

## Question 1 (35 % / 35 pts)

Frank Best, CEO of John John Corporation, contacts a large shareholder Mr. Owen to solicit support for planned stock offerings to raise money for its corporation.

In a phone call with Mr. Owen, Mr. Best explained the details of the plan to Mr. Owen. Although Mr. Owen was not convinced about the plan, he promised not to sell his John John stocks. A few days after this agreement, Mr. Owen decides to sell his stocks.

The SEC proceeded against Mr. Owen for insider trading.

Please explain the theoretical basis of this case. Would the action brought by the SEC be successful? Would it make any difference for the success of the action if the SEC was able to prove the existence of an agreement between the major shareholder Mr. Owen and the CEO Frank Best?

A similar situation takes place in Europe. The CEO of a European company, EUROPE FOREVER, Ms. Frances Gaugen, and a major shareholder, Marion Cotillard, have a similar conversation: Ms. Gaugen communicates to Ms. Cotillard the intention to issue new stocks the week after. Immediately after the phone call, Ms. Cotillard decides to sell the participation held in EUROPE FOREVER.

Is Ms. Cotillard liable under the European Market Abuse Regulation?

Please explain and emphasize the differences, if any, with the American approach emerging from the previous case.

What is insider trading. Basis and rules punishing it (3 Points)

The case relies on the interpretation of the misappropriation theory. Explanation of misappropriation theory (and relevant cases) (3 Points)

The SEC could proceed against Mr. Owen based upon the misappropriation theory. Specifically, the SEC could allege that Mr. Owen gained details regarding a proposed stock offering by John John Corporation by promising its CEO that Mr. Owen would not trade before the offering, and then, in breach of the CEO's trust created by this promise, Mr. Owen sold his John John stock. (6 Points)

Proving the existence of the agreement makes a difference indeed. (5 Points)

- If the SEC was able to convince a jury that Mr. Owen had promised not to trade, there would a violation of the U.S. insider trading prohibition. If not, it might be possible
- On the contrary the situation of proving the existence of an agreement leads to a fiduciary relationship between Mr. Owen and the company, that would to the incrimination of Mr. Owen for insider trading.
- Explanation of the relationship between Mr. Owen and John John Corporation.

Further Reference to US case law (for example Newman)

European Approach

Market Abuse Regulation (6 Points)

- Notion of Insider Information
- Applicability of the elements of insider information to the case at hand

Ms. Cotillard would be liable under MAR. (4 Points)

Ms. Cotillard was aware that she was in possession of material non-public information, which makes trading forbidden under MAR.

In this case proving that the agreement exists or not doesn't make any difference – Explaining why (3 Points)

Differences between US and Europe (5 Points)

- Misappropriation Theory vs European Approach.
  - o Basis of the misappropriation theory (relationship with the company)
  - o MAR: Applicability to any individual using Insider Information (instead of abstaining)

## Question 2 (30 % / 30 pts)

X plc is incorporated in the United Kingdom. For tax reasons, X plc intends to take over and subsequently merge „into“ the Irish Y LTD, which is listed on the Irish stock exchange. A – shareholder of 51 % of Y LTD's voting capital and voting rights – approves of X plc's plan; Y LTD's BoD opposes it.

In the course of action, X plc accidentally publishes address information of its and Y LTD's UK shareholders on the company website. When becoming aware, X plc removes the weblink to the file but doesn't delete the exact webpage.

Meanwhile, an Indonesian representative of Y LTD attempts to prevent a local investigation into certain business practises. He is asked to transfer part of the respective settlement payment directly to a government official.

Please discuss.

Issues : Corporate inversion, absorption merger (2)

Interplay of securities regulation, company law and competition law (1)

Applicability of EU Takeover Directive (TD), Company Law Directive (CLD)

since target company has registered office/is listed in Ireland (2)

Mandatory bid requirement if X plc obtains A's shares (art. 5 TD) (1)

Qualified majority necessary for merger (art. 93 I CLD) (1)

Board neutrality rule (art. 9 TD) (1)

But : Ireland opt-out of restriction on defenses? (art. 12 TD) (1)

Discussion of different defensive measures (1)

Concentration assessment based on competition law (only very broadly) (1)

((11))

Issue: Breach of data security (1)

«UK shareholders »: Territorial applicability of GDPR, national UK GDPR (widely identical with GDPR) (2)

Material scope : personal data – Discussion if „identifiable“ (art. 4 I GDPR) (2)

Breach notification to supervisory authority --> Irish DPA (art. 33 GDPR) (1)

And : communication to data subjects (art. 34 GDPR) (1)

Relevant basic principle: appropriate security (art. 5 I f GDPR) (1)

Failure to implement appropriate TOMs, which is ongoing (no deletion of webpage) (art. 32 GDPR) (2)

Fine (art. 83 GDPR) (1)

((11))

Issue: Potential bribe (1)

Applicability of UK Bribery Act 2010, potentially U.S. Foreign Corrupt Practises Act (2)

Extra-territorial applicability (1)

Active/passive bribery ; in casu : active bribery (covered by both UK and U.S. acts) (2)

of a foreign public official (person exercising a public function outside UK/U.S.) (1)

Liability for „representative“? Discussion of employee/agent position (1)

Bonus: Defence of adequate procedures to prevent bribery (1)

((8))

((tot. 30))

### **Question 3 (20 % / 20 pts)**

Frank Goodhart is the CEO of a Delaware corporation, LetsMakeTonsOfMoney. After many profitable years in which the company systematically distributed dividends, Mr. Goodhart decides not to distribute any dividend and instead contribute to a humanitarian cause, to distribute a higher number of vaccines in Africa.

Could in principle the shareholders of LetsMakeTonsOfMoney bring a lawsuit against Mr. Goodhart? If so on which basis?

Please explain.

Shareholders could in principle sue Frank Goodhart: YES/NO & WHY (4 Points)

- Debate on Shareholder vs Stakeholder value Maximization (3 points)
  - o Emphasis on the duties of a CEO (3 points)

- Notion of Fiduciary Duties (3 Points)
- References to the literature (3 Points)
- (Potential reference to further theories)

Examples from case law: (4 Points)

- Dodge vs Ford
- Revlon
- Ebay vs Craigslist

#### **Question 4 (15 % / 15 pts)**

Corporate law characterizes for significant principal-agent problems. After explaining the nature of the principal-agent problem, please explain what is the role of gatekeepers in this context. Who should they protect? What are the main problems as they also emerged in famous scandals from the past?

What is the principal-agent problem (3 Points)

Different strategies for mitigating the principal agent problem (such as disclosure and gatekeepers)

Applying the Principal Agent problem to Gatekeepers: (6 Points)

- Who should they protect:
  - the corporation and (indirectly) its shareholders
  - Gatekeepers tend to protect the managers that hire them, instead of protecting the company

Scandals: Enron, Worldcom, Financial Crisis (6 Points)

- Role of Gatekeepers in these scandals
- Problems of conflicts of interests (remuneration and further problems, i.e. auditing services coupled with other consulting services)
- Other Potential problems
- (Potential: Causes of such scandals and solutions)

#### **Bonus Question**

How does technology impacts on the role of gatekeepers?

Existence of different disruptive technologies and Emphasis of which technology disrupts specific actions. (1 Point)

Blockchain technology could potentially help to redesign the role of gatekeepers, allowing each shareholder to “control” the company on a regular basis. (2 Point)

Redesign the audit function (2 Point)