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A. Proposal for a Reform of Ad hoc Disclosure (Art. 17 MAR) and Inside Information (Art. 7 MAR)

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Article 17 Market Abuse Regulation

Public disclosure of inside information

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

For the purpose of subparagraph 1, Art. 7 (2) 2, (3) do not apply.

[...]

4. [...]

~~In the case of a protracted process that occurs in stages and that is intended to bring about, or that results in, a particular circumstance or a particular event, an issuer or an emission allowance market participant may on its own responsibility delay the public disclosure of inside information relating to this process, subject to points (a), (b) and (c) of the first subparagraph.~~

[...]

12. ESMA shall issue guidelines to establish a non-exhaustive indicative list of information which is to be disclosed pursuant to paragraph 1.

Article 7 Market Abuse Regulation

Inside Information

[...]

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.~~ rational investor would be likely to consider relevant for the fundamental value of the issuer and use as part of the basis of his or her investment decisions. For the purposes of paragraph 1 point (d) it is assumed that persons charged with the execution of orders concerning financial instruments trade irrespective of information relevant to the fundamental value of the issuer.

B. Explanation of the Proposal

1. Reform of Art. 17 (1), (12) MAR

The proposed wording of Art. 17 MAR would be a vast improvement compared to the current system of ad hoc disclosure.[1] Its main benefit would be that the ad hoc disclosure obligation were not to apply to intermediate steps in a protracted process. At the same time, it retains the obligation to disclose future events, which contributes to market efficiency. Thus, the scope of application of Art. 17 MAR would be considerably limited, costs for issuers would be reduced and legal certainty would be improved. In addition, the amendment would be consistent with the MAR system and its regulatory goals and would require only minor changes.

In our opinion, the proposal made here represents a sensible *first* reform step, but the European Commission should continue its efforts to fundamentally reform ad hoc disclosure. Although legal certainty will be noticeably improved with the proposed amendment of Art. 17 MAR, some degree of legal uncertainty is likely to remain even then, since it would still not stipulate specific items of information to be disclosed.[2] Therefore, we also propose to extend the mandate of ESMA (Art. 17 (12) MAR) and require ESMA to issue guidelines for further harmonisation and concretisation of the information to be disclosed according to Art. 17 (1) MAR. Issuer guidelines published by NCAs such as BaFin or CONSOB provide best practices to be implemented on a European level.

Example: Daimler/Geltl revisited

The difference between the current regulation of ad hoc disclosure and the one proposed here is best illustrated by the cause célèbre of European market abuse law – the *Daimler/Geltl* decision of the ECJ[3].

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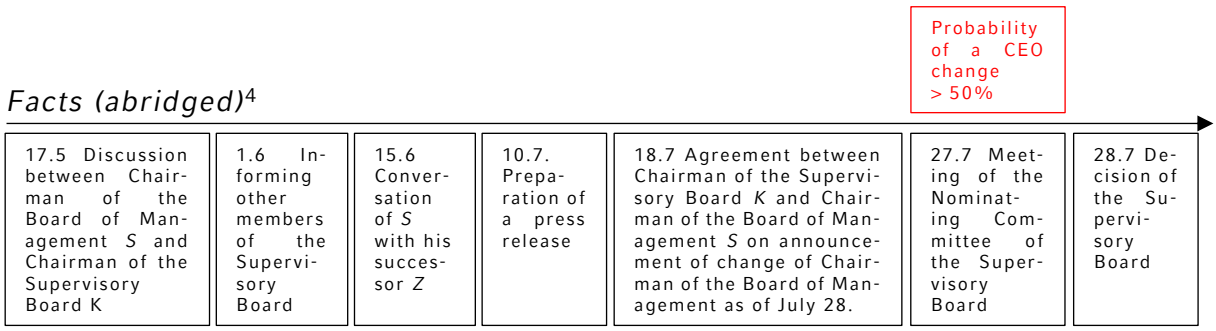
[1] For a cost-benefit analysis of the current design of Art. 17 MAR and further considerations cf. *Veil/Wiesner/Reichert*, High-Level Response to the European Comminssion´s Targeted Consultation on the Listing Act, 10.01.2022 and the expanded version of this paper *Veil/Wiesner/Reichert*, ECFR 2022 (forthcoming).

[2] In particular, this concerns the distinction between a final event and an intermediate step in a protracted process, which, as the ECJ of 28 June 2012, Case C-19/11 (*Daimler/Geltl*) para. 37 has already stated, may not always be unambiguous.

[3] ECJ of 28 June 2012, Case C-19/11 (*Daimler/Geltl*).



Solution according to Art. 7, 17 MAR (current version): According to Art. 7 (3) MAR not only the future event of the change of the Chairman of the Management Board may be deemed inside information, but also the previous intermediate steps (17.5.; 1.6.; etc.).

When considering whether an intermediate step meets the criteria of Art. 7 (1) MAR, it should be noted that price relevance can also be determined by reference to the relevance of the final event for the security price[5], which is the reason for the current broad scope of the ad hoc disclosure obligation[6].

Consequently, (i) even before 27.7. the issuer is obliged to publish an ad hoc announcement about the upcoming change of the Chairman of the Management Board (unless Art. 17 (4) MAR applies), whereby it is a fairly difficult question which of the previous intermediate steps triggers the ad hoc disclosure obligation. Furthermore, (ii) insider trading prohibition (Art. 8, 10 MAR) and ad hoc disclosure apply at the same time.

Solution according to the proposed version of Art. 17 MAR: Under the proposed amendment to Art. 17 MAR, the ad hoc disclosure obligation no longer applies to intermediate steps. Issuers are to disclose future events ("circumstances which may reasonably be expected to come into existence") only when their occurrence is predominantly probable (50% + x).[7] In other words: The future final event (termination agreement) precludes an intermediate step from being examined as a possible information to be published in pursuance of Art. 17 (1) MAR.

Applying our solution to the facts of the case leads to the following legal outcome: (i) The prohibition of insider trading (Art. 8, 10 MAR) continues to apply as soon as an inside information (Art. 7 MAR) arises. It is important to note that Art. 7 (3) remains applicable for the purposes of the insider trading regulation. Consequently, the prohibition of insider trading is also triggered by an intermediate step that qualifies as inside information. Thus, trading in possession of the information on the future change of the Chairman of the Board of Management would not be legally possible even before 27.7. (ii) However, unlike the solution under current law, the issuer would not be obliged to publish the information about the future change of the CEO before 27.7,

[4] Cf. OLG Stuttgart of 22.4.2009 – 20 Kap 1/08, ZIP (2009), 962 and BGH of 25.2.2008 – II ZB 9/07 = ZIP (2008), 639.

[5] BGH of 23.04.2013 – II ZB 7/09 para. 25 = NZG 2013, 708; *BaFin*, Issuer Guideline, Module C, p. 13 f.; *Veil*, European Capital Markets Law, 3rd ed. 2022, § 14 para. 59 et seqq.

[6] The BGH explicitly recognizes this consequence of the interpretation of the notion of inside information in its decision (BGH of 23.04.2013 – II ZB 7/09 para. 26 = NZG 2013, 708).

[7] *Veil,* European Capital Markets Law, 3rd ed. 2022, § 14 para. 41.

relieving issuers from the error-prone task to judge price relevance for intermediate steps.[8]

2. Reform of Art. 7 (4) MAR

For the purposes of Art. 7 MAR we only recommend very minor changes. A clarification of the concept of "significant price effect"/"reasonable investor" in Art. 7 (4) MAR to the effect that it refers to a rational investor who considers only information relevant for the fundamental value would be in line with the regulatory goals of MAR (in particular with market efficiency) and would noticeably improve legal certainty.

We strongly recommend, though, not to implement a "long-term" criterion, as discussed in the Consultation. As we have explained in detail elsewhere[9], a long-term perspective is inherent in the concept of fundamental value. At the same time, there is a risk that "long-term" could be interpreted as having a different, independent meaning such as "sustainable". The notion of "long-term" is then rather opaque and could conflict with the regulatory goals of ad hoc disclosure and insider trading regulation. Furthermore, it would be difficult to handle for issuers and investors and would reduce legal certainty. Alternatively, if the Commission is not inclined to change the wording of Art. 7 (4), our proposed definition could also be included in the recitals of MAR.

[8] Cf. OLG Stuttgart of 22.4.2009 – 20 Kap 1/08, ZIP (2009), 962 and BGH of 25.2.2008 – II ZB 9/07 = ZIP (2008), 639 for a discussion of when the future end event (the change of CEO) may be deemed sufficiently probable. In the view of the OLG Stuttgart, the future change of the Chairman of the Board of Management was already predominantly probable on July 27 with the decision of the Nominating Committee.

[9] Cf. references in fn. 1.