Deutsches Aktieninstitut

EU Market Abuse Regulation Must Reflect better Listed Companies Legitimate Interests

Upcoming review of the Market Abuse Regulation offers unique opportunity

Reply of Deutsches Aktieninstitut to ESMA “MAR review report”, 29 November 2019

Summary

Deutsches Aktieninstitut appreciates the opportunity to respond to ESMA's consultation on review of MAR.

From the issuers' perspective, MAR has led to a situation in which issuers face constant legal uncertainties. They furthermore make the experience that their interests are not adequately protected and that they have to cope with too much bureaucracy.

The review of MAR thus offers the unique opportunity to address these problems and to better balance the issuers' interests in keeping sensitive information confidential and being able to comply with the MAR in practice against the investors' interest in fair market practices and transparency.

ESMA addresses some of the bureaucratic and burdensome duties of the issuers and is requesting legal certainty for issuers. Deutsches Aktieninstitut appreciates this.

However, the consultation paper also takes the opposite direction for the core duties of listed companies. More specifically, we are concerned that additional compliance duties for the option of delaying the publication of inside information and more documentation duties for information that ceased to be inside information will be created (see response to Q 26 und Q 29).

Instead of an evaluation of potential additional obligations we would like to encourage ESMA to pick up a number of points that need to be addressed from the listed companies' perspective in order to make listing in stock markets more attractive and in order to ease the day-to-day compliance.

In particular, issuers face the following key problems:

1. **Uncertainty on the term "inside information"**

   Issuers face significant uncertainties on the term "inside information". The vagueness of the term makes it often close to impossible to determine with reasonable certainty if and at which point of time a piece of information will constitute an inside information. In addition, neither the ECJ's rulings nor the supervisory practices resulted in sufficient clarity and/or appropriate guidance for market participants. Rather the opposite is true leading to inadequately broad interpretations. As a consequence, issuers are not only under the constant risk of being forced to premature disclosures. The broad interpretation also blocks the issuers' possibility to raise capital; it also causes difficulties with employee participation schemes and generally requires a level of internal organisation to ensure compliance that appears inappropriate

2. **Early stages of protracted processes**

   Early stages of protracted processes should not be treated as inside information: Legal uncertainty and the risk of wide interpretation are in particularly relevant for protracted processes, i.e. in processes that occur in stages. Though MAR tried to clarify the definition in this respect, issuers' experiences are negative. Early stages of protracted processes are now under the constant risk of falling under the definition of inside information from a purely legal perspective though from a market view this is not appropriate.

3. **Protection of reasonable interests of issuers by option to delay disclosure is undermined**

   The option to delay the disclosure of inside information has been introduced in order to protect reasonable interests of issuers and to mitigate negative effects of the disclosure obligation. It also protects the market from being misled by premature information. Unfortunately, the requirement of "legitimate interests" is interpreted narrowly by regulators. Moreover, the newly introduced obligation to respond to market rumours undermines this option for issuers and puts at risk issuers' reasonable interests. The review should thus make delaying the publication safe(r) for issuers both in legal terms and in application in practice. This needs to be done irrespective of the need for more certainty on the definition of inside information.

These concerns are explained in more detail in the position paper "Review of EU Market Abuse Regulation – Main Issues from the Perspective of Listed Companies" which is attached to this response. The paper also develops concrete proposals

- how to limit the overly broad interpretation of inside information,
- how to treat protracted processes in a more appropriate manner (i.e. early stages of protracted processes are taken out of scope of the definition inside information),
- how to integrate further examples of legitimate interests for the delay of the disclosure of inside information and
- how to better protect delayed disclosures against abusive rumour spreading.

Besides the core issue of better balancing the definition of inside information and better protecting issuers' interests in the delay mechanism, there is a number further topics that should be picked up in the MAR review. From our perspective, tackling these issues would reduce bureaucratic burden for listed companies or increase flexibility for them without running counter core political objectives of the MAR. Namely:

- Regarding insider lists: the volume of required data should be reduced.
- Regarding Managers' Transactions: transactions with no signal value (e.g. gifts, inheritances, but also elements of remuneration with not discretion) should be out of scope and notification requirements should be streamlined to avoid the risk of confusing the market.
- The list of closely associated persons (Art. 19(5) MAR) should be abandoned or at least made less burdensome.
- The safe harbour for share buy backs should be widened in scope to all justifications for share buy backs that are provided by the respective corporate law as well as to buy backs of debt instruments.
- The regime on market soundings should continue to be a safe harbour and should be reviewed regarding bureaucracy limiting its application in practice.
- Non-financial companies should be out of scope of the STOR regime of Art. 16(2).

Overall, Deutsches Aktieninstitut believes that the MAR review is an opportunity to amend and clarify existing provisions of MAR so that issuers' compliance will simplified, the attractiveness of capital markets will be improved and competitive disadvantages of listed companies will be avoided. We are convinced that our proposals will not put at risk the objectives of investor protection and transparency but instead will ensure that European capital markets will better develop and will be more attractive for both companies and investors. Thus, our proposals also are in line with the debate on the Capital Market Union.

1 Scope of MAR

1.1 Spot FX contracts

Q1: Do you consider necessary to extend the scope of MAR to spot FX contracts? Please explain the reasons why the scope should or should not be extended, and whether the same goals could be achieved by changing any other piece of the EU regulatory framework.

Deutsches Aktieninstitut does not believe that it is helpful to extend the scope of MAR to spot FX contracts. It is not a coincidence that FX spot contracts are not a derivative under MiFID as FX spot contracts are generally used as a standard operative payment instrument. We do not see a compelling reason to subdue such a basic mean of operative business to market abuse controls, as it probably would only complicate daily settlements for companies selling products or services abroad.

In general, the inclusion of physical products into financial regulation has also the risk of duplicative regulatory obligations and/or restrictions (e.g. overlap between MAR and BMR, or MAR and REMIT), market infrastructure and dynamics may differ significantly and therefore any inclusion of physical products into the scope of MAR should be considered very carefully.

Overall, we agree with ESMA's arguments against extending the scope of MAR to spot FX contracts (page 15-16) – among them the existence of the global FX code and the necessity of additional documentation and compliance requirements.

Q2: Do you agree with ESMA's preliminary view about the structural changes that would be necessary to apply MAR to spot FX contracts? Please elaborate and indicate if you would consider necessary introducing additional regulatory changes.

1.2 Scope of application of benchmark provisions

Q3: Do you agree with this analysis? Do you think that the difference between the MAR and BMR definitions raises any market abuse risks and if so what changes might be necessary?

Q4: Do you agree that the Article 30 of MAR "Administrative sanctions and other administrative measures" should also make reference to administrators of benchmarks and supervised contributors?

Q5: Do you agree that the Article 23 of MAR "Powers of competent authorities" point (g) should also make reference to administrators of benchmarks and supervised contributors? Do you think that is there any other provision in Article 23 that should be amended to tackle (attempted) manipulation of benchmarks?

Q6: Do you agree that Article 30 of MAR points (e), (f) and (g) should also make reference to submitters within supervised contributors and assessors within administrators of commodity benchmarks? Q7: Do you agree that there is a need to modify the reporting mechanism under Article 5(3) of MAR? Please justify your position.

2 Article 5 of MAR – Buy-back programmes (BBPs)

2.1 Reporting obligations of BBPs

Q7: Do you agree that there is a need to modify the reporting mechanism under Article 5(3) of MAR? Please justify your position.

Yes, we think that the current reporting mechanism is burdensome. As ESMA points out, issuers cannot be informed about every trading venue on which their shares are traded.

Q8: If you agree that the reporting mechanism should be modified, do you agree that Option 3 as described is the best way forward? Please justify your position and if you disagree please suggest alternative.

At first glance, it appears to be a practical option to report to the most liquid market according to Art. 26 MiFIR only. However, this would still require issuers to monitor all markets on which its shares are listed and to continuously review the liquidity of those markets. Therefore, Option 3 does not appropriately address the challenges resulting for issuers from a duty to continuously monitor all trading venues where its shares are traded. Also, as the Art. 26 MiFIR reporting requirement (to which Option 3 references) only applies to financial institutions, there does not seem to be a direct synergy of the reporting requirements for non-financial institutions. Therefore, Option 2 (reporting to the NCA of the jurisdiction where the issuer requested or approved admission to trading) is clearly preferable. Option 2 could, like the proposed Option 3, be supplemented by the possibility for other authorities to request the transaction data from the NCA of the jurisdiction where the issuer requested admission to trading (or approved trading).

Additional general remark:

The safe harbour provisions for buyback programs should not be limited in scope as it is currently the case in Art. 5(2) MAR. Rather, the safe harbour should apply to:

- all buybacks of shares permitted under corporate law (see Art. 21 et seq. Directive 2012/30/EU);
- buybacks of debt instruments.

The current distinction between the different purposes of share buy-back programmes is not justified. The market impact of a buy-backs is generally unrelated to the underlying (economic) purpose. In practice, it appears that a number of regulators do not consider the execution of buyback programmes for a purpose permitted under the relevant corporate laws as market abuse if the requirements of the safe harbour provisions are being complied with (as if the buyback was in scope). However, a clarification of that effect would be useful and promote regulatory convergence.

Furthermore, buying back outstanding debt securities that trade significantly below nominal value has proven to be a useful tool to reduce an issuer’s debt burden and to adapt an issuer’s debt exposure to more favourable market conditions when interest levels decline. Therefore, there is an economic need to execute these bond repurchases and it does not seem to be justified from a market integrity perspective not to have a safe harbour for debt buybacks as well. Therefore, we propose to extend the scope of the safe harbour rules for buy-back programmes also to the buy-back of debt instruments.

2.2 Simplification of the reports for BBPs

Q9: Do you agree to remove the obligation for issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR? If not, please explain.

Yes, we agree.

Q10: Do you agree with the list of fields to be reported by the issuers to the NCA? If not, please elaborate.

Q11: Do you agree with ESMA’s preliminary view?

Yes, we agree with ESMA's preliminary view that market participants will find more useful data in aggregated form and not find much value in all the details of the transactions previously reported to the NCAs.

Q12: Would you find more useful other aggregated data related to the BBP and if so what aggregated data? Please elaborate.

3 Article 7 of MAR – Definition of „inside information“

3.1 Effectiveness of the definition of „inside infomation“ in preventing market abuse

Q13: Have market participants experienced any difficulties with identifying what information is inside information and the moment in which information becomes inside information under the current MAR definition?

Yes, **issuers face significant uncertainties** regarding the term “inside information”. The vagueness of the term makes it often close to impossible to determine with reasonable certainty if and at which point of time a piece of information will constitute an inside information. In addition, neither the ECJ’s rulings nor the supervisory practices have led to adequate clarity and/or appropriate guidance for market participants. Rather the opposite is true. Issuers have made the experience that the current definition is prone to an extremely wide interpretation so that reasonable judgement becomes more or less impossible or is even biased in a direction that is inappropriate.

According to Art. 7 MAR, for a non-public information to qualify as inside information, it needs to be specific enough that a reasonable investor would be likely to use it as part of the basis of his or her investment decisions. However, as explained in the attached position paper practice has shown that this definition cannot reliably serve its purposes (1) to narrow the definition to an extent that is practicable for issuers and (2) to enhance legal certainty (for this purpose see recital (18) MAR) for the ex ante judgement of the issuer. Concretely, the term “inside information” needs clarification in three respects:

a. **Reasonable investors** should be understood as rational investors that assess information generally with a view on the (long-term) fundamental value of a financial instrument.

b. It has to be clarified that the reference to a significant effect on the prices of “**related derivative financial instruments**” will only become relevant in connection with transactions in that particular derivative. The price impact on a derivative instrument depends on its structure, particularly the leverage. While it is possible to use inside information relating to the underlying share or bond for transactions in a related derivative instrument, this does not work the other way around. Furthermore, as there is no general transparency of any possible derivative instrument, it is factually impossible for market participants to make that assessment. For issuers, it should be clarified that they do not have to consider inside information with regard to derivatives issued by a third party – since otherwise a monitoring obligation would be imposed on them that would be impossible to be complied with (see below our comment on Art. 17 MAR).

c. **Early stages of protracted processes should not be treated as inside information.** In many cases inside information develops over a period of time, i.e. it occurs in stages of a protracted process. Typical examples of such a protracted process are M&A activities or the issuance of a financial instrument. Having in mind a ruling of the ECJ (Geltl./.Daimler), MAR tried to clarify that not each and every stage of a protracted process can and should be considered as inside information. However, the definition and recitals in MAR relating to protracted processes leave it still unclear in which circumstances an intermediate step can by itself be deemed to constitute inside information. Even worse, issuers feel increased pressure to assume inside information in too early stages of protracted processes. The paper attached therefore makes a concrete proposal how to clarify the definition in order to improve legal certainty and in order to take issuers' day-to-day compliance problems properly into account.

Specific problems with the definition of inside information relating to emission allowances

For gas and power market participants it is still unclear what constitutes "inside information" in relation to emission allowances under the definition of Article 7(1)(c) MAR, which is not already caüptured by the definition of inside information under Article 2(1) REMIT. It is the experience of our members that in practice each potential insider information concerning emission allowances markets as well as concerning gas and power markets is already sufficiently covered and published under REMIT. Also, the REMIT publication is sufficient for the purpose of the MAR disclosure of inside information as Article 2(2) of Implementing Regulation (EU) 2016/1055 recognises it also for the purpose of compliance with the disclosure obligation under Article 17(2) MAR. Nevertheless, wholesale energy market participants (as defined in REMIT) have to comply with the MAR definition at the same time although it does not cover additional price relevant inside information in practice. Therefore, we believe that the current definition of "inside information" in relation to emission allowances of MAR creates an unnecessary additional layer of complexity and legal insecurity for wholesale energy market participants and this without any obvious benefits.

Therefore, we propose to introduce a reference to the definition of inside information of REMIT into the definition of Art. 7(1)(c) MAR to avoid these adverse effects for wholesale energy market participants. This would mean that wholesale energy market participants would have to comply exclusively with the lex specialis REMIT definition of insider information with regard to emission allowances markets. This approach substantially reduces complexity for the real economy.

Furthermore, the thresholds under Article 7(4) and 17(2) MAR for EAMP are set at a rather low level and should be therefore set at plant level but not at group level. Individual companies with emissions far below the threshold often exceed the threshold only at group level. As long as the overall threshold and the single plant threshold are not exceeded cumulatively, companies should be out of scope of the EAMP definition.

Q14: Do market participants consider that the definition of inside information is sufficient for combatting market abuse?

We believe that the definition of inside information is in any case sufficient for combatting market abuse, in particular for preventing insider trading.

Moreover, as pointed out above (see Q 13), the key problem of the definition is rather that it leads to legal uncertainties and results in interpretations that are often too broad. Thus, the question should not be to widen the definition further, but to narrow it to a level that is practicable for issuers. Otherwise, there might also be the risk of an information overflow (increased number of disclosure of inside information) that would reduce the relevance of disclosures for market participants.

Due to the broad definition of inside information, difficulties also arise in relation to an issuer's **disclosure obligations** (Art. 17 MAR). First of all, an obligation to disclose information at an unduly early stage of a protracted process may result. There is the risk to damage the issuer's ability to pursue his objectives (e.g. regarding M&A activities, the issuance of capital and changes in top management positions) in a structured process by being urged to publish sensitive information at an early stage.

Second, the option to delay disclosure of inside information under Art. 17 (4) MAR in these cases is only a suboptimal safeguard for issuers and – as a consequence - exposes the issuer to the uncertainty that he does not have control over the time period during which a delay can be upheld (see Q 25).

Q15: In particular, have market participants identified information that they would consider as inside information, but which is not covered by the current definition of inside information?

No, we have not identified such missing price-relevant information. The current definition is however too vague and must be clarified in a manner that avoids assuming inside information too early (see above).

Q16: Have market participants identified inside information on commodity derivatives which is not included in the current definition of Article 7(1)(b) of MAR?

As mentioned above in our response to Q13, market participants have made the experience that all relevant insider information concerning emission allowances markets as well as concerning gas and power markets is already sufficiently covered and published under REMIT. MAR should rather make reference to REMIT in order to avoid unnecessary complexity.

Q17: What is an appropriate balance between the scope of inside information relating to commodity derivatives and allowing commodity producers to undertake hedging transactions on the basis of that information, to enable them to carry out their commercial activities and to support the effective functioning of the market?

We believe that commodity derivatives must be treated separately. There have been good specific reasons to include the forth element of "disclosability" to the definition of inside information in commodity markets, namly that the relevant information must be disclosable. This element has to be retained.

Commodity market participants must be able to hedge their production against these commodity price risks. It is therefore crucial that there is no general disclosure requirement with regard to commodity markets. The publication of sensitive information relating to expected or anticipated production or the use of certain commodities should be avoided as this would restrict the possibilities of hedging for commodity market participants. Hedging is essential for the risk management of those participants and not only protects their existence, but also minimizes the risks to the entire economy.

Q18: As of today, does the current definition of Article 7(1)(b) of MAR allow commodity producers to hedge their commercial activities? In this respect, please provide information on hedging difficulties encountered.

We are not aware of material hedging difficulties and therefoe we don't see a need to change the current definition of Article 7(1)(b) of MAR.

Q19:Please provide your views on whether the general definition of inside information of Article 7(1)(a) of MAR could be used for commodity derivatives. In such case, would safeguards enabling commodity producers to undertake hedging transactions based on proprietary inside information related to their commercial activities be needed? Which types of safeguards would you envisage?

We don't agree that the general definition of inside information of Article 7(1)(a) of MAR should be used for commodity derivatives for the same reasons as explained in our response to Q17.

Q20: What changes could be made to include other cases of front running?

Q21: Do you consider that specific conditions should be added in MAR to cover frontrunning on financial instruments which have an illiquid market?

Q22: What market abuse and/or conduct risks could arise from pre-hedging behaviours and what systems and controls do firms have in place to address those risks? What measures could be used in MAR or other legislation to address those risks?

Q23: What benefits do pre-hedging behaviours provide to firms, clients and to the functioning of the market?

Q24: What financial instruments are subject to pre-hedging behaviours and why?

4 Article 17 MAR – Delayed disclosure of inside information

4.1 Effectiveness of the mechanism to delay the disclosure of inside infor mation

Q25: Please provide your views on the functioning of the conditions to delay disclosure of inside information and on whether they enable issuers to delay disclosure of inside information where necessary.

As the EU legislator has opted for a rather broad definition of inside information (covering both market abuse prohibitions and the duty of disclosure), the delay should be regarded as the natural (and necessary) counterweight to protect the legitimate interests of the issuer against being impaired by premature disclosure.

In other words: The option to delay the disclosure of inside information has been introduced in order to **protect legitimate interests of issuers** and to avoid negative effects of the disclosure obligation. However, the requirements for a delayed disclosure of inside information question the usability of the “delay option”. The review should thus make delaying the publication safe(r) for issuers both in legal terms and in application in practice. This needs to be done irrespective of the need for more certainty on the definition of inside information (see Q 13).

As laid down in more detail in the position paper attached Art. 17 should be amended in several respects for that reason.

First of all, **it has to be clarified for certain typical situations that there is a legitimate interest of the issuer and that this legitimate interest prevails over the interest of market transparency**. More specifically, it is necessary to enable issuers an orderly and structured capital markets communication. There is a conflict between the periodic financial reporting under the Transparency Directive and the issuer’s “ad hoc” disclosure obligation under Art. 17 MAR. Issuers might be forced to prematurely publish fractions of financial information stemming from a upcoming periodic financial report (giving the full picture of the issuer’s financial situation and performance) even where the scheduled time of publication of such periodic financial report is close Also, it should be clarified that an issuer with a two tier board structure must be able to delay disclosure of inside information where the supervisory board still has to endorse a management board decision. That includes the need for a supervisory board to have sufficient time to assess and discuss the subject of its proposed resolution, including taking appropriate advice where required. MAR should be neutral regarding the corporate governance structures of member states. That includes allowing a supervisory board taking the time it reasonably needs to adopt a resolution after due and diligent consideration of the matter.

Second, in practice no issuer can guarantee that he is able to **ensure the confidentiality** of the information. He can only implement appropriate compliance structures to educate insiders on their duties and to keep confidentiality in his own area of responsibility.

Third, the key problem is that the issuer has to **react to the emergence of rumours** according to Art 17(7) MAR. He must immediately disclose the inside information under delay, if that rumour indicates that confidentiality is no longer ensured. Unfortunately, MAR sets out only low conditions for this kind of forced disclosure: Firstly, the rumour does not have to come from the issuer's sphere, i.e. it does not have to fall in his area of responsibility. Secondly, and even worse, it is unclear when a rumour has to be regarded as sufficiently precise to indicate a breach of confidentiality. As a result, issuers always run the risk of being forced to make public inside information the disclosure of which was legitimately delayed when a rumour arises. The provision thus invites to unfair spreading of rumours, especially in sensitive situations.

In addition, the early disclosure of an existentially important transaction for an issuer may have the consequence of undermining the transaction inappropriately. In this case, the issuer's interest to ensure its financial viability or to prepare significant strategic changes should have priority over transparency at any cost (similarly to recital 50 of MAR). The issuer's investors should have a corresponding interest in the delay. Otherwise they may suffer significant economic losses or – in the case of a necessary re-financing of the issuer failing - may even jeopardize their Investment.

Q26: Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of the procedure under Article 17(4) of MAR.

Please refer to Q 25.

Q27: Please provide your view on the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information. What would the impact be of introducing a systems and controls requirement for issuers?

Issuers are well capable of handling compliance processes to decide on the delay of an inside information. We therefore oppose additional obligations for issuers to establish and maintain effective arrangements, systems and procedures for the identification, handling and disclosure of inside information. The decision how to comply with MAR obligations should thus be left to the issuer.

In addition, the reference to Article 16 MAR is misleading. Art. 16 was set up for a different purpose i.e. detecting and reporting suspicious transactions, through professionals (i.e. market operators, investment firms and persons professionally arranging or executing transactions) involved in the trading of financial instruments within the framework of their “professional activity”. This is a role in trading activities that is entirely different from that of an issuer that is not itself involved in the trading of his securities on a trading venue. Therefore, we oppose the idea that the scope of Art. 16 (2) MAR could be extended to issuers in general outside the financial sector and for the purpose of compliance with Art. 17 MAR.

Additional remark on Art. 16 (2)

Notwithstanding the discussion above, we would like to point to an issue regarding Art. 16 (2) MAR itself.

Due to a broad interpretation in a Q&A of ESMA (Q6.1) and differently from the previous regime, the abovementioned rules are applicable also for non-financial counterparties (NFC) professionally arranging or executing transactions in financial instruments. The ESMA Q&A brings into scope non-financial firms whose main activities however do not consist in arranging or executing financial transactions on a professional basis. NFC’s engage in financial transactions on an ancillary basis only, with the main objective to hedge risks related to their commercial or treasury financing activities. Hence, decisions to use financial instruments are taken based on operative requirements, within the framework of internal guidelines, and not with the aim to chase opportunities in financial markets. Moreover, NFC’s mostly act as clients of the financial sector in the respective transactions, not as providers or market makers. Therefore, NFCs should not have to comply with the obligation of Art. 16 MAR. From our perspective the review of the MAR should clarify the scope of Art. 16 MAR by excluding non-financial firms. It has never been the political intention to bring the “real economy” into the scope of that regime. Rather, it appears to be a mixture of an ambiguous wording (such as the reference to a trading desk for which there is no definition) and a far-reaching interpretation of ESMA that resulted in the current situation.

Q28: Please provide examples of cases in which the identification of when an information became “inside information” was problematic.

As mentioned in Q 13, the interplay between intermediate steps in a protracted process and treatment of future circumstances as inside information (Article 7(2) and (3) MAR) seems to lead to uncertainty as to when the current stage of a protracted process amounts to inside information.

Article 7(2) MAR provides that a future event could constitute inside information if it may reasonably be expected to occur. According to the ECJ ruling in the Geltl ./. Daimler case this requires a realistic prospect that the future event will come into existence (item 49).

Article 7(3) MAR deems an intermediate step in a protracted process to be inside information if, by itself, it satisfies the criteria of inside information.

Most future events are developing in a protracted process with multiple intermediate steps. However, there seems to be a trend to treat intermediate steps as inside information even where their potential price impact derives from the significance or magnitude of the future event they are to bring about and irrespective of the fact that the future event has not yet reached a “realistic prospect” to actually occur. If that approach is taken the explicit determination in MAR that future events only constitute inside information where they have a “realistic prospect” to occur would be ignored. As a result, issuers are urged to either disclosure the protracted process that is still in early stages. This increases the risk of that process (e.g. negotiations of a strategic transactions or a financial restructuring) being jeopardized or at least negatively affected. Alternatively, issuers would have to delay disclosure – at the expense of implementing cumbersome documentation and monitoring requirements and, even worse, running the risk of being urged to premature disclosure if “rumours” occur, even if those rumours may just be speculation without any factual background.

From our perspective this kind of interpretation needs to be avoided by clarifying MAR. In the position paper attached we have thus made concrete proposals how the definition of inside information regarding protracted processes could be amended and clarified. Please refer to the paper attached.

Q29: Please provide your views on the notification to NCAs of the delay of disclosure of inside information, in those cases in which the relevant information loses its inside nature following the decision to delay the disclosure.

In the light of preventing market abuse, there is no need to inform NCAs about information which has lost its inside nature. This would impose more reporting duties on issuers without added value and also the NCAs would receive too much information.

The non-disclosed information has never reached the public. The underlying event does not take place and will not have an effect on the share price so there is no potential risk of market abuse.

4.2 Issues specifially related to credit institutions or financial institutions

Q30: Please provide your views on whether Article 17(5) of MAR has to be made more explicit to include the case of a listed issuer, which is not a credit or financial institution, but which is controlling, directly or indirectly, a listed or non-listed credit or financial institution.

Q31: Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of Article 17(5) of MAR.

Q32: Please indicate whether you have found difficulties in the assessment of the obligation to disclose a piece of inside information under Article 17 MAR when analysed together with other obligations arising from CRD, CRR or BRRD. Please provide specific examples.

5 Art. 11 MAR – Market Sounding

5.1 Enforceability of market soundings

Q33: Do you agree with the proposed amendments to Article 11 of MAR?

We have general remarks on Art. 11:

The market sounding procedures set out in Art. 11 as well as the RTS and ITS adopted thereunder should (continue to) be a safe harbour provision and not a strict obligation. The legal nature as a safe harbour (conceptually comparable to Art. 5 MAR relating to buyback programs and stabilisation) clearly follows from recital 35 and Article 11 (4) as well as the general notion that market sounding is a "highly valuable tool" and "important for the proper functioning of financial markets" (Recital 32 MAR). Therefore it has been the intention of the legislator to facilitate market sounding and not to complicate it.

The formalities of market sounding should be streamlined, specifically:

- Doing market sounding on a recorded line should continue to not be a strict requirement.
- The requirement to agree on minutes of a market sounding should be abolished; it appears sufficient to minute that the market sounding recipient has been advised that inside information may be disclosed and what legal and regulatory duties and sanctions apply in that regard.
- Cleansing "by lapse of time" should be allowed.

5.2 Definition of market sounding and difference with other forms of interactions with potential counterparties

Q34: Do you think that some limitation to the definition of market sounding should be introduced (e.g. excluding certain categories of transactions) or that additional clarification on the scope of the definition of market sounding should be provided?

Q35: What are in your view the stages of the interaction between DMPs and potential investors, from the initial contact to the execution of the transaction, that should be covered by the definition of market soundings?

Based on the existing definition the market has a good understanding of the stages of interaction which fall within the definition of a market sounding. Therefore, further clarification does not seem to be required. In particular, market sounding should continue to capture where a seller seeks to gauge interest about the terms of a potential transaction. In particular, communication unrelated to a specific transaction should not be captured. This has also – rightly – been indicated in Recital 19 of MAR stating that MAR is not intended to prohibit discussions of a general nature regarding the business and market developments between shareholders and management concerning an issuer. The same should apply to communication of a similar nature with investors generally. Also communication of information after the announcement of a transaction may, if it includes the disclosure of inside information, be sufficiently covered by the general regime under Article 10 MAR.

Q36: Do you think that the reference to "prior to the announcement of a transaction" in the definition of market sounding is appropriate or whether it should be amended to cover also those communications of information not followed by any specific announcement?

5.3 Simplification of the market sounding procedures and requirements

Q37: Can you provide information on situations where the market soundings regime has proven to be of difficult application by DMPs or persons receiving the market sounding? Could you please elaborate?

A significant part of the institutional investor community perceives the Art. 11 MAR regime as overly cumbersome and rejects to participate in market sounding due to the overly formalistic procedural requirements. For that reason, market sounding is becoming increasingly difficult. It appears sufficient to limit these to a general advice that the information to be disclosed may constitute inside information and the legal obligations and sanctions resulting therefrom as under Article 18(2) MAR.

Q38: Can you provide your views on how to simplify or improve the market sounding procedure and requirements while ensuring an adequate level of audit trail of the conveyed information (in relation to both the DMPs and the persons receiving the market sounding)?

See above.

6 Article 18 MAR – Insider list

6.1 Usefulness of insider lists

Q39: Do you agree with ESMA's preliminary view on the usefulness of insider list? If not, please elaborate.

We do not see the right balance between the effort to manage insider lists by the issuers and their usefulness for NCAs. Especially to gather the amount of the specific data to be included into insider lists according to Commission Implementing Regulation (EU) 2016/347 is not only very burdensome for issuers. It allso appears disproportionate and an unjustified intrusion into the privacy of the individuals entered into the insider list to require by default the entry of personal data home addresses, private phone numbers and private email addresses. This information is simply not necessary to identify the relevant individuals. In the case of an actual suspicion NCAs may easily ask the person obliged to draw up an insider list for more specific data.

Therefore we ask for a reduction of this data request. Insider lists are still useful, even if they do not include home addresses, private phone numbers, private email addresses, and possibly even business phone numbers.

6.2 Content of the insider lists

Q40: Do you consider that the insider list regime should be amended to make it more effective? Please elaborate.

It should be amended in the above mentioned way (see Q 39) that volume of **data requested should be reduced.**

Furthermore, setting up **preliminary lists** (so called shadow lists) seems to be common and useful compliance practice. Therefore, it would be helpful for issuers if the existence of these preliminary lists were endorsed by ESMA. By acknowledging the instrument of such a preliminary list ESMA would support issuers. Issuers then would have the possibility to refer to ESMA when they gather data of their employees for the preliminary list.

Specific issue regarding insider lists with respect to Emission allowances market participants

In addition, currently the **MAR EAMP** thresholds defined as per Art. 17(2) para. 2 are set at a rather low level and the compliance burden with keeping an updated insider list for EAMPs is unduly high. Please also see our response to question 13.

Q41: What changes and what systems and controls would issuers need to put in place in order to be able to provide NCAs, at their request, the insider list with the individuals who had actually accessed the inside information within a short time period?

Q42: What are your views about expanding the scope of Article 18(1) of MAR (i.e. drawing up and maintain the insider list) to include any person performing tasks through which they have access to inside information, irrespective of the fact that they act on behalf or on account of the issuer? Please identify any other cases that you consider appropriate.

We don't see a need to expand the scope of Art. 18(1). ESMA points out auditors and notaries in the CP. Auditors and notaries are usually mandated by an issuer where they have access to inside information. Therefore, they should be in scope of Art. 18 MAR already.

Q43: Do you consider useful maintaining the permanent insider section? If yes, please elaborate on your reasons for using the permanent insider section and who should be included in that section in your opinion.

As ESMA rightly points out there is hardly anyone who has access "at all times to all inside information within the issuer" and therefore would qualify as a permanent insider. Accordingly the permanent section as currently defined appears somwhat redundant. However, even if the definition is narrow it can be used for some persons. We would therefore not advocate to drop the permanent section. Furthermore, it is worth to note that issuers have learnt to comply with the new environment that only allows for project-related lists which also have a number of positive aspects regarding compliance duties (in particular, it is cleary documented when a certain person has access to a specific inside information). Project-related lists thus should be kept and we do not advocate to return to the former regime under the MAD.

This is however not to say, that we would oppose allowing a certain flexibility for issuers how to cope with the fact that there might be persons that do not have access to all inside information but due to the nature of their function or position, might have regular access to inside information.

Q44: Do you agree with ESMA's preliminary view?

Yes, we agree with ESMA's preliminary view. BaFin has already adopted such a practice that has proven to be very sensible and useful, see BaFin's FAQ on Article 18 MAR, response to question II.3.

Q45: Do you have any other suggestion on the insider lists that would support more efficiently their objectives while reducing the administrative work they entail? If yes, please elaborate how those changes could contribute to that purpose.

7 Article 19 MAR – Managers' transactions

7.1 Appropriateness of thresholds and transactions to be notified once the threshold is reached

Q46: Does the minimum reporting threshold have to be increased from Euro 5,000? If so, what threshold would ensure an appropriate balance between transparency to the market, preventing market abuse and the reporting burden on issuers, PDMRs, and closely associated persons?

The de minimis threshold should generally be raised to EUR 20,000. The number of transactions notified to the NCAs has significantly increased under MAR compared to the previous regime. Raising the threshold would therefore prevent an overflow of information. As ESMA mentions, a number of NCAs has already used the option to raise the threshold. Raising the threshold generally would alleviate administrative burdens for both issuers and NCAs.

In addition, MAR should provide for the option of NCAs to further increase the threshold, e.g. to EUR 50,000.

General Remark on Managers' Transactions:

Notwithstanding the threshold issue, that review should also be used to concentrate the managers' transaction regime on transactions that really have signalling value for the market.

More specifically, the EU Commission should abolish the duty to inform about **donations and inheritances,** as they do not have any significance for the estimation of the manager on how the share price will develop. Similarly, automatic allocations under management incentive programs and transactions by a portfolio manager acting independently from the PDMR should be out of scope because in all these cases it is not the PDMR that takes an investment decision so that these transactions necessarily cannot have any "signalling" effect. Disclosing them as "managers' transactions" may even mislead the market.

Second, issuers' have made the experience that notifications required under MAR are overloaded with details so that unnecessary bureaucracy is created and investors tend to be confused by the practice of notifications. There are at least two aspects that need to be tackled where ordinary trading practices leads to overwhelming notification requirements that have no added value for the market: (1) The execution of a sale or purchase of shares is typically done "at best price" by a bank for the PDMR and, for this reason, is split across various trading venues (depending on the best execution policy of banks holding the accounts for the PDMR). This kind of splitting makes necessary a number of separate notifications, although being just one order by the PDMR to the bank (one for each venue). (2) Also, if a transaction is executed at one single day on one single trading venue, but is split into a number of sub-transactions (which is also standard practice of banks to ensure market-sensitive trading), the PDMR has to notify a long list of single trades which also makes the notification burdensome and confuses the market. From our point of view the MAR review should also take into consideration these two problems. A way forward could be, e.g., to allow the PDMR to aggregate transactions within a certain time span or executed under one joint order, so that the market gets to know in one notification the aggregate volume of transactions and e.g. the average price.

Third, we would also like to remind on the fact that it is of high importance to fix the issue of identical deadlines for both the notification of the PDMR to the issuers and the issuer’s notification to the market. For issuers this regulation is highly unfavourable and, thus ,not acceptable since it puts them into an illegal position without any own fault if the PDMR notifies only at the very end of the 3 days deadline. We, therefore, urge the legislator to implement fast the agreement reached in the so-called SME listing package which would give the issuer 2 days time to comply with its own notification requirement after the issuers has received the notification from the PDMR.

Furthermore, it is a constant compliance issue that issuers have to draw up a **list of all persons discharging managerial responibilities <u>and</u> persons closely associated** to them (Art. 19 (5) MAR). Especially the list of closely associated persons is quite burdensome as e.g. the supervisory board of a DAX company can consist of 20 persons, partly being domicled abroad. It is not only very difficult to fulfil this duty. Compiling the list also runs counter the political the objective to protect the privacy of individuals. From our perspective this objective should prevail, which is even more true as we do not have the impression that the NCAs are interestes in the lists compiled. Hence, this general duty should be abolished. It should be enough that the issuers has to draw up such a list when the NCA asks for it in a case of suspicion.

Q47: Should NCAs still have the option to keep a higher threshold? In that case, should the optional threshold be higher than Euro 20,000? If so, please describe the criteria to be used to set the higher optional threshold (by way of example, the liquidity of the financial instrument, or the average compensation received by the managers).

Please refer to Q 46.

Q48: Did you identify alternative criteria on which the reporting threshold could be based? Please explain why.

Q49: On the application of this provision for EAMPs: have issues or difficulties been experienced?

Q50: Did you identify alternative criteria on which the subsequent notifications could be based? Please explain why.

Q51: Do you consider that the 20% threshold included in Article 19(1a)(a) and (b) is appropriate? If not, please explain the reason why and provide examples in which the 20% threshold is not effective.

Yes, we consider that the 20% threshold included in Article 19(1a)(a) and (b) is appropriate.

Q52: Have you identified any possible alternative system to set the threshold in relation to managers' transactions where the issuer's shares or debt instruments form part of a collective investment undertaking or provide exposure to a portfolio of assets?

7.2 Appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Art. 19 (11)

Q53: Did you identify elements of Article 19 (11) of MAR which in your view could be amended? If yes, why? Have you identified alternatives to the closed period?

Transactions where the PDMR does not take any investment decision or exercises any discretion on the decision and execution of any transaction, such as those executed by a portfolio manager independently, should be excluded from the scope of Art. 19(11) MAR since they necessarily cannot bear the risk of insider dealing. The same should apply for transactions under employee participation schemes.

Q54: Market participants are requested to indicate if the current framework to identify the closed period is working well or if clarifications are sought.

We think that all the clarifications provided in the ESMA’s Q&A are sufficient.

Q55: Please provide your views on extending the requirement of Article 19 (11) to (i) issuers, and to (ii) persons closely associated with PDMRs. Please indicate

which would be the impact on issuers and persona closely associated with PDMRs, including any benefits and downsides.

Closed periods should not be extended to the issuer and/or to closely associated persons; the protection provided by Art. 7, 8 and 9 MAR is sufficient.

ESMA rightly points out the downsides of such an extension. The PDMR would have the duty to keep an eye on his/her closely associated persons to keep them informed about the closed period. For the issuers such a closed period would raise problems by e.g. ongoing processes on refinancing etc.

In addition, closely associated persons would themselves be overloaded with compliance duties that are not necessary against the objective of the closed periods and having in mind the general obligations of the MAR.

7.3 Exemptions to the application of the closed period requirement

Q56: Please provide your views on the extension of the immediate sale provided by Article 19 (12)(a) to financial instruments other than shares. Please explain which financial instruments should be included and why.

We would welcome an extension in Art. 19 (12) (a) to other financial instruments than shares. A differentiation between types of financial instruments does not seem justified.

Q57: Please provide your views on whether, in addition to the criteria in Article 19 (12) (a) and (b), other criteria resulting in further cases of exemption from the closed period **obligation could be considered.**

An exemption should be created mirroring the legitimate behaviours defined in in MAR Article 9(3).

8 Sanctions

We still believe that sanctions laid out in Art. 30 of MAR are too high and are out of balance – especially when it comes to formal “mistakes” such as anfringement of the duty to diclose managers’ transactions ot mistakes regarding drawing up the insider lists. We believe this is out of proportion regarding the factual offence and we urgently the EU Commission to review this system of sanctions.

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Review of EU Market Abuse Regulation – Main Issues from the Perspective of Listed Companies

29 November 2019

I. Background and key areas of concern after three years of being in force

According to Article 38 MAR the EU Commission has to report on several elements of the EU Market Abuse Regulation (MAR) which will supported by Technical Advice to be issued by ESMA. Notwithstanding the formal consultation process on this advice, this paper summarises listed companies' key issues of concern with both the definition of inside information in Article 7 MAR and the obligation to publish inside information according to Article 17 MAR.

It aims at drawing to the legislator's attention the experience that the MAR has created an environment where issuers are faced with a high level of uncertainty in the application of MAR. More specifically, it is the issuers' view that too much information is published too early. These problems are aggravated by the fact that the ECJ rulings in *Geltl* and *Lafonta* are interpreted in a way that tends to inappropriately widen the scope of inside information and thus makes it more difficult to define its limits.

Therefore, we are convinced that there is a need to improve legal certainty. More specifically, the term "inside information" should be clarified (and narrowed) and disclosures by issuers should be limited to cases where disclosure creates a clear benefit for the functioning of the markets.

This appears to us the key issue relevant to better balance MAR; a number of topics are closely connected and should also be resolved in a broader approach:

- **Uncertainty on the term "inside information":** Issuers face significant uncertainties on the term "inside information". The vagueness of the term makes it often close to impossible to determine with reasonable certainty if and at which point of time a piece of information will constitute inside information. In addition, neither the ECJ's rulings nor the supervisory practices have brought adequate clarity and/or appropriate guidance for market participants. Rather the opposite is true as they lead to inadequately broad interpretations. As a consequence, issuers are not only under the constant risk of being forced to premature disclosures. The broad interpretation also hampers issuers' ability to raise capital, to prepare and execute M&A transactions, causes difficulties with employee participation schemes and generally increases compliance duties to inappropriate levels.

- **Early stages of protracted processes should not be treated as inside information:** Legal uncertainty and the risk of an overly broad interpretation are in particularly relevant for protracted processes, i.e. in processes that occur in stages. Though the MAR 2014 tried to clarify the definition in this respect, issuers' experiences are negative. Early stages of protracted processes are now under the constant risk of falling under the definition of inside information from a purely legal perspective though from a market view this does not appear appropriate as it may lead to premature disclosure that may put the entire process at stake.

- **Protection of reasonable interests of issuers by the option to delay disclosure is undermined:** The option to delay the disclosure of inside information has been introduced in order to protect reasonable interests of issuers and to mitigate effects of the disclosure obligation. It also protects the market from being misled by premature information. Unfortunately, the requirement of “legitimate interests” is interpreted narrowly by regulators. Moreover, the newly introduced obligation to respond to market rumours undermines this option for issuers and puts at risk issuers’ reasonable interests. The review should thus make delaying the publication safe(r) for issuers both in legal terms and in application in practice. This needs to be done irrespective of the need for more certainty on the definition of inside information.

Overall, the review of the MAR offers the unique opportunity to redraft certain elements of the MAR in order to better balance the issuers’ interest in keeping sensitive information confidential and being able to comply with the MAR in practice against the investors’ interest in fair market practices and transparency.

This is not only necessary having in mind that there is the risk of very significant sanctions if an issuer is mistaken in its legal judgment. It is also necessary to avoid negative economic impact for listed companies. For example, issuers frequently report that they are already now limited in their M&A activities compared to non-listed companies because MAR duties might lead to premature disclosures.

The remainder of this paper outlines the issues in more detail and offers solutions how the MAR should be amended in order to deliver more clarity and adequate solutions for the practice.

Concretely, the legislator should amend Article 7 and Article 17 MAR and improve the respective recitals so that

- the overly broad interpretations of inside information will be limited/reduced,
- protracted processes will be treated in a more appropriate manner (i.e. early stages of protracted processes are taken out of scope of the definition inside information) and
- the possibility to delay the disclosure of inside information will be protected better against abusive rumour spreading.

II. Clarification of the definition of inside information in Article 7 MAR

1) Legal uncertainty on the definition of inside information

<u>a) Main issue</u>

Though the term inside information is pivotal under MAR, it is vague and needs to be interpreted by market participants. To a certain degree, the vagueness is unavoidable. Thus, a certain degree of legal judgement and judgement from a market perspective will always be necessary.

However, issuers have made the experience that the current definition is too open for an extremely wide interpretation.

According to Article 7 MAR for a non-public information to qualify as inside information, it needs to be *specific enough* that a *reasonable investor would expect significant price effects* on the financial instrument(s) in question. However, practice has shown that this definition cannot reliably serve its purposes (1) to narrow the definition to an extent that is practicable for issuers and (2) to enhance legal certainty (for this purpose see recital (18)) for the ex ante judgement of the issuer).

b) Proposed amendments

In our view, the term "inside information" should be clarified in two respects:

aa) Reasonable investors should be understood as rational investors that assess information generally with a view on the (long-term) fundamental value of a financial instrument. At least in the German market there has been an intensive discussion whether or not reasonable investors have to anticipate irrational market reactions or even if they themselves act (partly) in an irrational manner. If the reasonable investor test was interpreted that way, a meaningful ex ante judgement of market reactions/price effects of a piece of information would become impossible.

It should therefore be clarified that the issuer can assume investors acting rationally and adjusting to changes in the fundamental value of the issuer.

To achieve this, we believe it is sufficient to amend recital (14):

Recital (14): *Reasonable investors base their investment decisions on information already available to them, that is to say, on ex ante available information. Therefore, the question whether, in making an investment decision, a reasonable investor would be likely to take into account a particular piece of information should be appraised on the basis of the ex ante available information.* ***Reasonable investors are expected to act in a rational manner: As a rule investors assess information with the view to changes of the fundamental value of a financial instrument.*** *Such an assessment has to take into consideration the anticipated impact of the information in light of the totality of the related issuer's activity, the reliability of the source of information and any other market variables likely to affect the financial instruments, the related spot commodity contracts, or the auctioned products based on the emission allowances in the given circumstances.*

bb) Clarification that issuers only have to evaluate effects on own financial instruments. Currently, it is not clear whether, when assessing their disclosure obligation under Article 17 MAR, issuers would also have to evaluate price effects an information might have on (derivative) instruments that are issued by third parties. Taken literally Article 7 MAR could be read as if even information that has no price effect on the (underlying) instrument of the issuer (i.e. share or bond) could qualify as inside information if it has only an effect "the prices of related derivative financial instruments" (see Article 7(1) MAR, last sentence). Indeed, there is already commentary in that direction picking up the ECJ's ruling in the *Lafonta* case.

However, already for practical reasons issuers cannot include financial instruments issued by third parties in their ex ante judgement. Furthermore, the benchmark for evaluating information would become extremely vague and thus meaningless as the price impact of any information on a derivative will pretty much depend on its leverage – which is arbitrary and may be fully unrelated to the issuer.

To solve this problem Article 7(1) MAR could be amended and a new Article 7(4a) could be integrated as follows:

Art. 7(1): *For the purposes of this Regulation, inside information shall comprise the following types of information:*

(a) information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, 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 instrument.~~***

Art. 7(4a): ***For the purpose of Article 17 and Article 18*** *[if necessary add additional issuers' duties]* ***of this Regulation, the term inside information shall only comprise of inside information, that, if made public, would be likely to have a significant effect on the prices of financial instruments issued by that issuer.***

This clarification would not mean that derivative financial instruments are excluded from the scope of the prohibition of insider dealing. It would only mean, that issuers can limit their ex ante judgement for reasons of disclosure to their own financial instruments and that their compliance duties solely relate to their own financial instruments.

Excluding derivatives from the definition will not result in a limitation of investor protection since any financial instruments tradable on a trading venue are already captured by the "base case" definition that will remain unaffected of the proposed change.

2) Early stages of protracted processes should not be treated as inside information

a) Main issue

In many cases inside information develops over a period of time, i.e. it occurs in stages of a protracted process. Typical examples of such a protracted process are M&A activities or the issuance of a financial instrument. Having in mind the ECJ ruling re *Geltl./.Daimler*, MAR tried to clarify in recital (16) and Article 7(3) MAR that not any stage of a protracted process can and should be considered as inside information. However, the newly introduced definition and recitals around protracted processes leave it still unclear in which circumstances an intermediate step can by itself deemed to be inside information.

Even worse, issuers feel increased pressure to assume inside information in too early stages of protracted processes and, hence, may be forced to premature disclosure.

b) Proposed amendments

From our perspective, some minor amendments to recitals (16) and (17) and Article 7 MAR should sufficiently address that problem.

Recital (16): *Where inside information concerns a process which occurs in stages, each stage of the process as well as the overall process could constitute inside information. An intermediate step in a protracted process may in itself constitute a set of circumstances or an event which exists or where there is a realistic prospect that they will come into existence or occur, on the basis of an overall assessment of the factors existing at the relevant time. However, that notion should not be interpreted as meaning that the magnitude of the effect of that set of circumstances or that event on the prices of the financial instruments concerned must be taken into consideration.*

Intermediate steps usually have to be evaluated in conjunction with the potential final stage in a protracted process. If the final stage cannot be reasonably expected to occur, the intermediate step is typically not to be regarded as an inside information. Therefore, *an intermediate step should* ***only*** *be deemed to* *constitute inside information if it, by itself, **i.e. [and] irrespective of a final stage, satisfies** ~~**meets**~~ the criteria laid down in this Regulation for inside information.*

Recital (17): *Information which relates to an event or set of circumstances which is an intermediate step in a protracted process **which should be regarded in conjunction with the final stage** may relate, for example, to the state of contract negotiations, terms provisionally agreed in contract negotiations, the possibility of the placement of financial instruments, conditions under which financial instruments will be marketed, provisional terms for the placement of financial instruments, or the consideration of the inclusion of a financial instrument in a major index or the deletion of a financial instrument from such an index.*

These clarifications should also be reflected in Article 7(3) MAR:

Art. 7(3): *An intermediate step in a protracted process shall **only** be deemed to be inside information if it by itself, **i.e. irrespective of the final stage,** satisfies the criteria of inside information as referred to in this Article.*

The amendments to recital (16) and Article 7(3) MAR clarify that an intermediate step should *by itself* qualify as inside information in exceptional circumstances only. The amendment to recital (17) makes clearer that the examples mentioned here illustrate the standard situation where an intermediate step will not qualify as inside information by itself, i.e. irrespective of the final stage.

III. Public disclosure of insider information (Article 17 MAR)

1) Respect the specifics of the two-tier board system

a) Main issue

Furthermore, the MAR provisions should better reflect realities of the two-tier board system. Issuers frequently face the problem that it remains unclear that they can delay the disclosure of inside information on the grounds that a decision of the management board is not yet approved or even not yet discussed by the supervisory board. The MAR and even more the existing ESMA guidelines on legitimate interests set tighter restrictions than appropriate.

b) Proposed amendment

The problem can easily be addressed in clarifying in recital (50) that a delay should always be possible in a two-tier board system in order to protect the legitimate interest of the issuer to respect the typical (and legally defined) decision processes of a two-tier board system.

Recital (50): *For the purposes of applying the requirements relating to public disclosure of inside information and delaying such public disclosure, as provided for in this Regulation, legitimate interests may, in particular, relate to the following non-exhaustive circumstances: (a) […] (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 those bodies,* ~~***provided that public disclosure of the information before such approval, together with the simultaneous announcement that the approval remains pending, would jeopardise the correct assessment of the information by the public.***~~

2) Ease orderly periodic capital market communication

a) Main issue

There is a conflict between MAR and the regular financial reporting under the Transparency Directive that results in an information of investors at predictable points of time. Issuers might be forced to publish information relating to periodic financial reports under Article 17 MAR even though the scheduled time of publication of periodic financial reporting is close. Although issuers have in principle the possibility to delay that the disclosure of inside information it is however, unclear, whether the condition of Article 17(4) MAR can be applied to such situations. Furthermore, rumours will put at risk the delay and, thus, the orderly information of markets.

b) Proposed amendment

From our point of view, the legislator should in general give periodic and comprehensive information priority over immediate disclosure of single pieces of information relating to that periodic information.

This priority could be ensured by clarifying that the two major conditions for a delay are assumed to apply close to the date of announced periodic information. Article 17(4a) MAR could be drafted as follows:

Art. 17(4a): ***It will be regarded as a legitimate interest of the issuer and as not misleading the public if the inside information is part of an interim financial report or a year-end report within the meaning of Article 19(11) or of any other periodic financial report that the issuer has announced, or is due, to publish within 30 calendar days.***

3) Delayed disclosure (Article 17(4) MAR)

a) Main issue

The option to delay the disclosure of inside information has been introduced in order to protect reasonable interests of issuers and to mitigate effects of the disclosure obligation. However, rather high hurdles are set for a delay of disclosure of inside information. In particular, in practice no issuer can guarantee that he *is able to ensure* the confidentiality of the information. He can only implement appropriate compliance structures to educate insiders on their duties and to keep confidentiality in his own area of responsibility.

b) Proposed amendments

Recital 49: *The public disclosure of inside information by an issuer is essential to avoid insider dealing and ensure that investors are not misled. Issuers should therefore be required to inform the public as soon as possible of inside information. However that obligation may, under special circumstances, prejudice the legitimate interests of the issuer. In such circumstances, delayed disclosure should be permitted provided that the delay would not be likely to mislead the public and the issuer is able to ensure the confidentiality of the information* ***within its area of responsibility****. The issuer is only under an obligation to disclose inside information if it has requested or approved admission of the financial instrument to trading.*

Art. 17(4): *4. An issuer or an emission allowance market participant, may, on its own responsibility, delay disclosure to the public of inside information provided that all of the following conditions are met:*

> *(a) immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant;*
>
> *(b) delay of disclosure is not likely to mislead the public;*
>
> *(c) the issuer or emission allowance market participant is able to ensure the confidentiality of that information* ***in its own area of responsibility****.*

[…]

4) Rumours (Article 17(7) MAR)

a) Main issues

According to Article 17(7) MAR issuers may have to react to rumours with immediate disclosure of inside information under delay, if that rumour indicates that confidentiality is no longer ensured. Unfortunately, the MAR sets out only low conditions for this kind of forced disclosure.

First, the leak of the rumour does not have to come from the sphere of the issuer, i.e. does not have to fall in his area of responsibility.

Second, and even worse, it is unclear when a rumour has to be regarded as precise enough to indicate a breach of confidentiality.

As a result, issuers always run the risk of immediate disclosure of legitimately delayed inside information when a rumour arises. The provision thus invites to unfair spreading of rumours, especially in sensitive situations.

In addition, the disclosure of an existentially important transaction for an issuer may have the consequence of undermining the transaction inappropriately. In this case, the interest of the issuer to ensure its financial viability or to prepare significant strategic changes should have primacy over transparency in any case. This is also in the interest of investors as otherwise issuers could suffer significant economic losses or even jeopardise their existence.

b) Proposed amendments

Overall, the existing MAR provisions on rumours may lead to abusive rumour spreading und thus thwart/devalue the possibility to delay disclosure. In order to better protect the legitimate interest of the issuer against unfair practices and misinformation it needs to be clarified when a rumour is precise enough to lead to immediate disclosure. This should be the case when it contains the most significant details of the delayed inside information and – at the same time – does not contain wrong or misleading information. In addition to that, an issuer should not be forced disclosure immediately as long as the rumour does not stem from his sphere. Furthermore, no comment policy should always be possible in cases where the publication of inside information would jeopardise the financial viability of the issuer.

Article 17(7) MAR should be amended accordingly. Additionally, a new recital (50a) should be introduced that explains the rationale of the amendments to Article 17(7) MAR.

Recital 50a: ***Issuers will have to publish inside information under delay, if a sufficiently accurate rumour relating to that information occurs. However, the Regulation sets out strict conditions for the accuracy in order to protect issuers' interests and in order to avoid abusive rumour spreading.***

Art. 17(7): *Where disclosure of inside information has been delayed in accordance with paragraph 4 or 5 and the confidentiality of that inside information is no longer ensured,* *the issuer or the emission allowance market participant shall disclose that inside information to the public as soon as possible.*

This paragraph includes situations where a rumour explicitly relates to inside information the disclosure of which has been delayed in accordance with paragraph 4 or 5, where that rumour is sufficiently accurate to indicate that the confidentiality of that information is no longer ensured ***and the issuer has strong indications that the breach of confidentiality stems from his own sphere of influence. A rumour may only be regarded as sufficiently accurate, if it reveals all of the most significant details of the inside information and does not contain [additional] wrong or misleading information. Issuers do not have to respond to a rumour that does not meet these criteria. In cases where the publication of inside information carries the risk that the issuer would suffer significant economic losses, a disclosure based solely on a rumour is not required.***

IV. Summary

The paper addresses the main problems that issuers have identified in the application of the MAR, i.e.

- uncertainty on legal terms,
- wide interpretation of inside information in particular in protracted processes and
- the limited protection of legitimate interests and the constant risk of being forced to premature disclosures under Article 17 MAR.

Though some of the problems might also be resolved through legal interpretation and/or guidance from supervisory authorities, we believe that the best way forward would be to tackle the problems by amendments to MAR itself.

Our proposals above would keep the two-fold notion of inside information of the MAR, i.e. the same definition of inside information is used for both the prohibition of insider trading and the disclosure obligation. However, it will be ensured that more appropriate results are delivered by this concept.

This is however not to say that there cannot be other solutions for the problem. As an alternative to the changes to the Regulation laid down in the main part of the paper, it could also be conceivable to work towards an amendment to the Regulation that retains the current, rather broad concept of inside information for the prohibition of insider dealing, while limiting issuers' disclosure obligations. The advantage of this proposal is that it would leave the definition of inside information untouched and only make disclosure obligations under Article 17(1) MAR subject to additional conditions (for a concrete preliminary proposal, see Annex 1)

Annex 1

A new Article 17(1) MAR revised on this basis could read as follows (changes to the existing highlighted):

Art. 17(1): *Public disclosure of inside information*

An issuer shall inform the public as soon as possible of inside information which directly concerns that issuer ***provided that all of the following conditions are met:***

(a) The inside information has a reasonable degree of finality.

(b) The inside information would have a significant effect on the prices of financial instruments issued by the issuer.

(c) The inside information is not part of an interim financial report or a year-end report within the meaning of Article 19 (11) or of any other periodic financial report that the issuer has announced, or is due to, publish within 30 calendar days*.*

[…]

Condition (a) reflects the need to avoid disclosures that happen to early, and it gives issuers some flexibility to not disclose, without having to comply with the rather restrictive requirements for delay under Article 17(4) MAR. Condition (b) limits monitoring obligations for issuers to financial instruments that they have issued themselves by excluding from disclosure information with price effects on derivatives issued by third parties. Condition (c) reflects the fact that, as regards financial reporting, the market and the principle of information equality is best served by delivering financial information at a moment that is known in advance to all market participants.

Issuers would remain free to disclose inside information before being required to do so under the redrafted Article 17(1) MAR, provided they comply with the requirements under Article 17(8) MAR. This proposal is really not much more than (i) complementing the delay provisions with a solution that is more workable in practice (conditions a and c), and (ii) a correction of the regulatory practice after *Lafonta* (condition b). The provisions for delay would only be needed in cases where there is a reasonable degree of finality, but there continue to be overriding interest in maintaining confidentiality (e.g., participation of an issuer in a leniency programme that requires confidentiality).

For example, employees of an issuer working on a large M&A deal would be covered by the ban on insider trading from the outset – but the issuer would only be obliged to publish the information when it is “ready for publication”, i.e., in normal cases, where an SPA has been signed. Similarly, the prohibition of insider dealing may have a broad field of application in the course of preparing financial reporting, which is also reflected in the trading prohibitions under Article 19(11) MAR that apply independently of the existence of inside information. For the question of disclosure obligations, however, the regular financial reporting is usually sufficient as the market will be aware of the release dates/financial calendars of the issuer.

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