable, if disclosed, of significantly affecting the prices of financial instruments or the prices of related derivative financial instruments.

38. As regards the question whether or not a fact must be disclosed, significance must be attributed, not to its chronological location in a process giving rise to an event, but to its precision and, in addition to its not having been made public, its ability significantly to affect market prices.

39. Indeed, it must be borne in mind that the value of financial instruments issued by an operator is not necessarily affected by a single factor but may be dependent upon a series of events, often staggered over time.

40. For its part, in addressing what information must be deemed to be of a precise nature, Article 1(1) of Directive 2003/124 refers not only to individual events which have occurred but also to 'a set of circumstances which exists or may reasonably be expected to come into existence' and to information which is 'specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances'.

41. In this fashion, Article 1(1) of Directive 2003/124 has conferred importance, for the purposes of determining whether or not a duty of disclosure arises, even on the individual phases leading to the conclusion of a protracted process, since it has placed at the same level and attributed equal weight to: (i) individual events and the sets of circumstances which might precede them and (ii) circumstances which already exist and future circumstances.

42. The same can be said of Article 2(3) of Directive 2003/124, under which any significant changes concerning inside information which has already been made public must be publicly disclosed promptly after they occur, through the same channel as the one used for public disclosure of the original information.

43. Further support for those findings is offered by Article 3 of Directive 2003/124, which — reflecting recital 5 to that directive and in implementation of Article 6(2) of Directive 2003/6 — lists as examples of legitimate interests justifying non-disclosure of inside information a series of circumstances most of which clearly relate to the individual phases of a protracted procedure, such as ongoing negotiations or the decisions taken and the contracts entered into by the management body of an issuer which need the approval of another body of the issuer in order to become effective, where the organisation of such an issuer requires the separation of those bodies.

44. The fact that Directive 2003/124 permits issuers not to inform the public of certain circumstances which constitute the intermediate steps in a process which may be concluded, but not until some point in the future (in the cases just mentioned, not until negotiations have been successfully concluded or the decisions taken and the contracts entered into by the managing body of the issuer have been approved by the other competent body) demonstrates that, where the other preconditions set out in the directive in question are satisfied, information of that kind must as a rule be disclosed.

5 — What is meant by 'precise' will be specifically considered in the context of Question 2.

45. There is thus no formal justification in the text of Directives 2003/6 and 2003/124 for any interpretation of 'inside information' which excludes from that concept, where the other preconditions set out those directives are satisfied, information relating to circumstances which constitute the intermediate steps in a process which may be concluded, but not until some point in the future.

46. Nor can a different view be formed on consideration of the aim of Directives 2003/6 and 2003/124 and the means which they contemplate for achieving that aim.

47. That aim emerges, first of all, from recitals 2 and 12 to Directive 2003/6, which explain that the aim of legislation targeting market abuse — which includes unlawful insider dealing and market manipulation — is to ensure the integrity of the Community financial markets and to enhance investor confidence in those markets, these being prerequisites for economic growth and wealth.

48. As recital 24 to Directive 2003/6 makes quite clear, prompt and fair disclosure of information to the public is the chosen means of enhancing market integrity, while selective disclosure by issuers is identified, by contrast, as a possible cause of a loss of investor confidence in the integrity of the financial markets.

49. The Court has confirmed the content of points 47 and 48 above, in particular, in *Spector Photo Group and Van Raemdonck*,[6] in which it explained that the purpose of Directive 2003/6 is to protect the integrity of the financial markets and to enhance investor confidence, pointing out that such confidence is based, in particular, on the assurance that investors will be placed on an equal footing and protected against the improper use of inside information.

50. In that connection, the Court has also made plain that the prohibition on the misuse of inside information is designed to prevent any investor who possesses confidential information from profiting from that information to the detriment of those who are unaware of it,[7] assuming fewer risks thanks to the additional information available to him.

51. Consequently, it would be inconsistent with the aim of Directive 2003/6 and incompatible with the means introduced by that directive to achieve its aim — as described in greater detail in points 47 and 48 above and in *Spector Photo Group and Van Raemdonck* — to adopt in relation to the circumstances under consideration an interpretation of 'inside information' which would enable those in possession of confidential information relating to forthcoming future circumstances and capable of affecting share values to withhold that information.

52. Indeed, to do so would be to hinder the prompt and proper disclosure to the public of information capable of affecting the financial markets and, as a consequence, neither the integrity of those markets nor investor confidence would be protected, given that as a rule it is precisely the use of information which predicts the occurrence of future events capable of affecting share prices which characterises the various misuses of inside information prohibited by the legislation under examination.

53. Since the aim of Directives 2003/6 and 2003/124 is to protect market integrity and investor confidence, investors must be allowed to take their own decisions and to accept the consequences thereof after receiving and evaluating all relevant information capable of affecting market prices.

54. Any interpretation of 'inside information' which, given the close relationship between that concept and the prohibition on insider dealing operations, would have the effect of widening the range of information which cannot be disclosed and of limiting the types of abusive conduct prohibited by Directives 2003/6 and 2003/124 must therefore be ruled out.

6 — Case C-45/08 [2009] ECR I-12073, paragraphs 37, 47, 61 and 62: a judgment which in turn adopted the findings set out in Case C-391/04 *Georgakis* [2007] ECR I-3741, paragraph 38, and Case C-384/02 *Grøngaard-Bang* [2005] ECR I-9939, paragraphs 22 and 33.

7 — *Spector Photo Group and Van Raemdonck*, paragraphs 47 and 48.

55. Moreover, the Committee of European Securities Regulators (CESR) [8] stated, in point 1.6 of its July 2007 Guidelines on the application of Directive 2003/6, [9] that 'if the information concerns a process which occurs in stages, each stage of the process as well as the overall process could be information of a precise nature' and, in point 1.7 of those guidelines, that, '[i]n addition, it is not necessary for a piece of information to be comprehensive to be considered precise'.

56. In conclusion, therefore, I suggest that the Court state in answer to Question 1 that point 1 of Article 1 of Directive 2003/6 and Article 1(1) of Directive 2003/124 should be interpreted as meaning that, in the case of a process which is intended, over the course of a number of intermediate steps, to bring about a particular set of circumstances or to give rise to a particular event ('a protracted process'), even information concerning facts — current or past — which relate to the intermediate steps and which are connected with bringing about the future set of circumstances or future event may be regarded as precise information and, accordingly, as inside information, provided that all the other preconditions laid down in those directives are also satisfied.

VI – Question 2

57. By Question 2, the Bundesgerichtshof actually addresses two queries — closely interconnected — to the Court, asking it:

(a) first of all to clarify whether the reference in Article 1(1) of Directive 2003/124 to 'reasonably … expected' requires that the probability be assessed as preponderant or significant;

(b) secondly, whether the reference to sets of circumstances which may reasonably be expected to come into existence or to events which may reasonably be expected to occur must be taken as meaning that the degree of probability required depends on the extent of the consequences for the issuer and that, where their potential for affecting share prices is significant, it is sufficient that the occurrence of the future event or set of circumstances, albeit uncertain, be not improbable.

58. The first of the two queries set out in point 57 is relevant to the resolution of the dispute before the national court in that it is designed to establish at what precise point, in the case of a protracted process such as that under consideration, it is conceivable, for the purposes of applying Article 1(1) of Directive 2003/124, that the event whose occurrence is anticipated in the information treated as inside information, may actually come about.

59. If what is required is a high degree of probability that the event will occur (the view propounded, in substance, by the Oberlandesgericht Stuttgart), the duty to disclose Mr Schrempp's plan to resign from duties could not have arisen until that plan had been approved by the Supervisory Board, which adopted a resolution to that effect on 28 July 2005, or until it had been approved by the meeting of the Presidential Committee of 27 July 2005, which proposed that the meeting of the Supervisory Board of 28 July 2005 vote in favour of Mr Schrempp's request.

60. Only after those decisions had been taken would it have been legitimate to treat the news of Mr Schrempp's replacement as precise information and, accordingly, Daimler AG would not be required to give any earlier notice about the internal procedure that was under way.

61. The position would be different if it were held that, in order for inside information to arise, it is sufficient for facts to emerge which make a future event, albeit uncertain, not improbable.

8 — Replaced on 1 January 2011 by the European Securities and Markets Authority.

9 — Second set of CESR guidance and information on the common operation of the Market Abuse Directive.

62. If that were so, according to the arguments of the referring court, inside information could — given also the significant changes in share prices which followed the announcement of Mr Schrempp's replacement — have arisen as early as 17 May 2005 when Mr Schrempp informed the Chairman of the Supervisory Board of his intention to resign at the end of the year, with the consequence that shareholders like Mr Geltl would have had to be informed on that date about what was happening and, reasonably, would have sold their shares at a higher price than they actually did or, perhaps, would have held on to them.

63. I ought, as a preliminary point, to emphasise that the doubts of the national court might be attributable to the wording of the German version of Article 1(1) of Directive 2003/124, which, with regard to the materialisation of future sets of circumstances or events, refers to the yardstick of 'sufficient probability' ('… man mit hinreichender Wahrscheinlichkeit davon ausgehen kann'), as opposed to the majority of the other language versions of that provision [10] which, essentially refer to the yardstick of reasonable expectation.

64. However, by contrast with the approach of the national court and many of the parties which have lodged observations in these proceedings, my view is that the interpretation of Article 1(1) of Directive 2003/124 must not focus exclusively on the yardstick of 'probability'.

65. Indeed, as the Estonian Government rightly emphasised at the hearing, it is settled case-law that the wording used in one language version of a provision of European Union law cannot serve as the sole basis for the interpretation of that provision; nor can that wording be made to override the other language versions in that regard, since such an approach would be incompatible with the requirement that European Union law be uniformly applied. [11]

66. In order to resolve this first query it must be borne in mind that the expression requiring interpretation in the present dispute appears in directives which regulate the way in which inside information must be dealt with and its disclosure to the public.

67. That means that the word 'reasonably' must be interpreted in the context of its relationship to all the other factors which make it possible to categorise certain information as inside information.

68. Account must first of all be taken of the fact that, in Article 1(1) of Directive 2003/124, the context in which the expression in question appears is one in which it is established that information is precise if the following two conditions are met at the same time:

(a) the information 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;

(b) the information is specific enough to enable conclusions to be drawn as to the possible effect of that set of circumstances or that event on the prices of financial instruments or of related derivative financial instruments.

69. That reasonable expectation, therefore, whilst required by way of the first condition under Article 1(1) of Directive 2003/124 (point 68(a) above), must be assessed together with — not separately from — the second condition under Article 1(1) of Directive 2003/124, even though it is logically distinct from it, that second condition being that it must be possible, by dint of the fact that the information is sufficiently specific, to draw conclusions as to the effect of the set of circumstances or the event on trading in the financial instruments in question or in the connected derivative instruments (point 68(b) above).

10 — See, in particular, the French version ('on peut raisonnablement penser'), the English version ('may reasonably be expected'), the Italian version ('si possa ragionevolmente ritenere'), the Spanish ('pueden darse razonablemente'), Dutch ('waarvan redelijkerwijze mag worden aangenomen'), Maltese ('b'mod raġjonevoli jiġi'), Romanian ('există motive raționale de a crede'), Estonian ('mõistliku eelduse kohaselt'), Finnish ('kohtuudella olettaa toteutuvan'), Latvian ('ir pamats uzskatīt'), Swedish ('rimligtvis'), Polish ('uzasadniony przewidywać'), Slovak ('odôvodnene predpoklada') and Portuguese versions ('razoavelmente previsíveis').

11 — See, to that effect, Case C-451/08 *Helmut Müller* [2010] ECR I-2673, paragraph 38, and Case C-41/09 *Commission* v *Netherlands* [2011] ECR I-831, paragraph 44.

70. In practice, greater weight may be attributed to either of those two conditions as compared with the other — even, if necessary, by ascertaining that there is a proper balance between the two in the circumstances — provided that neither condition is wholly unsatisfied, which means that, on the one hand, as regards reasonable expectation, the set of circumstances or the event in question must at least be capable of arising and, on the other, that the information must be at least specific enough to enable it to be regarded as precise.

71. Furthermore, the definition of reasonableness that must apply in a case such as that under consideration [12] must be constructed by reference to the 'reasonable investor' (expressly mentioned in Article 1(2) of Directive 2003/124), that is to say, an investor who tests information concerning the occurrence of future sets of circumstances or events against an objective criterion of reasonableness, rather than in relation to merely speculative purposes.

72. In the light of the above considerations relating to the close connection [13] between the first and second conditions under Article 1(1) of Directive 2003/124 [14] and to the way in which that directive uses the concept of the reasonable investor, it must be held that information is precise and, accordingly, that the reasonableness criterion is satisfied, where that information would be capable, if known to him, of influencing the investor's decision-making and where the investor would evaluate it as indicating that a particular event or set of circumstances could come about [15] and as sufficiently specific to enable him to draw conclusions as to its possible effect on trading in the financial instruments in question or in related derivative instruments.

73. Directive 2003/124 does no more than lay down minimum requirements in the absence of which information cannot be regarded as precise information. As far as concerns what is meant by reasonable expectation, it does not require a high degree of probability that the set of circumstances in question will arise; nor does it require the information to be so specific that certain, or near-certain, conclusions may be drawn from it as to the possible effect on trading in the financial instruments at issue or in related derivative instruments. [16]

74. The reasonable investor — as may be gathered from recital 1 to Directive 2003/124 — will base his investment decisions on information already available to him, that is to say, on information available *ex ante*, and will take account of the anticipated impact of the information in the light of the totality of the related issuer's activity, the reliability of the source of the information and, more generally, any other market variables which might, in the circumstances, affect the financial instrument in question or the related derivative financial instrument. [17]

75. Recital 2 to Directive 2003/124 goes on to clarify that *ex post* information may also be used, even if only to check the presumption that the *ex ante* information was price sensitive.

12 — For the reasons set out points 68 to 70 above, this definition has consequences as regards the categorisation of information as precise information.

13 — That connection reflects the fact that, among the factors which a reasonable investor will take into account in making his investment decisions, he will inevitably give greatest weight to the possibility of drawing inferences as to the effect of such sets of circumstances or events on trading in the financial instruments in question.

14 — Set out in point 68 above.

15 — The test adopted is thus very similar to the 'total mix' test developed in United States legal theory and case-law, the only fundamental difference being that the information in question may be just one of the factors that might influence an investor there.
According to the case-law of the United States Supreme Court (which addressed the question in 1976 in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 1976), information is to be regarded as inside information and, therefore, material, that is to say, as conferring an advantage, where there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.

16 — Accordingly, information will not be precise where reason dictates that the event be regarded as impossible or improbable, the necessary element of reasonableness being absent, for example, where it is no more than rumour, or where the information is so vague as to make it impossible to draw inferences as to the possible effect on trading in the financial instruments at issue or in related derivative instruments.

17 — For example, as the Estonian Government mentioned at the hearing, the legal context, commercial practice and the conduct of investors on the local market (in this case, the German market).

76. The *ex ante* evaluation of information serves an important function both for investors, whom it puts on an equal footing, and for potential insider dealers, since it enables them to orient their conduct and operate on the market as well as possible and in lawful fashion, given that they may know in advance what constitutes prohibited conduct and thus avoid the penalties which it attracts. [18] *Ex post* evaluation, on the other hand, serves a different function, inasmuch as it can only confirm or disprove an *ex ante* evaluation.

77. Operators must make this assessment on a case by case basis (by way of example, the Estonian Government emphasised at the hearing that even the size of the reference market may be significant) and, inevitably, a definition of reasonable investor and of reasonableness that holds good in all situations is impossible.

78. In the event of a dispute, it will be for the national courts to decide, by applying the above tests, whether or not those in possession of information are under a duty to disclose it.

79. The national courts will therefore have to determine whether, on the basis of the information available *ex ante*, [19] a reasonable investor would have evaluated the information as indicating at least the likely occurrence of an event or a set of circumstances and as sufficiently specific to enable him to draw conclusions as to its possible effect on trading in the financial instruments in question or in related derivative instruments.

80. The European Union legislature intentionally took reasonableness as its point of reference, rather than probability or possibility, precisely in order to make it clear that, in identifying information as inside information and in distinguishing it from information which is not inside information, particular attention must be paid to the particular circumstances of the case.

81. Contrary to the view of some of the parties (such as the Commission), it would be of no use for the purposes of deciding cases such as that before the referring court to define in the abstract a particular percentage threshold below which it could not reasonably be thought that an event could occur. [20]

82. The directives merely require that inside information be precise and they refer to the deliberately unspecific criterion of reasonableness, which must be applied not by simply calculating statistical percentages for an event occurring but through a much more detailed and comprehensive evaluation. [21]

83. Such an evaluation will draw upon previous similar experiences and will seek to ascertain whether or not the occurrence of the event is, more generally, to be reasonably expected and, accordingly, whether its occurrence would be allowed for by a reasonable investor, in the light of the anticipated impact of the information viewed in the context of the totality of the related issuer's activity, the reliability of the information source and any other market variables which might, in the circumstances, affect the financial instrument in question or the related derivative financial instrument.

18 — As regards the submissions made by Daimler AG at the hearing regarding the risks which would ensue in terms of criminal law from too broad a definition of inside information, it must be emphasised, in so far as is relevant here, that it is the system of *ex ante* evaluation of information itself that ensures that the concepts used in the present directives — and, indirectly, the rules of national law, prescribing penalties, which should reflect them — are sufficiently precise. However, it must also be emphasised that, in accordance with Article 14 of Directive 2003/6, Member States remain free to lay down criminal penalties but are under no obligation to do so. They are merely required to ensure that, in conformity with their national law, the appropriate administrative measures and penalties can be adopted with regard to those responsible where the provisions adopted in implementation of the directive are not complied with. The directive has an essentially civil-law scope, and it is therefore for the Member States to address any questions relating to the drafting of possible criminal-law provisions in the field and to resolve them in conformity with their internal legal systems.

19 — As better described in point 74 above.

20 — As the Estonian Government pointed out at the hearing, to do so would leave no room for the discretion which is needed in order to take account of the circumstances of the particular case.

21 — At the hearing, the Estonian Government emphasised that, at the time when the directives in question were being drafted, it was deliberately decided to opt for a flexible form of wording, rather than to lay down percentages and rigid assessment criteria.

84. Those conclusions are not invalidated by the submissions made by Daimler AG in its observations.

85. In particular, Daimler AG takes issue [22] with the interpretation of *Spector Photo Group and Van Raemdonck* [23] given by the referring court, according to which 'an insider is sometimes exposed to lower market risks than an investor who is as yet unaware that there is an intention to bring about certain circumstances or events or that a decision-making process has been set in train'. [24]

86. Daimler AG maintains that, inasmuch as it took the view that it was not necessary for there to be a high probability of the event in question occurring, the referring court failed to apply correctly the principles flowing from that judgment, basing its reasoning not on the hypothetical conduct of a reasonable investor but on that of an investor acting speculatively, even though — in Daimler AG's view — Directive 2003/6 protects reasonable investors and is not concerned with the deterrence of speculative behaviour. [25]

87. In that connection, Daimler AG asserts that the conduct of those in possession of inside information tends to be different from that of the ordinary reasonable investor, one of the reasons being that they are driven by different motives and employ different methods. In particular, they will be more likely to take account even of improbable events, for purely speculative purposes.

88. I cannot share that view because it is based upon an interpretation of the case-law of the Court of Justice and of the rules under consideration which does not reflect the objective pursued by the directives in question.

89. As was observed in point 49 above, it was made plain in *Spector Photo Group and Van Raemdonck* [26] that the aim of Directive 2003/6 is to protect the integrity of the financial markets and to enhance investor confidence, which is based on the assurance that investors will be placed on an equal footing and protected against the improper use of inside information by those who possess it, to the detriment of those who are unaware of it.

90. The situation which it is sought absolutely to prevent, therefore, is that where the holder of inside information, who is at an advantage over market operators which are unaware of it, profits from financial transactions carried out with the benefit of that information, without running the same risks as other potential investors. [27]

91. It follows that — contrary to Daimler AG's submission — the hypothetical differences between the mental states and conduct of reasonable investors, on the one hand, and those in possession of inside information, who might prefer merely speculative investments, on the other, are irrelevant: irrespective of any distinction between the two groups, they must both be on an absolutely equal footing if the integrity of the financial markets is to be protected and the confidence of investors is to be enhanced.

92. The directives under consideration thus prohibit the misuse of inside information in order to protect the integrity of the financial markets and to enhance investor confidence. If that objective is to be achieved, the notion of reasonableness cannot be construed in terms of significant probability, since that would make it possible in practice not to disclose information which, on many occasions, contemplates the occurrence of future events capable of affecting share trading, and thus to favour highly speculative insider dealing operations.

22 — Paragraph 153 of Daimler AG's observations.

23 — Cited in footnote 6.

24 — Paragraph 20 of the order for reference.

25 — Paragraph 154 of Daimler AG's observations.

26 — Cited in footnote 6 (paragraph 47).

27 — Point 50 above.

93. Nor can any account be taken of the alleged risk of information overload [28] which would arise if, as a result of too broad an interpretation of inside information, capital markets were inundated with such quantities of unreliable information as to lead market operators astray.

94. The system created by Directives 2003/6 and 2003/124 is designed precisely to allow all investors to take their own decisions and to accept the consequences — and even to make mistakes — after receiving and evaluating all relevant information capable of affecting market prices. Consequently, if there is any doubt, it is better to interpret the directives in a way which increases, rather than reduces, the amount of information that must be disclosed to the public.

95. I would therefore suggest that the Court state in answer to the first query within Question 2 that:

— reasonable expectation for the purposes of Article 1(1) of Directive 2003/124 does not require that the probability of the set of circumstances or event in question occurring be assessed as preponderant or significant;

— the system introduced by Directives 2003/6 and 2003/124 merely requires that, neither of the two factors mentioned in Article 1(1) of Directive 2003/124 being completely absent, there should be precise information, on the basis of an *ex ante* evaluation carried out by reference to the anticipated impact of the information in the light of the totality of the related issuer's activity, the reliability of the source of the information and the other market variables which might, in the circumstances, affect trading in the financial instrument in question or in the related derivative financial instrument.

96. By the second query within Question 2, the referring court has also asked, more specifically, whether the reference to sets of circumstances which may reasonably be expected to come into existence or events which may reasonably be expected to occur implies that the degree of probability required depends on the extent of the consequences for the issuer and that, where their potential for affecting share prices is significant, it is sufficient that the occurrence of the future set of circumstances or event, while uncertain, be not improbable.

97. In order to answer that query, it must be remembered that point 1 of Article 1 of Directive 2003/6 provides that information is to be regarded as inside information if, in addition to relating to one or more issuers of financial instruments, three further conditions are satisfied:

(a) the information is precise;

(b) the information has not been made public;

(c) the information is likely to have a significant effect on the prices of the financial instruments in question.

28 — Paragraph 168 of Daimler AG's observations.

98. Leaving aside the question whether or not the information has been made public, which is not in issue here, the two fundamental factors on which the notion of inside information is based are (i) the precision of the information and (ii) the likelihood of its having a significant effect on the prices of the financial instruments in question:[29] factor (i) (point 97(a) above) relates to the intrinsic nature of the information, which must be precise, as defined in Article 1(1) of Directive 2003/124;[30] factor (ii) (point 97(c) above) relates to the outward effects of the information, that is to say, its potential impact, and this is addressed by Article 1(2) of Directive 2003/124.

99. The presence of those two factors and the relationship between them must be examined with reference to the 'inside' nature of the information.[31]

100. A court hearing a dispute of this nature must not focus exclusively on just one of these requirements, either the precision of the information or its potential impact, depending on the case, and completely leave aside the question of the presence of the other. Rather, it must establish whether the information is inside information on the basis of a comprehensive assessment of every piece of evidence in its possession.

101. Whilst they remain logically distinct at the point of their identification, those factors must be considered globally, and for this reason either of the pre-conditions may well in practice be attributed a greater significance than the other,[32] provided that the other is not wholly unsatisfied and that the information thus reaches a level where it may be regarded as inside information, it having been ascertained that there is a proper balance in the circumstances between its precision and its potential effect.

102. Indeed, in so far as the case before the referring court is concerned, Directives 2003/6 and 2003/124 require neither a significant probability of the set of circumstances in question arising, as has already been said, nor an actual influence on share prices.

103. In particular, according to *Spector Photo Group and Van Raemdonck*,[33] given the aim of Directive 2003/6, the capacity to have a significant effect on prices must be assessed, a priori, in the light of the content of the information at issue and the context in which it arises. For that reason, it is not necessary, in order to determine whether information is inside information, to examine whether its disclosure actually had a significant effect on the price of the financial instruments.

104. The legislation under consideration thus does no more than lay down minimum conditions to be satisfied, failing which information cannot be regarded as inside information.

29 — This is clear from recital 3 to Directive 2003/124, which states that legal certainty for market participants should be enhanced through a closer definition of two of the elements essential to the definition of inside information, namely the precise nature of that information and the significance of its potential effect on the prices of financial instruments or related derivative financial instruments.

30 — Under Article 1(1) of Directive 2003/124, information is precise:
(a)if it relates to a set of circumstances which exists (or an event which has occurred) or which may reasonably be expected to come into existence (or to occur); and
(b)if it is specific enough to enable conclusions to be drawn as to the possible effect of that set of circumstances or event on trading in the financial instruments in question or in related derivative financial instruments.

31 — As noted in point 98 above.

32 — It should be emphasised that there was discussion at the hearing of the influence upon Community law of United States case-law (in particular that of the United States Supreme Court in *Basic Inc.* v. *Levinson* (485 US, 224, 1988)), which, in assessing the conduct of the reasonable investor, applies the probability/magnitude test. According to that test, the importance of the information 'will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity'.
That case-law may have influenced the definition of reasonable investor and the drafting of recital 1 to Directive 2003/124, which states that reasonable investors base their investment decisions on information already available to them, that is to say, on information available *ex ante*, in particular, 'in light of the totality of the related issuer's activity', a form of words which expressly reflects the reasoning followed by the United States courts: 'in light of the totality of the company activity'.

33 — Cited in footnote 6 (paragraph 69).

105. With reference to the case before the referring court, that could be the position if it were to be held that reason dictates that the occurrence of an event is to be regarded as impossible or improbable, which would mean that the information would not have the requisite degree of precision (thus leaving the first condition unsatisfied) or that it could not have any effect on price quotation (thus leaving the second condition unsatisfied).

106. It follows that, where the potential of that information for affecting share prices is significant, it is sufficient that the occurrence of the future set of circumstances or event, albeit uncertain, be not impossible or improbable.

107. In making that assessment, the extent of the consequences for the issuer will be of relevance [34] inasmuch as that will form part of the information available *ex ante*, given that a reasonable investor will base his decisions on the anticipated impact of the information in the light of the totality of the related issuer's activity, the reliability of the information source and every other market variable which might, in the circumstances, affect the financial instrument in question or the related derivative financial instrument.

108. In any event, *ex post* information may also be used in order to check the presumption that the *ex ante* information was price sensitive. [35]

109. I would therefore suggest that the Court state in answer to the second query within Question 2 that:

— where the potential of the information for affecting share prices is significant, it is sufficient that the occurrence of the future set of circumstances or event, albeit uncertain, be not impossible or improbable;

— the consequences for the issuer will be of relevance inasmuch as that will form part of the information available *ex ante*, while *ex post* information may also be used in order to check the presumption that the *ex ante* information was price sensitive.

VII – Conclusion

110. In the light of the foregoing considerations, I therefore propose that the Court answer the questions referred by the Bundesgerichtshof as follows:

(1) point 1 of Article 1 of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (Market Abuse Directive) and Article 1(1) of Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation should be interpreted as meaning that, in the case of a process which is intended, over the course of a number of intermediate steps, to bring about a particular set of circumstances or to give rise to a particular event ('a protracted process'), even information concerning facts — current or past — which relate to the intermediate steps and which are connected with bringing about the future set of circumstances or future event may be regarded as precise information and, accordingly, as inside information, provided that all the other preconditions laid down in those directives are also satisfied;

34 — Recital 1 to Directive 2003/124 expressly mentions the anticipated impact of the information in the light of the totality of the related issuer's activity.

35 — As is clear from recital 2 to Directive 2003/124.

(2) (a) reasonable expectation for the purposes of Article 1(1) of Directive 2003/124 does not require that the probability of the set of circumstances or event in question occurring be assessed as preponderant or significant;

(b) the system introduced by Directives 2003/6 and 2003/124 merely requires that, neither of the two factors mentioned in Article 1(1) of Directive 2003/124 being completely absent, there should be precise information, on the basis of an *ex ante* evaluation carried out by reference to the anticipated impact of the information in the light of the totality of the related issuer's activity, the reliability of the source of the information and the other market variables which might, in the circumstances, affect trading in the financial instrument in question or in the related derivative financial instrument;

(c) where the potential of the information for affecting share prices is significant, it is sufficient that the occurrence of the future set of circumstances or event, albeit uncertain, be not impossible or improbable;

(d) the consequences for the issuer will be of relevance inasmuch as that will form part of the information available *ex ante*, while *ex post* information may also be used in order to check the presumption that the *ex ante* information was price sensitive.