Deutsches Aktieninstitut
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# Disclosure of Inside Information in Protracted Processes

The non-exhaustive indicative list of final events should be easy to use for listed companies

Discussion Paper of Deutsches Aktieninstitut on the non-exhaustive indicative list according to Art. 17 Para. 12a) Market Abuse Regulation (MAR), 8 July 2024

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# Introduction

The revision of Art. 17 Para. 1 of the Market Abuse Regulation (MAR) by the EU Listing Act introduces a paradigm shift in public disclosures of inside information by moving towards a concept of finality in the context of protracted processes that lead to inside information: only the final circumstances or event must be published immediately after they have occurred.

We expressly welcome the introduction of this concept of finality as it can simplify compliance for issuers and reduce legal risks. At the same time, the reform seeks to avoid confusing market signals that result from the publication of premature information. This serves market efficiency.

Overall, the reform is closely related to the central objective of the EU Listing Act, which is to improve the attractiveness of European capital markets and capital market financing in the EU.

In order to enable issuers to better identify the moment when disclosure of inside information is required Art. 17 Para. 12 a) MAR stipulates that the EU Commission is empowered to adopt a delegated act on a non-exhaustive list of possible final events in protracted processes according to Art. 17 Para. 1 MAR. This list is of crucial importance as the realisation of the above-mentioned goals depends on it.

This discussion paper contains proposals for such a list reflecting intensive discussions with various corporate practitioners. These proposals are based on five principles that we consider important:

1. The list should at least address the key protracted processes to be expected in general. Otherwise there is a risk that only a portion of the issues relevant in practice will be covered.

2. The list should be based on principles and avoid mentioning many detailed individual situations. Rather we believe it is preferable to provide to issuers and supervisory authorities simple basic rules. Issuers and supervisory authorities should thereby be put in a position to decide independently about the individual case whilst acting consistently across the EU. The list should also serve as a guiding framework for issuers and supervisory authorities when a situation is not explicitly covered in the list.

3. An issuer should only become obliged to publicly disclose inside information resulting from a protracted process upon the occurrence of the actual final events. Otherwise, the paradigm shift would not bring about a considerable improvement for issuers and market efficiency.

4. For the issuer, the obligation of public disclosure of inside information should be based on a clear, unambiguous definition of final events that regularly lie within the sphere of the issuer. This is the only way issuers will be relieved from complex assessments as required under the current MAR regime (e.g., regarding probability estimates).

5. The list should be equally applicable to various systems of corporate governance in the EU. In particular, it should cover different mechanisms of decision-making in one-tier and two-tier board structures. It should also take into account that a formally competent corporate body can delegate decisions within the company.

# 1 Basic Principles

### Principle 1: Coverage of typical protracted processes

The first (legal) question relates to the distinction between events which are considered protracted processes and events which are seen as one-offs. The EU Commission only has the competence to create a list of typical events that are considered protracted processes.

From our perspective, at least the following case types should be considered protracted processes: M&A processes, corporate actions (such as capital measures, share buybacks dividends, major corporate reorganisations) as well as important personnel decisions. These processes have in common that, according to the definition in Art. 7 MAR, inside information can occur at an early stage of a protracted process. However, early publication of such information could lead to misleading signals and endanger the successful implementation of the respective process or transaction.

The preparation of annual, half yearly, and quarterly financial reports constitutes an ongoing process for issuers and, hence, qualifies as a protracted process. The process is designed to publish the status of the development of the accounts and key financial indicators twice, often four times a year at pre-communicated dates. Disclosure of these interim financials probably represents the largest proportion of public disclosures of inside information resulting from protected processes.

Furthermore, compliance incidents and litigations typically develop in stages. From a legal perspective it is often uncertain as to when inside information emerges and needs to be disclosed in these cases. Thus, though not as frequent as other protracted processes, including these situations in the list could ease compliance practice.

### Principle 2: Principle-based design

Every protracted process unfolds in its own unique way.

This becomes particularly clear in the case of M&A transactions. From our perspective, the list should therefore capture typical situations. A too detailed and differentiated approach entails the risk that it is not reasonably applicable to the specific individual case and raises new interpretive questions.

### Principle 3: Disclosure of real end events or at least late stage disclosure

There has been and continues to be a political will to shift the obligation of public disclosure of inside information in protracted processes to a later point in time in

order to prevent a multitude of premature public disclosures. This is also underscored by the first part of Recital (67) that highlights the danger of misleading investors through premature public disclosures.

The key sentence in Art. 17 Para. 1 MAR reads: “In a protracted process, only the final circumstances or event shall be disclosed as soon as possible ***after*** they have ***occurred***.” This wording expresses a true concept of finality. Thus, according to the wording of Art. 17 Para. 12 MAR, the EU Commission shall be empowered to create a list that only contains real final events, e.g. the signing or even completion of a M&A agreement or a service agreement with a new board member, the decision of a General Meeting on the amount of dividends or an ordinary capital increase, the start of the execution of a share buyback or capital increase using authorised capital or the publication of financial information.

However, we are aware that the second part of Recital (67) dilutes this clear wording of the new Art. 17 Para. 1 MAR by mentioning the agreement on contractual core elements as a possible final event in the case of a merger. This opens room for interpretation what can be regarded as a final event in the legal sense. In any case, the point of time mentioned in Recital (67) marks the earliest possible mandatory disclosure date in the context of M&A processes whereas the term "agreement" obviously refers to the legally binding contractual agreement, not a non-binding preliminary agreement in the context of negotiations, such as the typical term sheets, letters of intent or memoranda of understanding.

### Principle 4: Clear, unambiguous events that lie within the sphere of the issuer

A fundamental problem of the current regulation is that issuers must continuously assess throughout the entire protracted process, based on probability evaluations and taking into account external developments, whether inside information has emerged and whether it needs to be published. This leads to barely manageable legal and procedural uncertainties and numerous individual questions and increases the risk of confusing market signals due to premature disclosure of information putting listed companies in a competitive disadvantage vis-à-vis their non-listed peers.

Therefore, the list will clearly improve the situation if the issuers are relieved from this complex assessment regarding public disclosure by determining real final events (such as signing of the final agreement). Should earlier disclosure dates be chosen in the light of Recital (67), such dates should also depend on clearly defined events that regularly lie within the sphere of the issuer. Such an event is usually the final (formal) resolution by the competent corporate body.

As mentioned above, in the case of an M&A process, based on the wording of Art. 17 Para. 1 MAR, it could be argued that the ‘final event’ is the signing of the

contract (one could even argue for completion of the contract after fulfilling additional conditions). At most, considering Recital (67), it could be argued that it might already depend on the final formal management decision (or more generally expressed: the responsible corporate body that has decision power) to enter into the M&A transaction based on a contract that is (almost) fully negotiated. An even earlier date would be in conflict with both the wording of Art. 17 MAR and the recital.

### Principle 5: Applicability to various systems of corporate governance in the EU

When formulating the list, the various corporate governance systems in Europe should be taken into account.

Merely relying on 'management' in a two-tier board system can be misleading if 'management' refers only to the management board, while the supervisory board has the legal decision-making power or must approve material decisions of the management board. Even more detrimental: Relying on the management board's decision with an associated obligation to publish in such cases could even lead to factually preempt the decision of the supervisory board. This is not in the spirit of good corporate governance. If the supervisory board rejects a decision of the management board, an obligation to publicly disclose based on the mere involvement of the management board could constitute a confusing signal to the market, which the MAR reform under the EU Listing Act intends to avoid. Conversely, the supervisory board would be urged to object to management board decisions only in the case of extreme concerns given that a delay or denial would otherwise have a negative impact on the company since the decision of the management board would already be in the public domain. In other EU countries, it may not be necessary according to the current law for certain decisions to require a resolution by the management board at all.

Therefore, we consistently recommend choosing the wording 'competent corporate body that has the decision making power' and adding an explanation that this wording covers various legal constellations.

Furthermore, it would be important for the EU Commission when formulating the list to consider (perhaps through a suitable explanation) that a formally responsible corporate body such as the management board or – if involved – the supervisory board can delegate decisions to other persons. In this case, the timing of the decision by these persons should naturally be decisive.

## 2 Suggestions for the List

In the following, we suggest various case types that could be useful to consider as the EU Commission designs the indicative list.

It is important to note that the table assumes that the respective matter or case has actually led to inside information, thus fulfilling the legal criteria for the emergence of inside information according to Art. 7 MAR. However, not every M&A transaction, capital increase, key personnel related decision, new financial information or other issue mentioned in our proposal constitutes inside information.

Since the interplay between the wording of Art. 17 Para. 1 MAR and Recital (67) offers room for interpretation for individual types of protracted processes, we add explanations where alternative dates could be regarded as legally feasible.

In all our suggestions, the issuer can – at least – refer to a formal decision of the competent corporate body that has the decision power or to another clearly determinable point in time. This significantly eases the compliance practice, especially for smaller issuers.

| **Cases of potential inside information in protracted processes** | **Occurrence of final event (Art. 17 Para. 1 MAR, considering Recital (67))** | **Reason/explanation** |
|---|---|---|
| M&A Transactions | Signing of M&A contract | Only upon the signing of the contract the final event has actually occurred. One could even argue that only after the fulfilment of additional contractual conditions (e.g., merger control clearance) does it lead to an 'end event'.<br><br>The earliest possible moment would be the management decision (in more general terms: 'the competent corporate body that has the decision power') on the conclusion of the M&A contract which has already been finally negotiated and agreed between the contracting parties.<br><br>The rule laid down here can regularly also be applied to major operational agreements like major project or supply agreements. |

| Cases of potential inside information in protracted processes | Occurrence of final event (Art. 17 Para. 1 MAR, considering Recital (67)) | Reason/explanation |
|---|---|---|
| Dividends | Management formal decision (in more general terms: 'the competent corporate body that has the decision power') on the resolution proposal for the General Meeting | The end event of the protracted process of a dividend payment is formally the General Meeting's resolution.<br><br>However, in this case it appears appropriate to take the formal decision of the competent corporate body for proposing the respective resolution of the General Meeting as the point of time of public disclosure in ensure appropriate market information.<br><br>This is an example of how a general formulation makes sense, as different corporate bodies may be responsible for the decision depending on the corporate governance system.<br><br>In Germany it would be the (joint) decision of the Management and Supervisory Board. |
| Ordinary capital increases | Management formal decision (in more general terms: 'the competent corporate body that has the decision power') on the implementation of the measure | Also here, the end event would be the General Meetings' resolution to increase capital.<br><br>However, in this case it appears appropriate to take the formal decision of the competent corporate body for proposing the respective resolution of the General Meeting as the point of time of public disclosure in ensure appropriate market information.<br><br>In Two-Tier systems the formal decision includes also the resolution of the Supervisory Board. |
| Share buybacks, utilisation of authorised capital | Formal management decision (in more general terms: 'the competent corporate body that has the decision power') on the implementation of the measure | The end event would be the announcement of the start of actual share buyback or the start of the technical process of increasing capital.<br><br>It could however be argued that already the formal decision to actually execute the measure could be taken as the point of time for disclosure. |

| Cases of potential inside information in protracted processes | Occurrence of final event (Art. 17 Para. 1 MAR, considering Recital (67)) | Reason/explanation |
|---|---|---|
| Key personnel matters (appointment or dismissal of a member of a corporate body in a key position) | Signing of the service agreement or agreement on termination | The earliest thinkable moment of a final event is, however, the decision of the 'competent corporate body that has the decision power' for the appointment/dismissal and the execution/termination of the service agreement. If no service agreement has to be concluded it is the decision of the 'competent corporate body' on the appointment/dismissal. |
| Personnel matter (Unilateral resignation of a board member in a key position) | Formal (usually written) resignation from office to the responsible corporate body | We see no other possible date for the required disclosure of inside information than the point in time of a formal resignation towards the competent body of the company. |
| Financial information (quarterly/half-yearly/ (preliminary) annual figures) | Management decision (more generally formulated: 'the competent corporate body that has the decision power') on the respective quarterly/half-yearly/(preliminary) annual figures | The end event in case of financial information would be the publication of the respective information according to the financial calendar of the issuer.<br><br>However, in this case it appears to a practicable solution to take the formal decision of the competent body on the respective financial information as the relevant point of time.<br><br>The rule laid down here can regularly also be applied to forecasts that are developed in the course of compiling regular financial information. |
| Major corporate reorganizations (e.g. spin-offs) | Conclusion of relevant agreement or, if agreement is contingent upon approval of another corporate body, the final decision of the competent corporate body that has the decision power<br><br>If no agreement is required, but a shareholders resolution, the decision of the competent corporate body that has the decision power on the final proposal to General Meeting | Internal decisions to analyse the reorganization, the implementation of interim steps, the obtaining of tax rulings or the completion of feasibility studies would not be sufficient. |

| **Cases of potential inside information in protracted processes** | **Occurrence of final event (Art. 17 Para. 1 MAR, considering Recital (67))** | **Reason/explanation** |
|---|---|---|
| Compliance Incidents | Incurrence of economic damage, e.g. fine, award of damage claim by court | The mere suspicion of illegal behaviour, e.g. based on a whistleblower notice, the initiation/completion of internal investigations and the opening of administrative or criminal proceedings would not be sufficient as long as the outcome is unknown. |
| Litigation proceedings, in particular major passive litigation | Final judgment | As a general rule, as long as an appeal is possible, the final and binding decision would be relevant. |

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