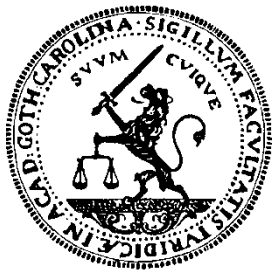

FACULTY OF LAW

LUND UNIVERSITY

Sigurður Guðmundsson

Too Much Information? An Assessment of the European Commission's Proposal for Changes to Article 17 of the Market Abuse Regulation

JAEM01 Master Thesis

European Business Law, LL.M

15 higher education credits

Supervisor: Xavier Groussot

Term: Spring 2023

Table of contents

Summary

Article 17(1) of the Market Abuse Regulation (MAR) mandates that an issuer shall publicly disclose "inside information" which directly concerns the issuer as soon as possible, with the concept of "inside information" defined in art. 7 of MAR. This obligation is often referred to as the *ad hoc disclosure requirement* and it's perhaps the most crucial obligation issuers have to comply with when their financial instruments have been admitted to trading on a regulated market.

However, assessing what constitutes "inside information" and should be disclosed has proved demanding for issuers and has garnered considerable legal debate over the years. The critique has sprung not least because the opaque concepts of art. 7 of MAR (and previous legislation) are exposed to interpretation and has specifically concerned the question of when to publish information on intermediate steps in protracted processes, which include, inter alia, mergers and takeovers.

In December 2022, the European Commission put forward a legislative proposal which would, if adopted, fundamentally change the ad hoc disclosure requirement by, among other things, adding a sentence to art. 17(1) of MAR explicitly stating that the requirement to inform the public as soon as possible "shall not apply to intermediate steps in a protracted process". The suggested changes also involve empowering the Commission to adopt a delegated act to set out a non-exhaustive list of information and the timing of disclosure of such information. According to the Commission, the suggested changes are meant to enhance legal certainty for issuers and investors without sacrificing market integrity.

The thesis finds that the proposed changes will bring clarity and consistent application to the ad hoc disclosure requirement in art. 17 of MAR, and will therefore bring legal certainty for issuers and market participants. The thesis also finds that the suggested changes don't seem to harm the requirements of equal access to accurate information and the elimination of market abuse activities. Consequently, the thesis finds that the suggested changes will achieve their objectives.

Abbreviations

BaFin	German federal financial supervisory authority; Bundesanstalt für Finanzdienstleistungsaufsicht
CESR	Committee of European Securities Regulators
CDIR	Commission Directive 2003/124/EC; Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation
ECJ	Court of Justice; a part of the Court of Justice of the European Union, which also includes the General Court and specialised courts
ESMA	European Securities and Markets Authority
ESME	European Commission's European Securities Markets Standing Committee
EU	European Union
IPO	Initial public offering
MAD	Market Abuse Directive; Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)
MAR	Market Abuse Regulation; Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC
MTF	Multilateral trading facility
OJ	Official Journal of the European Union
OTF	Organised trading facility
SMEs	Small and medium-sized enterprises
TFEU	Treaty on the Functioning of the European Union
US	United States; United States of America

Preface

About a year ago Lund University accepted my application for a place in the Master‘s Programme in European Business Law. For the past year, I have listened to lectures and participated in seminars with brilliant teachers, studied along with my bright and enthusiastic fellow students, and read a number of books and an even greater number of articles, troves of regulations and directives, an unimaginable amount of case law, and various guidelines and reports. But now, “sadly, it‘s finally over”, as someone once said, and this thesis represents the conclusion to my studies at Lund University. Studying at this distinguished university has been an immense privilege and pleasure.

I want to express my endless appreciation to my partner, Margrét María, and our two children, Grétar Már and Ragnheiður Dóra, for their patience and support during my studies.

Finally, I would like to thank my supervisor, Professor Xavier Groussot, for his guidance during my work on the thesis.

Lund, May 24, 2023

Sigurður Guðmundsson

1. Introduction

1.1 Background

There are many reasons why companies request their financial instruments to be admitted to trading on a regulated market[1], e.g. to raise funds, either through the issuance of shares or bonds, or to have an active price formation on its financial instruments listed on the market. With funds raised, the issuer can e.g. pay for acquisitions, and through active price formation, the issuer has an indicator from the market on how it is doing.

On the other hand, the admittance of financial instruments to trading also entails issuers undertaking particular *obligations*, chief among them is the multitude of disclosure obligations applicable to issuers. For example, before an issuer's securities[2] are offered to the public or are admitted to trading on a regulated market, the issuer has to *publish a prospectus* which contains information on, essentially, the issuer's financial position and the rights attached to the securities, as maintained in the Prospectus Regulation.[3] After the financial instruments have been admitted to trading, the issuer has to publicly publish his *annual and biannual financial report* within a specific time limit, as detailed in the Transparency Directive.[4] The issuer also has to publicly notify, within a particular time limit, when a *shareholder acquires or disposes of a major holding*[5] in the issuer, as detailed in the Transparency Directive, and of *managers' transactions*, which includes, inter alia, when a manager of the issuer takes part in a transaction with the issuer's shares over a fixed amount (currently EUR 5,000), as mandated in art. 19 of

[1] The thesis will generally refer to such companies as *issuers*, cf. the definition of the concept in art. 2(1)(d) of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and mending Directive 2001/34/EC (OJ L 390, 31.12.2004, pp. 38–57).

[2] The term "securities" is used in Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (OJ L 168, 30.6.2017, pp. 12–82). However, as the wider concept "financial instruments" is used in art. 17(1) of MAR, that term is generally used in the thesis. For a discussion on these concepts, see Rüdiger Veil: "§ 8. Financial instruments" in Rüdiger Veil (ed): *European Capital Markets Law* (Hart Publishing, 2nd edition, 2017), pp. 115–119.

[3] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

[4] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and mending Directive 2001/34/EC. According to the Directive, the annual financial report has to be disclosed within four months of the end of each financial year and the biannual financial report within three months of the end of the relevant period. It must be stressed that regulated markets in the EU put additional disclosure obligations on issuers, as indeed is the case regarding financial reporting with various regulated markets mandating issuers to also publish interim reports, i.e. for the first and third quarter of the financial year.

[5] Defined as when a shareholder acquires or disposes of shares in the issuer, to which voting rights are attached, where his proportion of the voting rights exceeds or falls below the thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%, according to art. 9(1) of the Transparency Directive. The *issuer* shall disclose the transactions within three trading days after having received a notification from the *shareholder*, which has a total of four trading days to notify the issuer.

MAR.[6] Finally, the issuer has to adhere to the *ad hoc disclosure requirement*[7] – once described as "one of the cornerstone provisions of EU securities regulation"[8] – stipulated in art. 17 of the Market Abuse Regulation (*MAR*).[9]

Art. 17(1) of MAR mandates that "[a]n issuer shall inform the public as soon as possible of inside information which directly concerns that issuer". The concept of inside information is provided in art. 7(1)(a) of MAR, which maintains, essentially, that information has to fulfil the *four constitutive elements* of inside information, i.e. be (i) of "a precise nature", (ii) non-public, (iii) relate, directly or indirectly, to an issuer or financial instrument, and (iv) "likely to have a significant effect on the prices" of the financial instruments, if made public.[10] Further delimitations or criteria regarding the concept of "inside information" are provided for in art. 7(2)-(4) of MAR, with art. 7(3) declaring that an "intermediate step" in a "protracted process"[11] shall be deemed inside information if, by itself, it satisfies the criteria of inside information as referred to in art. 7. Such intermediate steps can e.g. be negotiations, mergers, takeovers, and changes to the issuer's management.

The application of the ad hoc disclosure requirement is of obvious concern for issuers. The disclosure of information can hurt issuers, e.g. compromise agreements still under negotiation, add to the issuer's financial difficulties, or add disproportionality to the volatility of the price of the issuer's financial instruments.[12] Additionally, with *premature* disclosure of information, issuers may be put in a position where they have to rectify or alter previously disclosed information, and at worst, they have breached the prohibition on market manipulation, now stipulated in art. 12 of MAR, and made them subject to administrative sanctions or criminal penalties.[13] Such disclosure may even make issuers subject to class action

---

[6] More precisely, the disclosure obligation in art. 19 of MAR applies when persons "discharging managerial responsibilities" (as defined in art. 3(25) of MAR) and persons "closely associated with them" (as defined in art. 3(26) of MAR) take part in transactions on their own account relating to the shares or debt instruments of that issuer or to derivatives or other financial instruments linked to, once a total amount of EUR 5,000 has been reached within a calendar year. Such notification shall be made by the *issuer* within two days of the receipt of such notification, with the *person discharging managerial responsibilities* having a total of three days from the date of the transaction to make the notification to the issuer.

[7] This term will be consistently used in the thesis for this particular obligation, but in the literature other terms can be found when referring to this obligation.

[8] Alain Pietrancosta: "Public disclosure of inside information and market abuse" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide* (Oxford University Press, 2nd edition, 2022), p. 45.

[9] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, pp. 1–61).

[10] It must be noted that the definition found in art. 7(1)(a) of MAR applies to financial instruments, with additional definitions appearing in items (b)-(d) of the paragraph; item (c) applies to *emission allowances* and contains the same four constitutive elements which appear in item (a), but items (b) and (d) apply to *commodity derivatives* and *execution of orders concerning financial instruments* respectively, and contain a slightly different definition of the concept than appears in item (a) and (c). The discussion in the thesis will center on the definition contained in art. 7(1)(a), as per the delimitation made in Subchapter 1.4.

[11] Note that there are different concepts used for this situation in the literature, e.g. a "stage" in a "multi-stage process", but the concepts of "intermediate step" and "protracted process" will be consistently used in the thesis.

[12] Alain Pietrancosta: "Public disclosure of inside information and market abuse" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide*, p. 50.

[13] Jesper Lau Hansen: "Market abuse case law – Where do we stand with MAR?" (European Company and Financial Law Review, Vol. 14, Issue 2), p. 383. See art. 30(1)(a) of MAR, which stipulates that member states shall provide the competent authorities with the power to take "appropriate administrative sanctions and other administrative measures" in relation to infringements to at least specific articles of MAR, including art. 15 (which prohibits market manipulation). See also Directive 2014/57/EU of the European Parliament and of the Council of

litigation.[14]

On the opposite end, if issuers are found to have disclosed information *too late*, i.e. not within the mandate of "as soon as possible" in art. 17(1) of MAR, they could be subject to administrative sanctions by their national competent authorities and also criminal penalties[15], *and* be at risk of private litigation, both of which were seen in the case of the car manufacturer Daimler AG. In that case, the late disclosure of information concerning the CEO of the company departing resulted in shareholders suing the company for damages – with one of those cases finding its way to the European Court of Justice (ECJ) in **Geltl v Daimler**[16] – *and* the German financial supervisory authority, BaFin, issuing the company with an administrative fine.[17] In addition to all this, it has been held that the risk of litigation can affect issuers disclosing *less* information or less information that is *useful* to market participants.[18] Overall it's easy to find that issuers are walking a tightrope regarding the ad hoc disclosure requirement.

However, it is far from clear what information constitutes "inside information" according to art. 7 of MAR, and should therefore be published "as soon as possible" according to art. 17(1) of MAR. Market participants – issuers among them – have voiced their concerns, as noted in the *MAR Review report* of 2020, where ESMA reported that market participants considered the definition of "inside information" to be too broad and requested ESMA to issue guidance on several subjects to assist issuers in identifying circumstances and events which might constitute "inside information".[19] In addition, there has been considerable legal debate on the ad hoc disclosure requirement in MAR and previous legislation, how its framed, and what its effects are, with one commentator declaring that art. 17 of MAR imposes a transparency requirement on issuers that is "far more demanding than the corresponding obligations in the United States, disclosure regulations' birthplace".[20]

Interestingly, since its conception in the Stock Exchange Listing Directive[21], EU legislation has framed the ad hoc disclosure requirement in three distinct ways.

---

16 April 2014 on criminal sanctions for market abuse (market abuse directive), which put in place minimum requirements on member states with regards to criminal sanctions in respect of insider dealing, market manipulation and selective disclosure.

[14] Jesper Lau Hansen: "Market abuse case law – Where do we stand with MAR?", p. 383.

[15] See art. 30(1)(a) of MAR with regards to art. 17(1). See also Directive 2014/57/EU; Although the Directive mandates that member states shall put in place minimum requirements with regards to criminal penalties only in respect of *insider dealing*, *market manipulation* and *selective disclosure*, the member states are free to adopt such criminal penalties with regards to art. 17(1) of MAR.

[16] Case C-19/11 Markus Geltl v Daimler AG, delivered on June 28, 2012 (ECLI:EU:C:2012:397). The case will be dealt with at length in Subchapter 2.6.

[17] Hartmut Krause and Micheal Brellochs: "Insider trading and the disclosure of inside information after *Geltl v Daimler* – A comparative analysis of the ECJ decision in the *Geltl v Daimler* case with a view to the future European Market Abuse Regulation" (Capital Markets Law Journal, Oxford University Press, Vol. 8, No. 3), p. 285; and *BaFin's annual report of 2009*, p. 183, available on BaFin's homepage, www.bafin.de. According to the annual report (which actually does not state the name of the issuer), the fine was in the amount of EUR 200,000, and was contested by Daimler before the courts in Germany until the company eventually accepted the fine.

[18] Luca Enriques and Sergio Gilotta: "Disclosure and financial market regulation" in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds): *The Oxford Handbook of Financial Regulation* (Oxford University Press, 2015), pp. 531–532.

[19] *MAR Review report* (ESMA, September 23, 2020, ESMA70-156-2391), pp. 47–49.

[20] Alain Pietrancosta: "Public disclosure of inside information and market abuse" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide*, p. 49. The US ad hoc disclosure requirement is briefly detailed in Subchapter 2.4.

[21] Council Directive of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing (79/279/EEC) (OJ L 66, 16.3.1979, pp. 21–32).

The *first* manifestation of the requirement appeared in the Directive above, adopted in 1979, where issuers were mandated to "inform the public as soon as possible of any major new developments in its sphere of activity". When the prohibition on insider dealing was introduced in EU legislation ten years later in the Insider Dealing Directive[22], a new definition was established for information subject to such a ban, containing the four constitutive elements generally associated with the concept in EU law (and detailed previously). As there were *two separate concepts*, the measures did not automatically apply at the same time limit, meaning that the obligation to disclose information was not automatically "triggered" when the ban on insider dealing came into effect. However, a fundamental change was made when the *second* manifestation of the requirement appeared with the adoption of the Market Abuse Directive (*MAD*)[23] in 2003. With that Directive, a "*dual function*"[24] was assigned to the concept of "inside information", whereby the definition delimited the prohibition of insider dealing *and* ad hoc disclosure requirement. However, importantly, by interpreting art. 2(2) in Commission Directive 2003/124/EC (*CDIR*)[25], one of MAD's implementing directives, the time limit for the application of the ad hoc disclosure requirement was considered to be when the information was "*certain* or *near certain*"[26], and therefore *not automatically* at the same time as the prohibition on insider dealing. Currently, under MAR, the *third* manifestation appears, where the concept of "inside information" has the aforementioned dual function, and, as there is no provision similar to art. 2(2) in CDIR in the MAR regime, the two measures apply *simultaneously*, i.e. the ban on insider dealing applies at the exact moment as the ad hoc disclosure requirement mandates the disclosure of the information.[27]

The current regime has drawn criticism, with one commentator asserting that the dual role of the "inside information" concept in MAR, coupled with the broad notion of the concept, increased the risk of issuers being in breach of the ad hoc disclosure requirement with regards to intermediate steps in protracted processes.[28]

Recently, the European Commission introduced a proposal for legislation (*Proposal*)[29] where, inter alia, changes are suggested to the ad hoc disclosure requirement in art. 17 of MAR, including altering the first subparagraph of art. 17(1) in such a way that the provision would expressly state that the disclosure requirement would *not* apply to intermediate steps in a

[22] Council Directive of 13 November 1989 coordinating regulations on insider dealing (89/592/EEC) (OJ L 334, 18.11.1989, pp. 30–32).
[23] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ L 96, 12.4.2003, pp. 16–25).
[24] Jesper Lau Hansen and David Moalem: "The MAD Disclosure Regime and the twofold notion of inside information: The available solution" (Capital Markets Law Journal, Oxford University Press, Vol. 4, No. 3, 2009), pp. 324–325.
[25] Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation (OJ L 339, 24.12.2003, pp. 70–72).
[26] Jesper Lau Hansen: "Say when: When must an issuer disclose inside information" (Nordic & European Company Law, LSN Research Paper Series, Paper No. 16-03, University of Copenhagen Faculty of Law Research Paper No. 2016-28), p. 8.
[27] The development of the ad hoc disclosure requirement in EU legislation is described further in Subchapter 2.5.
[28] Jennifer Payne: "Disclosure of inside information" in Vassilios Tountopoulos and Rüdiger Veil (eds): *Transparency of Stock Corporations in Europe: Rationales, Limitations and Perspectives* (Hart Publishing, 2019), p. 107.
[29] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises (COM/2022/762 final. 2022/0411 (COD)).

protracted process. Therefore, the issuer would only need to disclose information related to the event that this protracted process intends to bring about when such information is sufficiently precise, "such as when the management board has taken the relevant decision to bring about the event", according to recital 58 in the Proposal[30], and not information on each intermediate step in the process. The suggested changes also include adding a paragraph to art. 17 where the Commission will be empowered to adopt a delegated act which would set out a non-exhaustive list of information to disclose and the timing of such disclosures.

As stated by the Explanatory Memorandum in the Proposal, the suggested changes to art. 17 of MAR are supposed to enhance *legal certainty* for issuers without sacrificing *market integrity*.[31] With that in mind, but also the legislative history and the legal debate on the ad hoc disclosure requirement, it is interesting to explore what effects the proposed changes to art. 17 of MAR will likely bring, if accepted by the EU legislative, and if these two objectives will be attained.

1.2 Purpose and research questions

In line with the objectives of the suggested changes, as set out in the Proposal, the thesis will answer the following questions:

1. Will the suggested changes to art. 17(1) of MAR enhance legal certainty?

2. Will market integrity be jeopardised with the suggested changes to art. 17(1) of MAR?

1.3 Methodology and material

The research questions in the thesis will be answered in the following way:

Firstly, a legal dogmatic research methodology will be employed in Chapter 3 to "give a systematic exposition of the principles, rules and concepts"[32] concerning the ad hoc disclosure requirement in art. 17(1), and also art. 7, of MAR. This will be complemented by a critical evaluation of the provisions by detailing academic debate and concerns put forward by market participants. To further understand the ad hoc disclosure requirement, two related topics will be discussed in Chapter 2; the objectives of the disclosure requirements and, specifically, of the ad hoc disclosure requirement, and the development of the ad hoc disclosure requirement through EU legislation. The concepts of legal certainty and market integrity – both of which are essential parts of the research questions – will also be described in Chapter 2. *Secondly*, the suggested changes to the ad hoc disclosure requirement in the Proposal, and its objectives, are detailed in Chapter 4. *Thirdly*, Chapter 5 details the likely effects of the suggested changes to art. 17(1) of MAR and analyses if the proposed changes will attain two of its stated objectives; enhancing legal certainty without sacrificing market integrity.

Both primary and secondary sources are used as material for the thesis. The primary sources include the Treaty on the Functioning of the European Union, the Market Abuse

[30] Ibid., p. 42.
[31] Ibid., pp. 7 and 11.
[32] Jan M Smits: "What is legal doctrine? On the aims and methods of legal-dogmatic research" in Edward L. Rubin, Hans-W. Micklitz and Rob van Gestel (eds): *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017), p. 210.

Regulation, previous legislative acts which contained the ad hoc disclosure requirement or the ban on insider dealing, and also other legislative acts in the field of securities law. The relevant case law from the ECJ will also be detailed. To supplement the primary sources, the thesis will discuss secondary sources, namely academic literature and soft law instruments, such as guidelines from EU institutions on how to apply the relevant EU legislation. In addition, proposals for EU legislation will feature in the discussion, and reports assembled by EU institutions on the application of MAR and previous legislation.

1.4 Delimitations

The thesis will focus on art. 17 of the Market Abuse Regulation, or more specifically, the suggested change by the Proposal to the first subparagraph of art. 17(1) and the additions of art. 17(1a) and art. 17(1b). The thesis will not specifically discuss other suggested changes to art. 17 of MAR, and consequently, when the thesis refers to the suggested changes to art. 17 of MAR, it applies to the three suggestions mentioned above.

The discussion in the thesis will focus on the Proposal as it was put forward on December 7, 2022. Any subsequent amendments to the Proposal will thus not be discussed in the thesis.

Furthermore, the thesis will focus on the ad hoc disclosure requirement regarding financial instruments in general. It will therefore not specifically discuss disclosure requirements or the definition of "inside information" in relation to commodity derivatives, emission allowances or auctioned products based thereon, or execution of orders concerning financial instruments, cf. art. 7(1)(b)-(d) of MAR.[33]

1.5 Outline

This thesis is divided into six chapters, including the introductory chapter. Chapter 2 details the objectives of disclosure obligations and describes the development of the ad hoc disclosure requirement in previous legislation. The ad hoc disclosure requirement in the current Market Abuse Regulation is detailed in Chapter 3, and the relevant provisions of the Proposal are described in Chapter 4. Chapter 5 explores the likely effects of the suggested changes to the ad hoc disclosure requirement and answers the research questions. Finally, Chapter 6 summarises the discussion of the thesis.

[33] See *n* 10.

2. Public disclosure requirements

2.1 Introduction

This chapter details the reasons behind the disclosure requirements generally and the ad hoc disclosure requirement specifically. It also gives an overview of the development of the ad hoc disclosure requirement in EU law, including detailing the instrumental decision of the ECJ in **Geltl v Daimler**. The concepts of "market integrity" and "legal certainty" are discussed as they are integral parts of the research questions. The issues discussed in the chapter are meant to give context for later discussion on the ad hoc disclosure requirement.

2.2 The objectives of public disclosure requirements

The most obvious objective of disclosure requirements is to provide information about issuers and their financial instruments to market participants, i.e. to investors, market analysts and others. But to what end? According to economist George Akerlof, a market will perform suboptimally, or not at all, if market participants fear that they are insufficiently informed.[34] Thus, for a market – like a regulated market where financial instruments have been admitted to trading – to function efficiently, rules on disclosure are required to provide market participants with adequate information.[35]

According to one commentator, it is possible to further categorise the objectives for disclosure requirements in general in this way:

1. Ensuring efficient allocation of capital: "[G]reater disclosure improves the allocative efficiency of markets. Disclosure of timely, accurate, and complete information enables investors to discriminate with greater accuracy among the projects for which companies are seeking funding in the market and to direct their investments to those which offer the highest probable returns. This is a benefit, not only to investors but also to society as a whole, since it facilitates the allocation of a scarce resource, capital, to those likely to use it in a way which society values most highly."[36]
2. Corporate governance tool: "[C]ontinuing disclosure and accurate price formation promote effective corporate governance in companies with dispersed shareholdings. The level of the stock price provides an important signal to the directors of the company about whether they are doing a good or a bad job with the management of the company's business."[37]
3. Promoting investor confidence/investor protection: "[B]oth the above mechanisms promote investor confidence in the market, in the sense that disclosure requirements reduce the

[34] Georg Akerlof: "The market for "Lemons": Quality uncertainty and the market mechanism" (The Quarterly Journal of Economics, Vol. 84, No. 3, August, 1970), pp. 488–490.
[35] Jesper Lau Hansen: "The hammer and the saw – A short critique on the recent compromise proposal for a Market Abuse Regulation" (Nordic & European Company Law, LSN Research Paper Series, Paper No. 10-35), p. 3.
[36] Paul Davies: "Damages actions by investors on the back of market disclosure requirements" in Danny Busch, Emilios Avgouleas and Guida Ferrarini (eds): *Capital Markets Union in Europe* (Oxford University Press, 1st edition, 2018), p. 320.
[37] Ibid.

information asymmetry between corporate insiders and outside investors as analysts incorporate quickly into the stock price the information required to be disclosed."[38]

2.3 The objectives of the ad hoc disclosure requirement

In the literature, the objectives of the *ad hoc disclosure requirement*, unsurprisingly, broadly correspond to the general objectives listed in the previous subchapter[39], but with one addition: The ad hoc disclosure requirement is also considered essential, by some commentators, in *preventing insider dealing*.[40] The rationale put forward is that when information has been made public it ceases to be considered "inside information" and thus cannot be subject to insider dealing. This issue perhaps doesn't merit an independent category and could fall within either of the category (1) or (3) in the previous subchapter.

However, one commentator has vigorously argued against using the ad hoc disclosure requirement to combat insider dealing, insisting that it would be "like trying to hammer in a nail with a saw".[41] His position is that the *common* purpose of the prohibition on insider dealing and the ad hoc disclosure requirement is to ensure efficient and fair security markets, but their *individual* objectives are distinct; the ban on insider dealing is to outlaw that particular behaviour from the market which relies on access to inside information, while the ad hoc disclosure requirement is meant to ensure that issuers provide information to the market which in turn supports the pricing mechanism of the market.[42] Furthermore, the prohibition of insider dealing is aided by other provisions, such as the ban on selective disclosure[43], currently in art. 14(c) of MAR. According to this commentator, mandating early disclosure of information to hinder insider dealing would not be beneficiary, might misguide investors and was likely to cause damage to the issuer and others.[44]

2.4 Legal certainty and market integrity

The Proposal states that the suggested changes to MAR are aimed at increasing legal certainty of what constitutes inside information and on the timing of disclosure of such information[45],

[38] Ibid., pp. 320–321. For further literature on the goals of disclosure requirements in general, see e.g. Luca Enriques and Sergio Gilotta: "Disclosure and financial market regulation" in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds): *The Oxford Handbook of Financial Regulation*, pp. 513–520.

[39] For literature on the objectives of the ad hoc disclosure requirement, see: Alain Pietrancosta: "Public disclosure of inside information and market abuse" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide*, pp. 45-47; Susanne Kalss and Clemens Hasenauer: "Article 17. Public disclosure of inside information" in Susanne Kalss, Martin Oppitz, Ulrich Torggler and Martin Winner (eds): *EU Market Abuse Regulation. A Commentary on Regulation (EU) No 596/2014* (Edward Elgar Publishing, 2021), pp. 206–207; Philipp Koch: "§ 19. Disclosure of inside information" in Rüdiger Veil (ed): *European Capital Markets Law* (Hart Publishing, 2nd edition, 2017), p. 348; and Jennifer Payne: "Disclosure of inside information" in Vassilios Tountopoulos and Rüdiger Veil (eds): *Transparency of Stock Corporations in Europe: Rationales, Limitations and Perspectives*, pp. 90–92.

[40] See e.g. Philipp Koch: "§ 19. Disclosure of inside information" in Rüdiger Veil (ed): *European Capital Markets Law*, p. 348.

[41] Jesper Lau Hansen: "Say when: When must an issuer disclose inside information", pp. 4–5.

[42] Ibid., pp. 4–5.

[43] Ibid., p. 5.

[44] Ibid.; and Jesper Lau Hansen: "The hammer and the saw – A short critique on the recent compromise proposal for a Market Abuse Regulation", p. 6.

[45] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive

but crafted in such a way as to avoid a negative impact on market integrity.[46] As these two concepts feature prominently in the Proposal, and form an integral part of each research question of the thesis, they need to be discussed further.

The definition of *market integrity* needs to be determined. Article 1 of MAR, entitled "Subject matter", refers to market integrity concerning market abuse activities:

> This Regulation establishes a common regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation (market abuse) as well as measures to prevent market abuse to ensure the integrity of financial markets in the Union and to enhance investor protection and confidence in those markets.

Furthermore, in the recitals in the preamble to MAR, and also in previous legislation, such as MAD, there are numerous mentions of market integrity, sometimes in relation to "investor confidence", "public confidence" or "investor protection"[47], as seen in recital 2 in the preamble to MAR, which maintains:

> An integrated, efficient and transparent financial market requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities and derivatives.

Another example is recital 24 in the preamble to MAD, where the reference is in connection with the disclosure of information:

> Prompt and fair disclosure of information to the public enhances market integrity, whereas selective disclosure by issuers can lead to a loss of investor confidence in the integrity of financial markets. […]

However, a reference is made to market integrity concerning both preventing market abuse activities *and* disclosure obligations in recital 52 of the Proposal, which, among other things, states:

> Regulation (EU) No 596/2014 establishes a robust framework to preserve market integrity and investor confidence by preventing insider dealing, unlawful disclosure of inside information and market manipulation. It subjects issuers to

for companies and to facilitate access to capital for small and medium-sized enterprises, p. 7. The notion which appears in the Proposal is actually to "*reduce* legal *uncertainty*", but in the thesis, the notion of *enhancing legal certainty* will be used.

[46] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises, p. 11.

[47] Regarding MAR, see arts. 1 and 13(2)(e) and recitals 2–4, 8, 23–24, 31, 44, 57 and 63. Regarding MAD, see recitals 2, 11–12, 24, 34, 37 and 43.

several disclosure and record-keeping obligations and requires issuers to disclose inside information to the public. […][48]

Despite these examples being limited in number, one can broadly assume that when the EU legislature refers to market integrity, it is referring to circumstances which are established by preventing market abuse, commonly defined as insider dealing, market manipulation and selective disclosure[49], and by ensuring prompt disclosure of information, equally accessible to every market participant. Furthermore, one commentator, in an effort to define the concepts of "market integrity" and "market fairness", maintained that those concepts not only require "the elimination of market abuse activities" and "accurate information about issuers of securities available to all participants at the same time", but also "non-discriminatory access to the market for all those wishing to participate" and "transparent and accurate information about the prices of securities available to all participants at the same time".[50]

If there are difficulties in establishing the definition of the term market integrity, no such difficulties should be regarding the term legal certainty. The principle of *legal certainty* is an essential part of EU law and is believed to mirror "the ultimate necessity of clarity, stability and intelligibility of the law".[51] The principle "expresses the fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly"[52], including, inter alia, that the effects of EU legislation are "clear and predictable", and that "situations and legal relationships … remain foreseeable"[53]. The very aim of the principle is to ensure clarity.[54] The principle is believed to acquire a particular relevance in the area of *economic law*, which is based on planning in advance.[55]

The principle applies as a rule of interpretation of EU law and laws of the member states that fall within the scope of EU law and as a substantive right.[56] The EU institutions and member states must comply with the principle.[57]

In this context, it's informative to detail the United States' counterpart to the ad hoc disclosure requirement in art. 17(1) of MAR. These two disclosure requirements stand in stark contrast to each other in their framing; the EU disclosure requirement has been described as *principle-based* while its US counterpart has been named an *events-specific approach*.[58] As seen from the previous description of the EU disclosure requirement, it sets forth a broad principle that issuers have to comply with. Meanwhile, the US disclosure requirement is entirely different, where issuers are primarily only mandated to disclose "material" events, as

[48] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises, p. 40.
[49] See art. 1 of MAR, but also recital 7 in the preamble to MAR.
[50] Janet Austin: "What exactly is market integrity? An analysis of one of the core objectives of securities regulation" (William & Mary Business Law Review, Vol 8, 2016-2017, Issue 2, Article 2), pp. 239–240. It should be noted that EU securities markets law are not specifically analysed in the article, but securities regulations around the world.
[51] Xavier Groussot: *General Principles of Community Law* (Europa Law Publishing, Groningen, 2006), p. 189.
[52] Takis Tridimas: *The General Principles of EU Law* (Oxford University Press, 2nd edition, 2006), p. 242.
[53] Ibid., p. 244.
[54] Xavier Groussot: *General Principles of Community Law*, p. 190.
[55] Takis Tridimas: *The General Principles of EU Law*, p. 242.
[56] Xavier Groussot: *General Principles of Community Law*, pp. 190-191.
[57] Ibid., p. 190.
[58] Alain Pietrancosta: "Disclosure of inside information and market abuse" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide*, p. 49.

required by Form 8-K, which not only sets forth a *closed list of events* but also instructions on, inter alia, the *content* and *timing* of such disclosures while allowing issuers the discretion to decide if they disclose other events.[59] The EU disclosure requirement is therefore more open and flexible in contrast to its US counterpart, but, however, as one commentator declared, the EU requirement "contrasts negatively, from a legal certainty viewpoint, with the more event-specific approach in US law".[60]

These two concepts – market integrity and legal certainty – will be discussed further in Chapter 5 concerning the suggested changes to art. 17(1) of MAR.

2.5 Development of legislation regarding the ad hoc disclosure requirement

In this subchapter, the development of the ad hoc disclosure requirement in previous EU legislation will be summarised to illustrate how this particular requirement has been framed differently throughout its existence in EU law and how the current ad hoc disclosure regime (MAR) came to be.[61]

2.5.1 Stock Exchange Listing Directive (79/279/EEC)

The first EU legislative text on issuers' ad hoc disclosure requirement was in the Stock Exchange Listing Directive.[62] The directive applied to securities admitted to official listing on a stock exchange situated or operating within the member states, cf. art. 1(1) of the Directive, and was meant to coordinate the minimum requirements for such an admission and the minimum obligations issuers were subject to after their securities were admitted to official listing.

Schedule A and Schedule B to the Directive contained the conditions for the admission to official listing the issuers of shares and debt securities respectively had to comply with, while Schedule C and Schedule D contained the criteria for *what* information was required to be published, and art. 17 of the Directive stated *how* issuers were required to publish information publicly.

Article 5(a) of Schedule C stated that a company "must inform the public as soon as possible of *any major new developments in its sphere of activity* which are not public know-

[59] Ibid., pp. 49–50; Alain Pietrancosta: "Article 17: Public disclosure of inside information" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide* (Oxford University Press, 2nd edition, 2022), pp. 466–467; and Jennifer Payne: "Disclosure of inside information" in Vassilios Tountopoulos and Rüdiger Veil (eds): *Transparency of Stock Corporations in Europe: Rationales, Limitations and Perspectives*, pp. 92–93. Form 8-K can be found on the Securities and Exchange Commission's website: https://www.sec.gov/files/form8-k.pdf.

[60] Alain Pietrancosta: "Disclosure of inside information and market abuse" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide*, p. 49.

[61] A summary of the EU legislative development regarding the ad hoc disclosure requirement, from the 1966 Segré Report onwards, can be found in Alain Pietrancosta: "Article 17: Public disclosure of inside information" in Marco Ventoruzzo and Sebastian Mock: *Market Abuse Regulation. Commentary and Annotated Guide*, p. 457–460. See also a summary of the legislative development regarding EU capital markets in general in Rüdiger Veil: "§ 1. History" in Rüdiger Veil (ed): *European Capital Markets Law* (Hart Publishing, 2nd edition, 2017), p. 3–22.

[62] Council Directive of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing (79/279/EEC).

ledge and which may, by virtue of their effect on its assets and liabilities or financial position or on the general course of its business, lead to substantial movements in the prices of its shares" (emphasis added).

However, the competent authorities were permitted to exempt the company from this requirement (altogether, it seems) if disclosing the information would "prejudice the legitimate interests" of the company, cf. the second paragraph of art. 5(a) in Schedule C. In addition, the company must inform the public without delay of any changes in the rights attaching to the various classes of shares, cf. art. 5(b), and inform the public of any changes to major holdings in the company as soon as such changes come to its notice. Finally, art. 4 contained obligations for the company to publicly publish its annual accounts and reports as soon as possible.

The obligations in Schedule D, applicable to debt securities, were similar to those in Schedule C, as described above.

2.5.2 Insider Dealing Directive (89/592/EEC)

The Insider Dealing Directive[63] focused on coordinating the rules prohibiting insider dealing.

Articles 2(1) and 4 of the Directive prohibited insider dealing by essentially stipulating that anyone possessing "inside information" was banned from "taking advantage of that information with full knowledge of the facts" by acquiring or disposing of transferable securities of the issuer. The concept of inside information was defined in art. 1(1) of the Directive as "information which has not been made public of a precise nature relating to one or several transferable securities, which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities in question". This definition contained the *four constitutive elements* which the definition of inside information in MAR contains today – i.e. that the information is (i) of a precise nature, (ii) non-public, (iii) related to one or more transferable securities (or related to one or more *issuers*, as was later added), and (iv) if made public, likely to have a significant effect on the price of the transferable securities. All these elements must be met for information to be considered inside information.

As the ad hoc disclosure requirement was contained in the Stock Exchange Listing Directive, discussed previously, this meant that *two distinct concepts* were used for information subject to each measure – one for the ad hoc disclosure requirement and one for the prohibition of insider dealing.

Additionally, the Directive also prohibited *selective disclosure*, i.e. disclosure of inside information to any third party outside the normal course of the exercise of the discloser's employment, profession or duties, cf. art. 3(a), and *tipping*, which is recommending and procuring a third party based on inside information to acquire or dispose of transferable securities, cf. 3(b).

2.5.3 Stock Exchange Listing Directive II (2001/34/EC)

The Stock Exchange Listing Directive II[64] repealed and replaced the previous Stock Exchange

[63] Council Directive of 13 November 1989 coordinating regulations on insider dealing (89/592/EEC).
[64] Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities (OJ L 184, 6.7.2001, pp. 1–66).

Listing Directive, Directive 80/390/EEC on prospectuses[65], Directive 82/121/EEC on regular reporting[66], and Directive 88/627/EEC on publication of major holdings[67], and combined and newly codified the directives for clarity and efficiency, but did not make any relevant changes to the directives.[68]

Regarding the ad hoc disclosure requirement, the Stock Exchange Listing Directive II replicated, almost word-for-word, the substance of Schedules C and D of the previous Stock Exchange Listing Directive, which now appeared in art. 68 and art. 81 of the new Directive.[69] The ad hoc disclosure requirement, therefore, continued to be based on "any major new developments in [the issuer's] sphere of activity" which are not public and, in the case of shares, may "lead to a substantial movement in the prices" of the shares.

2.5.4 Market Abuse Directive (2003/6/EC)

The Market Abuse Directive (*MAD*)[70] replaced the Insider Dealing Directive *and* arts. 68(1) and 81(1) of the Stock Exchange Listing Directive II.

Thus, the Directive not only laid out, in one directive, the prohibition on insider dealing, cf. art. 2(1), and the ad hoc disclosure requirement, cf. art. 6(1), but it instrumentally did so by using *the same* definition of the concept of "inside information". Thus, the concept was given a "*dual function*"[71] as it was used to delimit information subject to the prohibition on insider dealing (and selective disclosure and tipping) on the one hand *and* the application of the ad hoc disclosure requirement on the other.

Article 1(1) of MAD defined "inside information" as "information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments". The definition was similar to the one contained in art. 1(1) of the Insider Dealing Directive, with the exception that the previous definition referred to "transferable securities" whereas the latter referred to "financial instruments". The new definition differed from the previous definition in art. 68(1) of the Stock Exchange Listing Directive II which referred to "any major new developments in its sphere of activity" which had not been made public and may "lead to a substantial movement in the prices of its shares".

---

[65] Council Directive 80/390/EEC of 17 March 1980 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing (OJ L 100, 17.4.1980, pp. 1–26).

[66] Council Directive 82/121/EEC of 15 February 1982 on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing (OJ L 48, 20.2.1982, pp. 26–29).

[67] Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of (OJ L 348, 17.12.1988, pp. 62–65).

[68] Rüdiger Veil: "§ 1. History" in Rüdiger Veil (ed): *European Capital Markets Law*, p. 10.

[69] With the only addition being subparagraph 2 of art. 68(3) which dealt with information being published regarding the acquisition or disposal of a major holding in a listed company.

[70] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).

[71] Jesper Lau Hansen and David Moalem: "The MAD Disclosure Regime and the twofold notion of inside information: the available solution", pp. 324–325.

The change to a dual-functioning concept of "inside information" in MAD was heavily criticised.[72] Even the European Securities Market Expert Group (ESME) – which was set to provide legal and economic advice on the application of the EU securities Directives to the Commission – stated, in its 2007-report on the implementation of MAD, that the dual role of the concept of inside information "[appeared] to be a fundamental flaw of the directive" and maintained that there were "widespread inconsistencies" with issuers and regulators when defining the concept.[73] The Report suggested, inter alia, that either the definition would be changed, i.e. reverting to two concepts, one for insider dealing and the other for the disclosure requirement, or changing the conditions for delay of disclosure.[74]

However, as two commentators maintained, "the Commission would appear to have provided a way to avert the possible harmful effects of the dual function of the concept of inside information" with art. 2(2) of CDIR[75], discussed in the following subchapter.

2.5.5 Commission Directive (2003/124/EC)

One of the implementation directives of MAD was the Commission Directive 2003/124/EC (*CDIR*)[76], which contained further definitions of concepts found in MAD. Recital 3 in the preamble to the CDIR stated that "[l]egal certainty for market participants should be enhanced through a closer definition" of two essential elements of the concept of "inside information" in art. 1(1) of MAD, i.e. the conditions of "precise nature" and "likely to have a significant effect on the prices of financial instruments" if the information was made public.[77]

Thus, art. 1 of the CDIR, named "Inside information", stated:

> 1. For the purposes of applying point 1 of Article 1 of Directive 2003/6/EC, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments.
>
> 2. For the purposes of applying point 1 of Article 1 of Directive 2003/6/EC, 'information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial

[72] Alain Pietrancosta: "Disclosure of inside information and market abuse" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide*, p. 47. See criticism in e.g. Jesper Lau Hansen: *Say when: When must an issuer disclose inside information*, pp. 6–7.
[73] *ESME Report. Market abuse EU legal framework and its implementation by Member States: A first evaluation* (Brussels, July 6, 2007), p. 5.
[74] Ibid., p. 7.
[75] Jesper Lau Hansen and David Moalem: "The MAD disclosure regime and the twofold notion of inside information: The available solution", p. 329.
[76] Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation.
[77] These are constitutive elements (i) and (iv) in the concept of "inside information", with all four of the elements listed here for convenience: Information is (i) of "a precise nature", (ii) non-public, (iii) relates, directly or indirectly, to an issuer or financial instrument, and (iv) is "likely to have a significant effect on the prices" of the financial instruments if made public

instruments' shall mean information a reasonable investor would be likely to use as part of the basis of his investment decisions. (Emphasis added)

In article 2(2) of the Directive there was also a clause which would prove to be an instrumental provision and will be discussed subsequently:

> 2. Member States shall ensure that issuers are deemed to have complied with the first subparagraph of Article 6(1) of Directive 2003/6/EC where, upon the coming into existence of a set of circumstances or the occurrence of an event, albeit not yet formalised, the issuers have promptly informed the public thereof. (Emphasis added)

As MAD, being a directive, gave the member states a scope of discretion as to its implementation, they did *not* implement the ad hoc disclosure requirement in art. 6(1) in the same way.[78] The different implementations by member states essentially revolved around the *time limit* of when each of the measures, i.e. the insider dealing prohibition and the ad hoc disclosure requirement, were considered to apply, with the member states either using the *two-step approach* or the *tie-in approach*.[79]

In member states applying the *two-step approach*, each measure was used independently.[80] When information was considered "inside information", the ban on insider dealing applied, but the ad hoc disclosure requirement was not considered to apply until the inside information was considered "*certain or near certain*".[81] The legal basis for the two-step approach was an interpretation of art. 1(1) and art. 2(2) of CDIR: As art. 2(2) replicated the "inside information" definition in art. 1(1) but *without* reference to "uncertain and future information", this supported the position that disclosure should only be made when the inside information was "certain or near certain".[82] Therefore, with art. 2(2) of CDIR, the Commission seemed to have found a way to prevent the possible negative effects of the dual role of the inside information concept in MAD.[83]

Other member states applied the *tie-in approach*, where both measures were applied at the same time.[84] Using this approach entailed what was called "the problem of the short

---

[78] Jesper Lau Hansen: "Say when: When must an issuer disclose inside information", p. 6; and Sebastian Mock: "History, application, interpretation, and legal sources of the Market Abuse Regulation" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide* (Oxford University Press, 2nd edition, 2022), p. 6. See also a discussion on the differences which had appeared in member states regarding the implementation of MAD in: *ESME Report. Market abuse EU legal framework and its implementation by Member States: A first evaluation*.

[79] Jesper Lau Hansen: "Say when: When must an issuer disclose inside information", pp. 7–8. For a description of the different national approaches, see: Carmine Di Noia and Matteo Gargantini: "Issuers at midstream: Disclosure of multistage events in the current and in the proposed EU market abuse regime" (European Company and Financial Review, 4/2012), p. 510–513; Jesper Lau Hansen: "Issuers' duty to disclose inside information" (ERA Forum 18, 2017), p. 33; and Hartmut Krause and Michael Brellochs: "Insider trading and the disclosure of inside information after *Geltl v Daimler* – A comparative analysis of the ECJ decision in the *Geltl v Daimler* case with a view to the future European Market Abuse Regulation", pp. 296–297.

[80] Jesper Lau Hansen: "Say when: When must an issuer disclose inside information", pp. 7–8.

[81] Ibid., p. 8.

[82] Ibid., pp. 8–9.

[83] Jesper Lau Hansen and David Moalem: "The MAD disclosure regime and the twofold notion of inside information: The available solution", p. 329.

[84] Jesper Lau Hansen: "Say when: When must an issuer disclose inside information", p. 7.

blanket", i.e. "either your toes or your nose must freeze", attributed to Carmine Di Noia[85] and described in this way:

> Either inside information was defined to include uncertain information, which would help the ban on insider dealing but be detrimental to the disclosure obligation, or inside information would only include certain or near-certain information, which would provide the opposite result. Either way, by tying in the two separate measures on insider dealing and mandatory disclosure, these member states produced a blanket that was too short.[86]

2.6 The case of Geltl v Daimler

After detailing MAD and CDIR, but before discussing MAR, its relevant to consider the judgement of the ECJ in the case of **Geltl v Daimler**[87], as it affected not only the application of MAD but also the substance of the ad hoc disclosure requirement in MAR.

The case revolved around what constitutes "inside information" but does, consequently, shed light on the question of *when* to publish such information. Despite that, the case did not concern art. 2(2) of CDIR, and in fact that paragraph of CDIR is not even mentioned at all in the judgement – perhaps because the request for a preliminary ruling originated from Germany, a country which adhered to the *tie-in approach*, discussed previously, which didn't specifically rely on art. 2(2) of CDIR.[88]

The case concerned several shareholders' claims for damages from Daimler AG, which had its shares listed on the regulated markets in Stuttgart and Frankfurt.[89] The shareholders maintained that the company had caused them financial damage as it had not disclosed "as soon as possible" information on the decision of the chairman of the company's management board (CEO) to depart the company early. In short, the company published an ad hoc notification on July 28, 2005, shortly after the company's supervisory board had decided that the CEO, Mr Schrempp, would depart his role early and Mr Zetsche would replace him. However, Mr Schrempp had started considering leaving his position following the company's annual meeting on April 6, 2005. He had discussed his intentions to leave with the chairman of the company's supervisory board on May 17, 2005, and subsequently various other personnel and board members of the company were informed of Mr Schrempp's intentions. Specific preparatory steps were taken, e.g. a draft press release was written, leading up to the supervisory board's decision on July 28, 2005, on Mr Schrempp leaving and Mr Zetsche replacing him. Soon after the disclosure, the company's share price rose sharply.

The shareholders started the proceedings in Germany, and eventually the German Federal Supreme Court (*Bundesgerichtshof*) requested a preliminary ruling from the ECJ, which contained two questions which essentially concerned the following: (1) Whether

[85] Ibid.
[86] Ibid.
[87] Case C-19/11 Markus Geltl v Daimler AG.
[88] See e.g. Jesper Lau Hansen: "The hammer and the saw – A short critique on the recent compromise proposal for a Market Abuse Regulation", p. 9; and Jesper Lau Hansen: "Market abuse case law – Where do we stand with MAR?", pp. 382–383.
[89] The shares were (are) also listed on the New York Stock Exchange, which is, however, not relevant to this discussion.

intermediate steps in a protracted process can be considered of a " precise nature" within art. 1(1) of MAD and art. 1(1) of CDIR, and (2) whether a set of circumstances or events which exist/occur or "may reasonably be expected" to come into existence or occur in art. 1(1) of CDIR refers only to circumstances or events that are considered to be *predominant* or *highly probable*, or whether the *magnitude of the effect* of that set of circumstances or events on the prices of the financial instruments concerned must be taken into consideration, sometimes referred to as the *probability/magnitude test* of materiality[90].

In its reply to the *first* question, the ECJ concluded, based on a literal and teleological interpretation of the two Directives, that art. 1(1) of MAD and art. 1(1) of CDIR must be interpreted as meaning that, in the case of a protracted process, not only may that future circumstances or future events be regarded as precise information within the meaning of those provisions, but also the intermediate steps of that process that are connected with bringing about that future circumstance or event.[91]

In its reply to the *second* question, the Court stated that by using the term "reasonably" in art. 1(1) of CDIR, the EU legislature had introduced a criterion to determine whether or not future circumstances and events come within the scope of that provision[92], which was an assessment to be made on "a case-by-case basis of the factors existing at the relevant time".[93] On how likely future circumstances had to be, the Court stated, on the one hand, that proof was not required for a "*high probability*" of the circumstances or events occurring[94], as that would undermine the objective of protecting the *integrity of the EU financial markets* and of enhancing investor confidence in those markets[95], but, on the other hand, that this did not apply to circumstances and events which were "*implausible*" to occur, with the Court citing the need to ensure *legal certainty* for market participants.[96] Therefore, the term "may reasonably be expected" in art. 1(1) of CDIR referred to future circumstances or events in which there is a "realistic prospect" that they will exist or occur.[97]

The Court then followed this by maintaining that the *probability/magnitude test* should *not* be considered when evaluating the term "may reasonably be expected"[98] but that it could be a part of determining whether the information is "likely to have a significant effect on the prices" of the financial instruments concerned[99], i.e. another part of the four-part criteria to determine if the information constitutes inside information.

The ECJ's judgement in **Geltl v Daimler** was criticised, either for what was contained in its reasoning or for what was *not* contained therein. On the latter point, one commentator lamented that the Court seemed to have overlooked the two-step approach and did not even mention art. 2(2) of CDIR, which regards the timing of disclosure, suggesting this was due to the questions posed by the national court to the ECJ.[100]

---

[90] Jesper Lau Hansen: "Say when: When must an issuer disclose inside information", p. 13.
[91] Case C-19/11 Markus Geltl v Daimler AG, para. 40.
[92] Ibid., para. 44.
[93] Ibid., para. 45.
[94] Ibid., para. 46.
[95] Ibid., para. 47.
[96] Ibid., para. 48.
[97] Ibid., para. 49.
[98] Ibid., para. 50.
[99] Ibid., para. 55.
[100] Jesper Lau Hansen: "Say when: When must an issuer disclose inside information", p. 10.

With regards to the ECJ‘s answer to the *first question*, one commentator noted that the judgement showed how the interpretation of the notion of “inside information” in a *disclosure case* can be “contaminated by insider dealing issues”, claiming that the extension of the concept of inside information, “which is understandable in the context of the insider dealing prohibition”, “[u]ndoubtedly … gives rise to problems in determining when an issuer has a duty to disclose information publicly, underlining the risk of insider trading and market manipulation caused by the premature disclosure of information”.[101] Another commentator maintained that the “expansive view of inside information“ adopted by the ECJ, when determining that intermediate steps in a protracted process could constitute “inside information”, heightened the problems which were characteristic of the use of the common definition of “inside information”.[102] Put in a different way, one might say that “the problem of the short blanket”[103], mentioned in the previous subchapter, entailed *more* problems after the ECJ‘s decision in **Geltl v Daimler**.

Concerning the Court‘s answer to the *second question*, one commentator considered that the Court‘s new concept of a “realistic prospect” lacked the clarity of art. 2(2) CDIR, as the provision referred to circumstances or events that are *certain*, i.e. “upon *the coming into existence* of a set of circumstances or the occurrence of an event…” (emphasis added).[104] Furthermore, commentators were not even unified in their position of whether it was possible to convert the concepts of “may reasonably be expected” or “realistic prospect” into *percentages* – i.e. that for an event to be considered a “realistic prospect”, the chances of it actually happening must be *more likely than not* (>50%). Some commentators stated that the probability must be more than 50%[105] but others did not accept that position, even noting that it would be wrong to give probabilities on a specific outcome as that required that the total number of outcomes was known, which was clearly not the case.[106] A disagreement on this point is perhaps *understandable*, seeing that the Court itself was far from exact on this point, maintaining that “may reasonably be expected” and “realistic prospect” were, deducing from

[101] Alain Pietrancosta: “Disclosure of inside information and market abuse” in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide*, p. 49

[102] Jennifer Payne: “Disclosure of inside information” in Vassilios Tountopoulos and Rüdiger Veil (eds): *Transparency of Stock Corporations in Europe: Rationales, Limitations and Perspectives*, p. 106.

[103] The concept is attributed to Carmine Di Noia, see Jesper Lau Hansen: “Say when: When must an issuer disclose inside information”, p. 7.

[104] Jesper Lau Hansen: “The hammer and the saw – A short critique on the recent compromise proposal for a Market Abuse Regulation”, p. 10.

[105] See e.g. Hartmut Krause and Micheal Brellochs: “Insider trading and the disclosure of inside information after *Geltl v Daimler* – A comparative analysis of the ECJ decision in the *Geltl v Daimler* case with a view to the future European Market Abuse Regulation”, pp. 288–289, 299; Susanne Kalss and Clemens Hasenauer: “Article 17. Public disclosure of inside information” in Susanne Kalss, Martin Oppitz, Ulrich Torggler and Martin Winner (eds): *EU Market Abuse Regulation. A Commentary on Regulation (EU) No 596/2014*, pp. 216 and 221; and Mario Hössl-Neumann and Ulrich Torggler: “Article 7. Inside information” in Susanne Kalss, Martin Oppitz, Ulrich Torggler and Martin Winner (eds): *EU Market Abuse Regulation. A Commentary on Regulation (EU) No 596/2014* (Edward Elgar Publishing, 2021), p. 68. It‘s noteworthy that on p. 68 in the last mentioned literature, the standard of “more likely than not” (>50%) is derived from that in the referring court‘s request for a preliminary ruling, the ECJ was presented with three alternatives, i.e. high probability, probability/magnitude test, and more likely than not, and as the first two were dismissed by the Court, the third was “left unanswered, which could be interpreted as eloquent silence”.

[106] Jesper Lau Hansen: “Say when: When must an issuer disclose inside information”, pp. 18–19; Jesper Lau Hansen: “Market abuse case law – Where do we stand with MAR?”, p. 385; and Jesper Lau Hansen: “Issuers‘ duty to disclose inside information”, pp. 27–28.

the Court's reasoning, somewhere between "*implausible*" and "*highly likely*".[107] However, it was unfortunate that the Court was not more clear on this crucial point.

Overall the judgement added to the complications issuers faced when evaluating if information constituted inside information. As one commentator argued, in the case of intermediate steps in a protracted process, in *addition* to assessing if information satisfied the other components of the definition of inside information, the issuer had to determine the chances of the protracted process being completed.[108] As two other commentators contended, this approach required issuers to "evaluate the probability of a probability" which they believed was "quite puzzling".[109]

Notwithstanding the critique, the judgement would prove to have a substantial influence on the ad hoc disclosure requirement as it was eventually framed in MAR, as will be detailed in Chapter 3.

[107] Case C-19/11 Markus Geltl v Daimler AG, paras. 46 and 48–49. It's also worth mentioning that Advocate General Mengozzi, in his opinion in the case, did not support the position of applying MAD and CDIR "by simply calculating statistical percentages for en event occurring", see para. 82 of AG Mengozzi's Opinion in Case C-19/11 Markus Geltl v Daimler AG, delivered on March 21, 2012 (ECLI:EU:C:2012:153).
[108] Jesper Lau Hansen: "Say when: When must an issuer disclose inside information", p. 26.
[109] Carmine Di Noia and Matteo Gargantini: "Issuers at midstream: Disclosure of multistage events in the current and in the proposed EU market abuse regime", p. 498.

3. Market Abuse Regulation

3.1 Introduction

After negotiations, the Market Abuse Regulation[110] replaced MAD. The use of regulation, rather than the previous (minimum harmonisation) directive, was meant to ensure "a more uniform interpretation of the Union market abuse framework".[111][112]

As detailed in this chapter, the dual role of the concept of inside information, introduced in MAD and discussed previously, comes out "strengthened" through MAR.[113] However, before the relevant provisions of MAR are described, it is necessary to detail the main provisions in the Commission's original proposal for MAR from 2011 (*MAR Proposal*) for context and later discussion.[114]

3.2 MAR Proposal

In the MAR Proposal, the Commission suggested reverting to the model used prior to MAD whereby there were two distinct definitions of information which delimited the two measures, i.e. the prohibition on insider dealing and the ad hoc disclosure requirement. Consequently, art. 6 of the MAR Proposal contained the definition of "inside information" in items (a)-(e), with item (a) containing the four constitutive elements of the concept of "inside information" but item (e) containing a *new* definition of information:

> 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 of financial instruments or to one or more financial instruments, and which if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.
>
> (b) in relation to derivatives on commodities […].
>
> (c) in relation to emission allowances or auctioned products based thereon […].

[110] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

[111] Recital 5 in the preamble to MAR. Although it is not entirely clear whether the Regulation is a minimum or maximum harmonisation Regulation according to Rüdiger Veil: "§ 13. Foundations" in Rüdiger Veil (ed): *European Capital Markets Law* (Hart Publishing, 2nd edition, 2017), pp. 186–187.

[112] It's worth mentioning that on the same day the Market Abuse Regulation was adopted, Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), was adopted, which put in place minimum requirements on member states with regards to criminal sanctions in respect of insider dealing, market manipulation and selective disclosure.

[113] Alain Pietrancosta: "Article 17: Public disclosure of inside information" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide*, pp. 461–462.

[114] Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) (Com(2011) 651 final. 2011/0295 (COD)). For an extensive account of the MAR negotiations, with regard to the ad hoc disclosure requirement, see Jesper Lau Hansen: "Say when: When must an issuer disclose inside information", pp. 19–27.

(d) for persons charged with the execution of orders concerning financial instruments […].

(e) information not falling within paragraphs (a), (b), (c) or (d) relating to one or more issuers of financial instruments or to one or more financial instruments, which is not generally available to the public, but which, if it were available to a reasonable investor, who regularly deals on the market and in the financial instrument or a related spot commodity contract concerned, would be regarded by that person as relevant when deciding the terms on which transactions in the financial instrument or a related spot commodity contract should be effected. (Emphasis added)

It is not easy to apprehend what information falls within item (e). The definition of the information to which item (e) applies, in contrast with the definition in item (a), suggests that item (e) applies to information not fulfilling the condition of being of a sufficiently "precise nature" (but fulfilling the other three conditions). This approximation is supported by recital 14 in the preamble of the MAR Proposal, where it states that information can constitute "inside information" but may not be "sufficiently precise for the issuer to be under an obligation to disclose it". The latter part of the definition, on the other hand, is harder to grasp. The reference to a "reasonable investor" suggests that the same criteria should be used as was contained in art. 1(1) of CDIR[115], applicable at that time (and was also suggested for art. 6(3) of the MAR Proposal). However, the addition of "who regularly deals on the market and in the financial instrument", and also the reference in the suggested art. 6(3) of the MAR Proposal to a "reasonable investor", seems to suggest that the investor referenced in item (e) is perhaps more experienced or sophisticated than the "reasonable investor".

Article 12 of the MAR Proposal contained the ad hoc disclosure requirement, with art. 12(1) encompassing substantially the same obligation as in art. 6(1) of MAD, but in the MAR Proposal, art. 12(1) contained the "principle" to the "exception" in art. 12(3), which applied to information falling within the definition of item (e), as seen here:

1. An issuer of a financial instrument shall inform the public as soon as possible of inside information, which directly concerns the issuer […].

2. An emission allowance market participant shall […].

3. Paragraphs 1 and 2 shall not apply to information which is only inside information within the meaning of point (e) of paragraph 1 of Article 6. (Emphasis added)

Thus, when arts. 6 and 12 were applied together, the MAR Proposal suggested that the time limits for when each of the measures would be applicable would *partly* be different, depending on if the information fell within the definitions items (a)-(d), where the ban on insider dealings and the ad hoc disclosure requirement were applicable at the same time, or if the information fell within the definition in item (e), where the prohibition on insider dealings would apply, but disclosure would not be required.

[115] For a discussion on the "reasonable investor": See e.g. Mario Hössl-Neumann and Ulrich Torggler: "Article 7. Inside information" in Susanne Kalss, Martin Oppitz, Ulrich Torggler and Martin Winner (eds): *EU Market Abuse Regulation. A Commentary on Regulation (EU) No 596/2014*, pp. 73–75.

Ultimately, however, in the negotiations on the MAR Proposal following the Commission putting it forward, the new definition of "inside information" was *altered* and recital 14 in the preamble *removed*, apparently as a result of the ECJ's judgement in **Geltl v Daimler**[116], which was pronounced on June 28, 2012, namely after the Commission had put forward the MAR Proposal.

Thus, in the adopted MAR, a new concept of "inside information" was *not* introduced, and the substantial elements of prohibiting insider dealing and requiring ad hoc disclosure were essentially the same as in the previous regime, *outside* of the instrumental art. 2(2) of CDIR, which is nowhere to be found in MAR, all of which will be detailed in the next subchapters.

3.3 Article 7 of MAR

Article 7(1)(a)[117] of MAR contained the same definition of "inside information" as art. 6(1) of the previous MAD, having the same four constitutive elements of the concept introduced with the Insider Dealing Directive in 1989.

Furthermore, the definitions of "precise nature" and "significant effect on the prices" of a financial instrument, which were in the art. 1(1) and (2) of CDIR in the previous regime were added to the *first* sentence of art. 7(2) and art. 7(4) of MAR, respectively. This was because "legal certainty for market participants should be enhanced through a closer definition" of these essential elements of the concept of "inside information", as stated in recital 18 in the preamble to the Regulation.

However, in the *second* sentence of art. 7(2) and art. 7(3), concerning "a protracted process" and "an intermediate step", the EU legislative set out the reasoning of the ECJ in **Geltl v Daimler**, as well as a CESR guidance from 2007, in MAR.[118] Thus it is clear that information concerning a protracted process which occurs in intermediate steps, and also each intermediate step of that process, can constitute inside information, depending on whether the overall process or each intermediate step, by itself, meets the criteria for "inside information" in art. 7(1)(a) of MAR.[119] Those intermediate steps can include e.g. "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".[120]

Finally, the concept of "realistic prospect" from **Geltl v Daimler** is not articulated, or even mentioned, in the Regulation. Still, its rationale is nonetheless applicable within the element of "may reasonably be expected" to come into existence or occur in art. 7(2) of

---

[116] Jesper Lau Hansen: "The hammer and the saw – A short critique on the recent compromise proposal for a Market Abuse Regulation", p. 9. Jesper Lau Hansen: "Say when: When must an issuer disclose inside information", p. 21. For a detailed discussion on the legislative procedure in regards to the ad hoc disclosure requirement in the MAR Proposal, see Jesper Lau Hansen: "Say when: When must an issuer disclose inside information", pp. 19–26.

[117] Also items (b)-(c), and partly (d). See *n* 10.

[118] Marco Ventoruzzo and Chiara Picciau: "Article 7: Inside information" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide* (Oxford University Press, 2nd edition, 2022), p. 271, referring to *Market Abuse Directive: Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market* (CESR, July 2007, CESR/06-562b), para. 1.6.

[119] Recital 16 in the preamble to MAR.

[120] Recital 17 in the preamble to MAR.

MAR.[121]

Consequently, art. 7 of the MAR maintains:

> 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 instruments;
>
> […]
>
> 2. For the purposes of paragraph 1, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instrument, the related spot commodity contracts, or the auctioned products based on the emission allowances. In this respect in the case of a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, those future circumstances or that future event, and also the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or that future event, may be deemed to be precise information.
>
> 3. An intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information as referred to in this Article.
>
> 4. For the purposes of paragraph 1, information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments, derivative financial instruments, related spot commodity contracts, or auctioned products based on emission allowances shall mean information a reasonable investor would be likely to use as part of the basis of his or her investment decisions.
>
> […]

[121] See e.g. Marco Ventoruzzo and Chiara Picciau: "Article 7: Inside information" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide*, p. 268, when discussing the relevance of three particular judgements of the ECJ, which dealt with the concept of "inside information" within previous legislation, in interpreting the provisions of MAR. The judgements in question are the previously discussed **Geltl v Daimler**, and also Case C-45/08 Spector Photo Group NV and Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA) of December 23, 2009 (ECLI:EU:C:2009:806) and Case C-628/13 Jean-Bernard Lafonta v Autorité des marchés financiers of March 11, 2015 (ECLI:EU:C:2015:162).

3.4 Article 17(1) of MAR

The first subparagraph of art. 17(1) of MAR contains the ad hoc disclosure requirement and is as follows:

> 1. An issuer shall inform the public as soon as possible of inside information which directly concerns that issuer.

As with art. 7 of MAR, art. 17 of the Regulation incorporates relevant provisions of the previous MAD regime's level 1 and 2 acts.[122] Thus, the first subparagraph of article 17(1) of the Regulation, seen above, is substantially similar to art. 6(1) of MAD, and the second subparagraph of art. 17(1) of the Regulation, stating the requirements on *how* disclosure should be made, is similar to subparagraphs 2 and 3 of art. 2(1) of CDIR.

As is apparent, art. 17(1) of MAR is based on the notion of "inside information" and the MAR regime thus continues the use of the dual role of the notion, previously introduced with MAD. One commentator even noted that the dual role comes out "strengthened" through MAR as it was retained *despite* **Geltl v Daimler** "extending the notion" of inside information to include intermediate steps in a protracted process and despite widespread criticism.[123] Another commentator noted that these elements, i.e. the dual role of inside information and the codification in MAR of the idea that intermediate steps could constitute inside information, "intensified" the risk that issuers would be in breach of their ad hoc disclosure requirement.[124]

However, *crucially*, one element that was *not* continued from the previous regime was art. 2(2) of CDIR. Under the MAD regime, that provision was interpreted as providing the *time limits* for disclosure, as detailed previously in Subchapter 2.5.5, but is *nowhere to be seen* in MAR. In its absence, article 17(1) requires disclosure as soon as possible. Thus, the measures apply simultaneously, i.e. when information is considered to constitute "inside information", the prohibition on insider dealing is applicable, and the ad hoc disclosure requirement. MAR thus *brought forward*, at least in those member states which applied the two-step approach, the time limit of the ad hoc disclosure requirement.[125]

Disclosure "as soon as possible" according to art. 17(1) applies unless the issuer takes advantage of the (more general) authorisation to delay disclosure contained in the first subparagraph of art. 17(4), based on, inter alia, that the "immediate disclosure is likely to prejudice the legitimate interests of the issuer" or the specific authorisation, *introduced with MAR*, in the second subparagraph of art. 17(4), which concerns delay in relation to a *protracted process*, or art. 17(5), where "financial stability" is concerned.[126] The extension of the right to

---

[122] For a discussion on the four levels of the *Lamfalussy process*, see Fabian Walla: "§ 4. Process and strategies of Capital Markets Regulation in Europe" in Rüdiger Veil (ed): *European Capital Markets Law* (Hart Publishing, 2nd edition, 2017), pp. 43–53.

[123] Alain Pietrancosta: "Article 17: Public disclosure of inside information" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide*, pp. 461–462.

[124] Jennifer Payne: "Disclosure of inside information" in Vassilios Tountopoulos and Rüdiger Veil (eds): *Transparency of Stock Corporations in Europe: Rationales, Limitations and Perspectives*, p. 107.

[125] Marco Ventoruzzo and Chiara Picciau: "Article 7: Inside information" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide*, p. 265.

[126] ESMA also issued guidelines in 2016, where it set out a "non-exhaustive and indicative list" of (1) legitimate interests of the issuer which are likely to be prejudiced by immediate disclosure, e.g. negotiations related to mergers and acquisitions, and (2) a list of situations where delay of disclosure is likely to mislead the public, e.g. where the information which the issuer intends to delay is "materially different" from the previously disclosed

delay protracted processes was "probably in recognition of the fact that this kind of uncertain information is likely to mislead the public if disclosed too early".[127]

3.5 MAR Review report

A few years after the adoption of MAR, ESMA issued the *MAR Review report*.[128] In the report, ESMA outlined, inter alia, that market participants considered the definition of inside information to be *too broad* and requested ESMA to issue guidance on several subjects to assist issuers in identifying circumstances and events which might constitute "inside information", while a "minority of respondents" proposed amendments to the definition in art. 7(1)(a) of MAR.[129] ESMA decided against recommending to the Commission that the definition in art. 7(1)(a) of MAR would be altered but maintained that it was ready to provide guidance on the definition.[130] The Report also detailed that issuers sought clarifications regarding issuers' right to delay disclosure in art. 17(4) of MAR, e.g. on the scope of the condition of an issuer's legitimate interests and the condition that delay is not likely to mislead the public.[131] ESMA did not consider it necessary to amend the conditions but insisted that it was keen to revise its 2016 Guidelines on the delay of disclosure[132].[133]

information. *MAR Guidelines: Delay in the disclosure of inside information* (ESMA, October 20, 2016, ESMA/2016/1478 EN).

[127] Jesper Lau Hansen: "Issuers' duty to disclose inside information", p. 34.

[128] *MAR Review report*.

[129] Ibid., pp. 47–49.

[130] Ibid., pp. 55–57.

[131] Ibid., pp. 64–65.

[132] *MAR Guidelines: Delay in the disclosure of inside information*.

[133] *MAR Review report*, pp. 69–70.

4. Proposed changes to MAR

4.1 Introduction

On December 7, 2022, the Commission put forward a proposal for changes to MAR, the Prospectus Regulation[134], and the Markets in Financial Instruments Regulation[135] (*Proposal*).[136] The suggested changes include, inter alia, an alteration to the ad hoc disclosure requirement in art. 17(1) of MAR so that the provision would explicitly state that issuers would *not* be obligated to publicly disclose information on "intermediate steps in a protracted process […] where those steps are connected with bringing about a set of circumstances or an event", cf. art. 2(38)(a) in the Proposal.

This chapter will describe the objectives of the suggested changes, followed by a discussion on the proposed changes to the ad hoc disclosure requirement.

4.2 Objectives of the proposed changes to art. 17 of MAR

In the Explanatory Memorandum with the Proposal, the Commission states that feedback from stakeholders indicates that the ad hoc disclosure requirement is "burdensome" due to the broadness of the notion of inside information and the difficulties in deciding what does and does not fall within the notion. As the notion covers not only events that have already occurred but also events that are "reasonably expected to occur" and also applies to intermediate steps in protracted processes, the issuers incur high compliance costs to determine when a particular piece of information is mature enough to be disclosed.[137]

As the same notion applies to both the prohibition on insider dealing and the ad hoc disclosure requirement, the Commission contends that the broadness of the notion means that the ban on insider dealing is applicable very early and that issuers are required to disclose information at a very early stage "when information on circumstances or events have not yet reached a high degree of certainty".[138] However, as the Commission states:

> "[…] the effectiveness of disclosure in reducing information asymmetries between issuers and investors is limited if the information is too preliminary, incomplete and still potentially subject to fundamental changes. Too early disclosure of information could mislead investors and trigger action on his/her part that could prove to be suboptimal in hindsight (e.g., divesting the stock too

[134] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

[135] Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, pp. 84–148).

[136] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises. Note that the Proposal was part of measures the Commission put forward to further develop the EU's Capital Markets Union, containing a number of legislative proposals in the field of clearing services, corporate insolvency and listing on public markets. For further information, see the Commission's press release from December 7, 2022, available here: https://ec.europa.eu/commission/ presscorner/detail/en/ip_22_7348 (accessed on March 29, 2023).

[137] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises, p. 5.

[138] Ibid.

soon or not divesting soon enough), thus increasing the opportunity cost[139] for investors."[140]

Therefore, the suggested changes to the first subparagraph of art. 17(1) and the addition of arts. 17(1a) and 17(1b) to MAR aim to reduce legal uncertainty on what constitutes inside information for disclosure purposes and the timing of disclosure. According to the Commission, these amendments "seek to make the MAR disclosure regime less costly to comply with by issuers, more predictable from the investors' point of view and more conducive to effective price formation."[141]

Finally, the Commission maintains in the Explanatory Memorandum that the proposed measures are proportionate, namely that they are adequate for reaching their objectives and do not go beyond what is necessary.[142] The Commission also maintains that the measures, meant to reduce the administrative burden for issuers, are "carefully calibrated to avoid a detrimental impact on market integrity and investor protection, which are the core objectives of MAR" and that by "limiting the disclosure obligation to "mature" events only, the proposal ensures that markets and investors receive only meaningful information, avoiding the circulation of inaccurate or misleading information, which may misguide investment decisions".[143] Finally, the Commission refers to the proposed addition to MAR of a measure for national competent authorities to combat market abuse, i.e. setting up a cross-market order book surveillance (CMOBS), which the Commission states will enhance market integrity and investor confidence.[144]

To summarise the discussion above, the objectives of the suggested changes to art. 17 of MAR are on one hand to enhance *legal certainty* for market participants but on the other hand, doing so without sacrificing *market integrity*.

4.3 Proposed changes to art. 17 of MAR

The Proposal suggests replacing the first subparagraph of art. 17(1) and adding two paragraphs, 1a and 1b, to art. 17(1), cf. art. 2(38)(a)-(b). If adopted by the EU legislature, arts. 17(1), 17(1a) and 17(1b) would appear in this form:

> 1. An issuer shall inform the public as soon as possible of inside information which directly concerns that issuer. That requirement shall not apply to intermediate steps in a protracted process as referred to in Article 7(2) and (3) where those steps are connected with bringing about a set of circumstances or an event.
>
> […]
>
> 1a. The Commission shall be empowered to adopt a delegated act to set out and review, where necessary, a non-exhaustive list of relevant information and,

[139] The concept of "opportunity cost" is defined as "the loss of other alternatives when one alternative is chosen". Oxford English Dictionary. Accessed online: https://www.oed.com.
[140] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises, p. 5.
[141] Ibid., p. 7.
[142] Ibid., p. 11.
[143] Ibid.
[144] Ibid.

for each information, the moment when the issuer can be reasonably expected to disclose it.

1b. An issuer shall ensure the confidentiality of the information which meets the criteria of inside information set out in Article 7 until that information is disclosed pursuant to paragraph 1. Where the confidentiality of that inside information is no longer ensured, the issuer shall disclose that inside information to the public as soon as possible.

The suggested change to the *first subparagraph of art. 17(1)* essentially involves adding a second sentence to the subparagraph and introducing a new category of information, which contains information on intermediate steps in a protracted process, and explicitly excluding this information from the ad hoc disclosure requirement, which is left untouched in the first sentence of the subparagraph.

With the suggested addition of *art. 17(1a)*, the Commission is empowered to adopt a *delegated act* to set out a non-exhaustive list of relevant information and when the issuer can be reasonably expected to disclose such information. This addition is suggested to "facilitate the assessment of the moment of disclosure of the relevant information by the issuer and ensure a consistent interpretation of the requirement", according to recital 59 in the preamble to the Proposal.[145] The delegated act will be issued on the grounds of art. 290 TFEU which states that "non-legislative acts of general application" may be adopted by the Commission "to supplement or amend certain non-essential elements of the legislative act". The delegated act could be adopted either as a directive or a regulation[146], but, as of October 2022, all delegated acts of MAR have been adopted as regulations[147].

The suggested addition of *art. 17(1b)* reiterates the issuers' obligation to keep inside information confidential and, where confidentiality is no longer ensured, to publish inside information as soon as possible.

Changes to art. 17(4), (5), (7) and (11) of MAR are also suggested in the Proposal, cf. art. 2(38)(c), (d), (e) and (f), but are not relevant and will therefore not be discussed further in the thesis. However, there are other changes in the Proposal that are relevant to the discussion in the thesis, including (i) a variety of changes to the Prospectus Regulation, which are made essentially to simplify and streamline the prospectus requirements, according to the Proposal[148], cf. art. 1 in the Proposal; (ii) a suggested change to the definition of "inside information" in art. 7(1)(d), where the definition is expanded to cover not only persons charged with the execution of an order but also other persons who may be aware of a forthcoming order or transaction[149], cf. art. 2(35) in the Proposal; and (iii) a suggested increase to the monetary threshold in art. 19 of MAR (to EUR 20,000) above which transactions conducted by managers

[145] Ibid., p. 42.
[146] Fabian Walla: "§ 4. Process and strategies of Capital Market Regulation in Europe" in Rüdiger Veil (ed): *European Capital Markets Law*, p. 47.
[147] Implementing and Delegated Acts on Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. (European Commission, issued on October 24, 2022.)
[148] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises, pp. 6–7.
[149] See *n* 10.

of the issuer are mandated to be disclosed, as the current threshold (EUR 5,000) puts an obligation on issuers to publish "transactions which would not be meaningful til investors", according to recital 65 in the Proposal[150], cf. art. 2(40)(a).

Finally, the suggested changes are accompanied by improvements to the information-exchange regime among national competent authorities, to better assist them in identifying market manipulation cases by setting up a cross-market order book surveillance (CMOBS), cf. art. 2(43) of the Proposal.

The effects of the suggested changes are detailed in the following chapter.

[150] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises, p. 43.

5. Analysis

5.1 Introduction

The research questions will be answered in this chapter; first the likely effects of the proposed changes to art. 17 of MAR will be explored, followed by an analysis of whether the objectives of the changes will be attained, based on the presumption that the suggested changes, as proposed by the Commission, will be adopted by the EU legislative (which at the time of writing is not clear).

5.2 Effects of the suggested changes to art. 17 of MAR

The suggested addition to the first subparagraph of art. 17(1) of MAR, stipulating that the ad hoc disclosure requirement shall not apply to intermediate steps, will *narrow* the scope of the ad hoc disclosure requirement from what it is currently, namely that the requirement will only apply to the event or circumstances that are *intended to complete the protracted process*, given that such an event or circumstances, in itself, qualifies as "inside information", "at the moment when such information is sufficiently precise, such as when the management board has taken the relevant decision to bring about the event", according to recital 58 in the Proposal.[151]

However, as the definition of "inside information" in art. 7(1) of MAR is not suggested to change, apart from a minor change suggested to the definition in *art. 7(1)(d)* of MAR, as briefly detailed in Subchapter 4.3, the prohibition on insider dealing will *essentially remain the same*, as will other prohibitions in MAR which rely on the concept, which are, inter alia, selective disclosure and tipping. Put in another way: Information on an intermediate step in a protracted process *could* constitute "inside information", and will therefore be subject to the prohibition of insider dealing, selective disclosure and tipping. However, the issuer will *not* be mandated to publicly disclose such information (unless the intermediate step is the event that is intended to complete the process and constitutes "inside information"). Thus, the suggested change to the first subparagraph of art. 17(1) concerns the *time limit*, so the prohibition on insider dealing, selective disclosure and tipping are applicable when information is considered to constitute "inside information", but the ad hoc disclosure requirement does not automatically apply at the same time limit.

In this context, the suggested changes regarding the first subparagraph of art. 17(1) seem similar to the *two-step approach*, applied previously by particular member states under MAD, discussed in Subchapter 2.5.5, but only regarding *intermediate steps in a protracted process*, as the suggested changes only refer to information about such situations. It leads from this, that the proposed changes seem to solve "the problem of the short blanket"[152] in relation to MAR, mentioned previously in relation to MAD, albeit only in the situations mentioned above.

As the suggested change to the first subparagraph of art. 17(1) only requires that information about the event intended to complete the protracted process should be published (if it in fact constitutes "inside information"), and not information on the intermediate steps, a common sense observation is that *less information concerning protracted processes* will be

[151] Ibid., p. 42.
[152] Jesper Lau Hansen: "Say when: When must an issuer disclose inside information", p. 7.

disclosed, namely only information in regards to the event that is intended to complete such a process, and therefore that *less information overall* will be disclosed on the market.

The suggested changes also involve adding arts. 17(1a) and 17(1b) to MAR; in art. 17(1a), the Commission is empowered to adopt a delegated act to set out a non-exhaustive list of relevant information and when the issuer can be reasonably expected to disclose it, and in art. 17(1b), the issuers‘ obligation to keep inside information confidential is reiterated and the obligation to publish inside information as soon as possible where confidentiality is no longer ensured. A further discussion on these suggested additions will feature in the following subchapters.

As previously discussed, the objectives of the suggested changes to art. 17 of MAR are to enhance legal certainty without sacrificing market integrity. In the following subchapters, it will be analysed whether the Proposal will attain these objectives.

5.3 Will legal certainty be enhanced?

As detailed in Subchapter 2.4, legal certainty "expresses the fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly"[153], which includes that EU legislation has "clear and predictable" effects, and that "situations and legal relationships … remain foreseeable"[154]. In the context of art. 17(1), cf. art. 7, of MAR, this means that issuers and market participants understand the ad hoc disclosure requirement contained in the provision so that they can apply it to their circumstances. In other words, this means that issuers are able to determine if and when to publish information.

The suggested change to the first subparagraph of art. 17(1) stipulates that the ad hoc disclosure requirement does *not* apply to "intermediate steps in a protracted process". As is discussed in the previous subchapter, this suggested change means, concerning protracted processes, that an issuer is *not* mandated to disclose information on intermediate steps in a protracted process and only on the event or circumstances which are meant to finish such a protracted process (if such an event or circumstances, in itself, constitute "inside information").

The difficulties issuers have faced when assessing what information they are mandated to disclose – especially in relation to intermediate steps in protracted processes – are discussed throughout the thesis. With this suggested amendment to the first subparagraph art. 17(1), these difficulties concerning intermediate steps seem to have been alleviated. In regards to intermediate steps, issuers are simply *not* mandated to disclose them. Issuers will therefore not be obligated to go through the whole process of determining if such information constitutes "inside information", including (but certainly not limited to) having to "evaluate the probability of a probability", as two commentators declared with regards to intermediate steps under MAD[155], but which applies equally under MAR. Therefore, the thesis concludes that the amendment to the first subparagraph of art. 17(1) ensures that issuers have a better understanding of what information to publish and when, and the amendment will bring *legal clarity* for issuers and other market participants.

[153] Takis Tridimas: *The General Principles of EU Law*, p. 242.
[154] Ibid., p. 244.
[155] Carmine Di Noia and Matteo Gargantini: "Issuers at midstream: Disclosure of multistage events in the current and in the proposed EU market abuse regime", p. 498.

Additionally, and perhaps more importantly, the suggested addition of art. 17(1a) to MAR means that the Commission will be empowered to adopt a delegated act to set out a non-exhaustive list of relevant information, i.e. events or circumstances, to which the ad hoc disclosure requirement in the first sentence of the first subparagraph of art. 17(1) applies and the moment when the issuer can be reasonably expected to disclose the information. That delegated act, adopted in accordance with art. 290 TFEU, will be legally binding and thus have more significant influence than if the suggested addition of art. 17(1a) would stipulate that ESMA issued a *set of guidelines* concerning this issue – as is mandated in e.g. arts. 7(5) and 17(11)[156] – which are considered non-binding but having other indirect legal effects[157].

However, the delegated act will (obviously) only apply to events or circumstances addressed in the act, and, as the list in the delegated act will be non-exhaustive as stipulated by in the suggested art. 17(1a), the delegated act will not automatically create a "safe harbour" regarding particular events or circumstances because of their absence from the delegated act. In other words, issuers will be obligated to disclose inside information not addressed in the delegated act (unless, of course, that information is regarding an "intermediate step" in a "protracted process", as stipulated by the suggested first subparagraph of art. 17(1)).

Despite this, the thesis finds that adopting the delegated act will *add legal clarity* for issuers and other market participants concerning what constitutes "inside information" and when to publish it, thus adding to the *consistent application* of the requirement.

To a minimal extent, the delegated act, if adopted by the Commission, would be reminiscent of Form 8-K, which is the basis for the ad hoc disclosure requirement in the United States and is discussed briefly in Subchapter 2.4. However, the most distinctive difference between the delegated act and Form 8-K would be that the form sets out an *exhaustive* list of events or circumstances mandated for disclosure, but the delegated act, in contrast, is meant to set out a *non-exhaustive* list of events and circumstances to disclose. Both deal with the *timing* of disclosures, but Form 8-K also deals with the *content* of disclosures, which is not supposed to be covered in the delegated act.

Overall, the thesis finds that the suggested changes to art. 17 of MAR will enhance *legal certainty* for issuers and other market participants. However, this position is accompanied by the caveat that the suggested change to subparagraph of art. 17(1) only applies to intermediate steps in protracted processes, and not to other situations which might prove troublesome for issuers. The position is also based on the presumption that the Commission will adopt the delegated act.

Finally, as the definition of "inside information" will *essentially remain the same*, as discussed in the previous subchapter, the EU legislator will, fortunately, avoid creating possible

---

[156] *MAR Guidelines: Information relating to commodity derivatives markets or related spot markets for the purpose of the definition of inside information on commodity derivatives* (ESMA, January 17, 2017, ESMA/2016/1480), issued on the grounds of art. 7(5) of MAR, and *MAR Guidelines: Delay in the disclosure of inside information*, issued on the grounds of art. 17(11) of MAR. See also *CESR. Market Abuse Directive: Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market*, issued under the MAD regime. All three instruments state that they contain a "non-exhaustive" and "indicative" or "purely indicative" list of information. See also art. 2(38)(f) of the *Proposal*, where it is suggested that ESMA will be mandated to issue "guidelines to establish a *non-exhaustive indicative* list of the legitimate interests of issuers…" (emphasis added).

[157] Fabian Walla: "§ 4. Process and strategies of Capital Market Regulation in Europe" in Rüdiger Veil (ed): *European Capital Markets Law*, pp. 49–50.

confusion for market participants by introducing a new concept concerning information into the MAR regime.[158]

5.4 Will market integrity be jeopardised?

As is discussed in Subchapter 2.4, the four elements which one commentator maintained were required for market integrity (and market fairness) are "non-discriminatory access to the market for all those wishing to participate" and "transparent and accurate information about the prices of securities available to all participants at the same time"[159] – which do not seem to be perturbed at all by the suggested changes to art. 17 of MAR and will therefore not be discussed any further – and "accurate information about issuers of securities available to all participants at the same time" and "the elimination of market abuse activities"[160]. The last two elements are relevant to the discussion and will thus be dealt with in turn.

5.4.1 Equal access to accurate information

As previously discussed, the suggested change to the first subparagraph of art. 17(1) of MAR will lead to less information being disclosed. Less information disclosed suggests that more information asymmetry will form between insiders of the issuer and others. However, based on the *nature* of the information that will be missing from disclosure, that information asymmetry is perhaps not so much after all. Namely, the information, not mandated to be published according to the suggested change to the first subparagraph of art. 17(1), is information on "intermediate steps in a protracted process", which could easily fall into the category of "*uncertain and future information*", established by one commentator in contrast to information that was deemed "certain or near certain".[161] Disclosure of such "uncertain and future information" could possibly misguide investors, be subject to changes and be contrary to the measure's stated objective, i.e. to inform the public.[162] The Commission itself contends in the Explanatory Memorandum in the Proposal that the disclosure of such information has a limited effect in decreasing information asymmetry between issuers and investors.[163] Thus it's highly questionable if the lack of disclosure of such information in fact reduces information asymmetry. In other words, in this context, less information disclosed doesn't automatically mean less market integrity.

An important point to note here is that the other disclosure requirements issuers need to comply with, detailed briefly in Subchapter 1.1, are not subject to suggested changes in the Proposal, apart from changes suggested to the prospectus regime and regarding the monetary

[158] See e.g. the discussion on arts. 6(1) and 12 of the MAR Proposal in Subchapter 3.2, where item (e) of art. 6(1) introduced a new type of information which surely would have made it more complex, at least initially, to identify information which was subject to the ad hoc disclosure requirement in art. 12. However, as explained in the referred subchapter, the concept of "relevant information" in item (e) in the MAR Proposal was abandoned in the negotiations for MAR, so those concerns were not realised.
[159] Janet Austin: "What exactly is market integrity? An analysis of one of the core objectives of securities regulation", pp. 239–240.
[160] Ibid.
[161] Jesper Lau Hansen: "Say when: When must an issuer disclose inside information", p. 8.
[162] Ibid., p. 6.
[163] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises, p. 5.

threshold above which managers‘ transactions need to be disclosed, as briefly detailed in Subchapter 4.3. Thus, if the suggested changes are adopted, considerable disclosure obligations will continue to rest on issuers.

Furthermore, the addition of art. 17(1b) maintains the obligation to keep inside information confidential until disclosure and, if confidentiality is not ensured, that disclosure shall be made as soon as possible. This is similar to the obligation in art. 17(7) of MAR, where an issuer has decided to delay disclosure, but can no longer ensure the confidentiality of such information. This addition in art. 17(1b) *re-enforces* the obligation of equal access to inside information.

Overall, the thesis finds that the suggested changes to art. 17 don‘t seem to harm the requirement of equal access to accurate information about issuers of securities.

5.4.2 Eliminating market abuse

First, as the definition of “inside information” in art. 7(1) of MAR is not suggested to change, apart from a minor change suggested to the definition in *art. 7(1)(d)* of MAR, the prohibition on insider dealing will *essentially remain the same*, as will other prohibitions in MAR which rely on the concept, e.g. ban on selective disclosure and tipping, as maintained in Subchapter 5.2. Therefore, when the suggested changes to art. 17 of MAR are adopted, these types of behaviour will continue to be prohibited and punishable according to national laws of member states, cf. art. 30 of MAR and Directive 2014/57/EU on criminal sanctions for market abuse.[164] Consequently, the principal measures supposed to combat market abuse will continue to be in place. In addition, as discussed in the previous subchapter, other disclosure requirements, apart from the prospectus regime and disclosure of managers‘ transactions, are not subject to changes in the Proposal. Thus, they will continue to support the national competent authorities in detecting market abuse cases.

The suggested changes to the first subparagraph of art. 17(1) of MAR will lead to less information being disclosed, as observed previously, but, however, it‘s doubtful that mandating disclosure of inside information is in fact helpful in preventing insider dealing. As one commentator suggested, mandating early disclosure of information to hinder insider dealing would not be beneficiary, might misguide investors and was likely to cause damage to the issuer and others.[165] In the same vein, concerns about the premature disclosure of information, which might amount to market manipulation[166], will no longer be valid because of the suggested change to the first subparagraph of art. 17(1), where it will no longer be mandated to disclose information on “intermediate steps”, which is the type of information primarily subject to these concerns. The Commission adopting a delegated act on the grounds of the suggested addition to art. 17(1a) would also assist in this regard, supporting a *consistent application* by issuers and market participants of the ad hoc disclosure requirement.

Furthermore, the suggested addition of art. 17(1b) maintains confidentiality of inside information, but if confidentiality is breached, the issuer is mandated to disclose the

[164] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive).
[165] Jesper Lau Hansen: “Say when: When must an issuer disclose inside information”, p. 5; and Jesper Lau Hansen: “The hammer and the saw – A short critique on the recent compromise proposal for a Market Abuse Regulation”, pp. 6.
[166] Jesper Lau Hansen: “Market abuse case law – Where do we stand with MAR?”, p. 383.

information as soon as possible. Thus, the provision *re-enforces* the obligation of keeping inside information confidential, but, if confidentiality cannot be kept, the information shall be disclosed, and therefore supports equal access to inside information and assists in preventing market abuse.

Finally, in the suggested changes to MAR are improvements to the information-exchange regime among national competent authorities, by setting up a cross-market order book surveillance (CMOBS), cf. art. 2(43) in the Proposal, which is intended to assist the authorities in identifying cases of market manipulation.

Overall, the thesis finds that the suggested changes to art. 17 of MAR don‘t seem to harm the requirement of eliminating market abuse activities.

5.5 Final comments

At the risk of using a worn-out phrase, “only time will tell” if the suggested changes to art. 17 of MAR will be adopted by the EU legislature and, if so, what exact effects they will have. However, the thesis finds that there is a reason to believe that the effects will be positive for issuers and other market participants, as the suggested changes, compared to the current ad hoc disclosure requirement, will increase legal certainty and they don‘t seem to harm market integrity. Therefore, the conclusion is made that the suggested changes will achieve their objectives.

6. Conclusion

As detailed in Chapter 1, the ad hoc disclosure requirement in art. 17(1) of MAR is one of a number of disclosure obligations issuers have to comply with when their financial instruments have been admitted to trading on a regulated market. It‘s of great importance that issuers adhere to the ad hoc disclosure requirement, as otherwise they might be subject to litigation and administrative or criminal liability. Legal scholars have criticised the requirement, and issuers have called for more clarity regarding its application. In December, the Commission put forward the Proposal where changes are suggested to the ad hoc disclosure requirement, including a change where it would be stated in art. 17(1) of MAR that issuers need not disclose information on intermediate steps in a protracted process. According to the Proposal, the changes are meant to increase legal certainty for issuers without sacrificing market integrity. The purpose of the thesis is to examine if these objectives will be attained with the suggested changes.

The objectives of disclosure requirements and the ad hoc disclosure requirement specifically are discussed in Chapter 2. The development of the ad hoc disclosure requirement from its inception in EU law in 1979 to MAD is detailed, demonstrating that the requirement has been framed in different ways throughout its history in the EU. Also detailed are the different ways in which member states implemented MAD into their national legislations, and the case of **Geltl v Daimler**, which affected the application of MAD, but also on the subsequent MAR.

The current legislation detailing the ad hoc disclosure requirement is described in Chapter 3. In MAR, the EU legislature decided to keep the same definition of “inside information” as in MAD but added elements from **Geltl v Daimler** to the definition. Article 17(1) carried on, unchanged, from MAD, but, as there was no specific provision dealing with the timing of the ad hoc disclosure requirement, as had been in MAD, the measures, i.e. prohibition on insider dealing and the ad hoc disclosure requirement, applied at the same moment. This was criticised by legal scholars and market participants.

The suggested changes to art. 17 of MAR are detailed in Chapter 4, which include, inter alia, a change to the first subparagraph of art. 17(1) MAR, whereby it‘s maintained that the ad hoc disclosure requirement shall not apply to “intermediate steps in a protracted process”, and the addition of art. 17(1a), whereby the Commission is empowered to adopt a non-exhaustive list of relevant information and the timing for its disclosure.

Finally, the suggested changes to art. 17 of MAR are analysed in Chapter 5. The thesis finds that the suggested change to the first subparagraph of art. 17(1) will bring legal clarity for issuers and other market participants in applying the ad hoc disclosure requirement. The thesis also finds that the suggested addition of art. 17(1a) will legal clarity and add to the consistent interpretation of the requirement. However, as the delegated act is supposed to be non-exhaustive, and will only apply to events of circumstances addressed in the act, the act will not automatically create a “safe harbour” for issuers regarding specific events or circumstances. Overall, the suggested changes should enhance *legal certainty* for issuers and other market participants.

The thesis finds that changes to the first subparagraph of art. 17(1) will lead to less information being disclosed, but, based on the nature of that information, finds it highly questionable that the lack of disclosure of such information will decrease information asymmetry. Consequently, the suggested changes to art. 17 don‘t seem to harm the requirement

of equal access to accurate information. Regarding whether the suggested changes to art. 17 of MAR harm the requirement of elimination of market abuse, the thesis reasons that if the suggested changes are adopted, the principal measures supposed to combat market abuse will continue to be in place. Other disclosure obligations will also generally be unaffected by the suggested changes, so they will continue to support the national competent authorities in detecting cases of market abuse. In addition, as issuers will no longer be mandated to disclose information on intermediate steps, as per the suggested change to the first subparagraph of art. 17(1), concerns that disclosing such information might amount to market manipulation are no longer valid. The Commission adopting a delegated act of information to disclose, as per the suggested addition of art. 17(1a), will support a consistent application of the ad hoc disclosure requirement.

Consequently, the thesis finds that the suggested changes to art. 17 of MAR will increase *legal certainty* but don‘t seem to harm *market integrity*. Therefore, the conclusion has to be made that the suggested changes will achieve their objectives.

Bibliography

Books

Groussot, Xavier: *General Principles of Community Law*. Europa Law Publishing, Groningen, 2006.

Tridimas, Takis: *The General Principles of EU Law*. Oxford University Press, 2nd edition, 2006.

Book Chapters

Davies, Paul: "Damages actions by investors on the back of market disclosure requirements" in Danny Busch, Emilios Avgouleas and Guida Ferrarini (eds): *Capital Markets Union in Europe*. Oxford University Press, 1st edition, 2018.

Enriques, Luca and Gilotta, Sergio: "Disclosure and financial market regulation" in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds): *The Oxford Handbook of Financial Regulation*. Oxford University Press, 2015.

Hössl-Neumann, Mario and Torggler, Ulrich: "Article 7. Inside information" in Susanne Kalss, Martin Oppitz, Ulrich Torggler and Martin Winner (eds): *EU Market Abuse Regulation. A Commentary on Regulation (EU) No 596/2014*. Edward Elgar Publishing, 2021.

Kalss, Susanne and Hasenauer, Clemens: "Article 17. Public disclosure of inside information" in Susanne Kalss, Martin Oppitz, Ulrich Torggler and Martin Winner (eds): *EU Market Abuse Regulation. A Commentary on Regulation (EU) No 596/2014*. Edward Elgar Publishing, 2021.

Koch, Philipp: "§ 19. Disclosure of inside information" in Rüdiger Veil (ed): *European Capital Markets Law*. Hart Publishing, 2nd edition, 2017.

Mock, Sebastian: "History, application, interpretation, and legal sources of the Market Abuse Regulation" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide*. Oxford University Press, 2nd edition, 2022.

Payne, Jennifer: "Disclosure of inside information" in Vassilios Tountopoulos and Rüdiger Veil (eds): *Transparency of Stock Corporations in Europe: Rationales, Limitations and Perspectives*. Hart Publishing, 2019.

Pietrancosta, Alain: "Public disclosure of inside information and market abuse" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide*. Oxford University Press, 2nd edition, 2022.

Pietrancosta, Alain: "Article 17: Public disclosure of inside information" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide*. Oxford University Press, 2nd edition, 2022.

Smits, Jan M.: "What is legal doctrine? On the aims and methods of legal-dogmatic research" in Edward L. Rubin, Hans-W. Micklitz and Rob van Gestel (eds): *Rethinking Legal Scholarship: A Transatlantic Dialogue*. Cambridge University Press, 2017.

Veil, Rüdiger: "§ 1. History" in Rüdiger Veil (ed): *European Capital Markets Law*. Hart Publishing, 2nd edition, 2017.

Veil, Rüdiger: "§ 8. Financial instruments" in Rüdiger Veil (ed): *European Capital Markets*

Law. Hart Publishing, 2nd edition, 2017.

Veil, Rüdiger: "§ 13. Foundations" in Rüdiger Veil (ed): *European Capital Markets Law*. Hart Publishing, 2nd edition, 2017.

Ventoruzzo, Marco and Picciau, Chiara: "Article 7: Inside information" in Marco Ventoruzzo and Sebastian Mock (eds): *Market Abuse Regulation. Commentary and Annotated Guide*. Oxford University Press, 2nd edition, 2022.

Walla, Fabian: "§ 4. Process and strategies of Capital Markets Regulation in Europe" in Rüdiger Veil (ed): *European Capital Markets Law*. Hart Publishing, 2nd edition, 2017.

Articles

Akerlof, George A.: "The Market for "Lemons": Quality Uncertainty and the Market Mechanism". The Quarterly Journal of Economics, Vol. 84, No. 3, August, 1970, pp. 488–500.

Austin, Janet: "What exactly is market integrity? An analysis of one of the core objectives of securities regulation". William & Mary Business Law Review, Vol. 8, 2016-2017, Issue 2, Article 2, pp. 215–240.

Di Noia, Carmine and Gargantini, Matteo: "Issuers at midstream: Disclosure of multistage events in the current and in the proposed EU Market Abuse Regime". European Company and Financial Review, 4/2012, pp. 484–529.

Hansen, Jesper Lau: "The hammer and the saw – A short critique on the recent compromise proposal for a Market Abuse Regulation". Nordic & European Company Law, LSN Research Paper Series, No. 10-35, pp. 1–12.

Hansen, Jesper Lau: "Say when: When must an issuer disclose inside information?" Nordic & European Company Law, LSN Research Paper Series, Paper No. 16-03, University of Copenhagen Faculty of Law Research Paper No. 2016-28, pp. 1–29.

Hansen, Jesper Lau: "Market abuse case law – Where do we stand with MAR?" European Company and Financial Law Review, Vol. 14, Issue 2, pp. 367–390.

Hansen, Jesper Lau: "Issuers' duty to disclose inside information". ERA Forum 18, 2017, pp. 21–39. Available here: https://doi.org/10.1007/s12027-017-0454-7 (accessed on April 29, 2023).

Hansen, Jesper Lau and Moalem, David: "The MAD disclosure regime and the twofold notion of inside information: The available solution." Capital Markets Law Journal, Oxford University Press, Vol. 4, No. 3, 2009, pp. 323–340.

Krause, Hartmut and Brellochs, Michael: "Insider trading and the disclosure of inside information after *Geltl v Daimler* – A comparative analysis of the ECJ decision in the *Geltl v Daimler* case with a view to the future European Market Abuse Regulation". Capital Markets Law Journal, Oxford University Press, Vol. 8, No. 3. pp. 283–299.

Official reports

Annual Report '09. Federal Financial Supervisory Authority. (Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin). Available on BaFin's homepage, www.bafin.de.

ESME Report. Market abuse EU legal framework and its implementation by Member States: A first evaluation. Brussels, July 6, 2007. (Not available online.)

MAR Review report. ESMA, September 23, 2020, ESMA70-156-2391. Available here: https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391_final_report_-_mar_review.pdf.

Implementing and Delegated Acts on Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. European Commission, issued on October 24, 2022. Available here: https://finance.ec.europa.eu/system/files/2022-10/mar-level-2-measures-full_en.pdf.

Press release

Press release from the European Commission dated December 7, 2022: "Capital market union: clearing, insolvency and listing package". Available here: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7348 (accessed on March 29, 2023).

Online dictionary

Oxford English Dictionary: https://www.oed.com.

Table of Legislation

EU primary Law

Treaty on the Functioning of the European Union (Consolidated version 2016) (OJ C 202, 7.6.2016, pp. 47–390).

EU secondary law

Regulations

Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. (OJ L 173, 12.6.2014, pp. 1–61).

Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments and amending Regulation (EU) No 648/2012. (OJ L 173, 12.6.2014, pp. 84–148).

Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC. (OJ L 168, 30.6.2017, pp. 12–82).

Directives

Council Directive of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing (79/279/EEC). (OJ L 66, 16.3.79, pp. 21–32).

Council Directive 80/390/EEC of 17 March 1980 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing. (OJ L 100, 17.4.1980, pp. 1–26).

Council Directive 82/121/EEC of 15 February 1982 on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing. (OJ L 48, 20.2.1982, pp. 26–29).

Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of. (OJ L 348, 17.12.1988, pp. 62–65).

Council Directive of 13 November 1989 coordinating regulations on insider dealing (89/592/EEC). (OJ L 334, 18.11.1989, pp. 30–32).

Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities. (OJ L 184, 6.7.2001, pp. 1–66).

Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse). (OJ L 96, 12.4.2003, pp. 16–25).

Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure

of inside information and the definition of market manipulation. (OJ L 339, 24.12.2003, pp. 70–72).

Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and mending Directive 2001/34/EC. (OJ L 390, 31.12.2004, pp. 38–57).

Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) (OJ L 173, 12.6.2014, pp. 179–189).

Soft law

Market Abuse Directive: Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market. CESR, July 2007, CESR/06-562b.

MAR Guidelines: Delay in the disclosure of inside information. ESMA, October 20, 2016, ESMA/2016/1478 EN.

MAR Guidelines: Information relating to commodity derivatives markets or related spot markets for the purpose of the definition of inside information on commodity derivatives. ESMA, January 17, 2017, ESMA/2016/1480.

Legislative proposals

Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse). Com(2011) 651 final. 2011/0295 (COD). Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011PC0651.

Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises. COM/2022/762 final. 2022/0411 (COD). Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0762.

Table of Cases

European Court of Justice

Case C-45/08 Spector Photo Group NV and Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA), delivered on December 23, 2009 (ECLI:EU:C:2009:806).

Case C-19/11 Markus Geltl v Daimler AG, delivered on June 28, 2012 (ECLI:EU:C:2012:397).

Case C-628/13 Jean-Bernard Lafonta v Autorité des marchés financiers, delivered on March 11, 2015 (ECLI:EU:C:2015:162).

Opinion of Advocate General

Opinion of Advocate General Mengozzi, delivered on March 21, 2012, in Case C-19/11 Markus Geltl v Daimler AG, delivered on March 21, 2012 (ECLI:EU:C:2012:153).