The EU Listing Act: Important Proposed Changes to MAR

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On December 7, 2022, the European Commission released a package of measures to further develop the EU's Capital Markets Union (CMU). Part of this proposal is the Listing Act,[1] which includes important changes to the Market Abuse Regulation (MAR).[2] Those changes will have a significant impact – mostly positive – on the MAR compliance practices of EU listed issuers

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MAR establishes a robust framework to preserve market integrity and investor confidence with numerous rules aiming to prevent insider dealing, unlawful disclosure of inside information and market manipulation. It subjects issuers to extensive obligations, including as to disclosure and record-keeping, that have a direct impact on the daily operations of listed companies.

Based on stakeholder feedback, the European Commission now introduces potential changes to the regime to alleviate some of the high compliance burdens which MAR puts on issuers. The objective of the Listing Act's proposed changes to MAR are to enhance legal clarity, address disproportionate requirements for issuers and, importantly, to increase the overall attractiveness of EU capital markets, while also ensuring an appropriate level of investor protection and market integrity.

The proposal has been submitted to the European Council and the Parliament for deliberation and adoption. The timing of its entry into force will largely depend on the timing of adoption, which in turn hinges on the European Council and the Parliament's (other) priorities.

In this alert memorandum, we summarize the most significant changes introduced by the Listing Act and consider some of their practical implications for issuers.

[1] Proposal (Comm.) 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-size enterprises, December 7, 2022, COM(2022) 762 final.

[2] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2015 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.

Proposed Key Changes to MAR

1. Immediate disclosure would no longer be required for **intermediate steps in a "protracted process" (*e.g.*, an M&A situation)** where those steps are connected with bringing about a set of circumstances or an event.
2. The general condition for **delayed disclosure** that "the delay of disclosure is not likely to mislead the public" is replaced by three conditions that essentially revolve around whether the information differs from information previously issued by the company.
3. The **timing of the notification of the decision to delay disclosure** of inside information to the competent authority is brought forward to the moment immediately after the decision to delay disclosure is taken.
4. Issuers will only be required to draw up a **permanent insider list** consisting of persons who, due to the nature of their function or position within the issuer, have regular access to inside information. *Ad hoc*, situation-specific insiders lists are no longer required, although in practice they may remain a useful risk management tool.
5. It is clarified that the **market sounding regime is an optional safe harbor and not a mandatory procedure**. If issuers choose to comply, they will benefit from the statutory safe harbor. However, if they do not, they will still be able to demonstrate that the market sounding was carried out in the course of the normal exercise of a person's employment, profession or duties.
6. The **threshold** to notify the issuer and national authorities of **transactions conducted by PDMRs and CAPs** is raised from EUR 5,000 to EUR 20,000. There is also a **broadening of the scope of exempted transactions** during closed periods.
7. **Administrative sanctions** for infringements of disclosure requirements will be made more proportional to the size of the issuer.
8. To enhance the effectiveness of market supervision, a **cross market order book surveillance mechanism** (CMOBS) is introduced to allow the exchange of order book data between competent authorities in a cross-border context and on an ongoing basis.

I. DISCLOSURE REQUIREMENT FOR INTERMEDIATE STEPS IN A "PROTRACTED PROCESS"

Current framework. As a general principle, inside information must be disclosed as soon as it arises (article 17(1) MAR). This is a sensitive issue in so-called protracted processes, where inside information may crystalize at different stages (article 7(3) MAR). Indeed, in these kind of processes, immediate disclosure of the inside information may sometimes prejudice the issuer (*e.g.*, in case of prolonged confidential negotiations) who may wish to keep the information confidential.

The issuer may however decide to delay such disclosure in compliance with the requirements of article 17(4) MAR (*see* also point II below). Such decision would be required for each new piece of information deemed to be sufficiently precise and of a price sensitive nature to constitute inside information within the meaning of article 7(1) MAR.

In this context, the Belgian Financial Services and Markets Authority has recently taken a fairly strict stance on the assessment of inside information and the immediate disclosure requirement (*see* the "Sapec" decision of the FSMA of December 27, 2021), which has further exacerbated the delicate balancing act between informing the markets as soon as possible and protecting the issuer's legitimate interest.

Proposed amendment. The Listing Act proposes to exempt intermediate steps in a protracted process from the immediate disclosure requirement of article 17(1) MAR. Immediate disclosure would no longer be required for intermediate steps in a protracted process where those steps are connected with bringing about a set of circumstances or an event. The information relating to intermediate steps is indeed not sufficiently mature and may therefore not contribute to the objective of enabling investors to take well-informed decisions but may instead mislead investors. Thus, even when the intermediate steps would be deemed to be "precise information" and would therefore qualify as inside information under article 7(3) MAR, the issuer would not be required to disclose this information before the "end result" (*i.e.*, the event that the protracted process intends to bring about) materializes. Consequentially, issuers will thus also no longer be required to take a decision to delay the disclosure of inside information (article 17(4) MAR) for these steps in order to avoid immediate disclosure.

Requirements and restrictions. In the absence of a disclosure requirement, issuers should ensure the confidentiality of this information. As is the case for inside information of which the disclosure has been delayed (article 17(7) MAR), in case the confidentiality is no longer ensured, the issuer is required to nevertheless disclose the inside information to the public as soon as possible.

In addition, the insider trading prohibition will continue to apply in full. Indeed, the change does not mean that steps in a protracted process cannot constitute inside information (they can, and trading in knowledge thereof continues to be unlawful insider trading), but rather that issuers are no longer required to disclose them or make an election to defer disclosure.

Timing of disclosure. Once the "end result" of a protracted process has been reached, the disclosure obligation revives. However, tricky questions may arise as to what exactly can be considered to be the "end result" of a process. To facilitate the assessment of the appropriate moment of disclosure, the European Commission is expected to adopt a regulation setting out a non-exhaustive list of relevant information and, for each piece of information, the moment when the issuer could be reasonably expected to disclose it.

The FSMA's Sapec Decision

In its decision of December 27, 2021, the FSMA imposed a EUR 250,000 fine on Sapec due to a breach by Sapec of:

1. article 17 MAR, *i.e.*, failure to disclose inside information as soon as possible. According to the FSMA, the decision of the Sapec board to continue the sale process of the AB division after having received non-binding offers from interested buyers constituted inside information. Such inside information related to an intermediate stage of the process (ultimately) leading to the sale of the AB division; and
2. articles 15 *juncto* 12, §1, c) MAR, *i.e.*, market manipulation by disseminating information giving or likely to give false or misleading indications through certain press releases issued by Sapec.

Practical considerations. As mentioned above, if adopted, issuers would no longer have to choose between immediate disclosure (article 17(1) MAR) or delayed disclosure (article 17(4) MAR) in the initial stages of a particular project. This will be especially relevant for multi-stage processes such as M&A transactions. Indeed, during an M&A process, questions on the qualification of inside information may arise early on and (re-)emerge during various stages of the process, often creating tension between the issuer's disclosure obligations and the preferred communication strategy.

Nevertheless, even though a formal 17(4) MAR deferral decision will no longer be required, it may still be prudent for an issuer to formally record the moment as from which it considers that it has inside information and open a so-called "prohibited period" for the relevant employees (*see* point III below on insider lists). This will be particularly relevant to ensure compliance with the trading prohibition and prevent any allegations of insider dealing post-factum.

II. DECISION TO DELAY DISCLOSURE

A. Conditions for delayed disclosure under article 17(4)

Proposed amendment. The Listing Act proposes to amend the requirements for delayed disclosure under article 17(4) MAR, essentially preventing issuers from delaying disclosure of inside information if (a) there are erroneous expectations in the market as to the issuer's situation and prospects, and (b) those expectations are based on previous disclosures by the issuer.

To this end, the current general requirement that "the delay of disclosure is not likely to mislead the public" (article 17(4)(b) MAR) will be replaced by the following specific requirements:

1. The relevant information is not materially different from previous public announcements by the issuer on the matter;

2. It does not contradict previously announced financial objectives of the issuer; and

3. It generally does not contrast with the market's expectations, where such expectations are based on signals previously sent to the market by the issuer.

Practical considerations. The "new" requirements listed are in fact already contained in the 2016 ESMA Guidelines on delayed disclosure of inside information.[3] Therefore, we do not expect this to have a significant impact in practice as regards the assessment of whether or not the conditions for an article 17(4) MAR deferral are met. In any case, it is already currently considered to be good practice for an article 17(4) MAR decision to explicitly justify compliance with these requirements.

B. Timing of notification to FSMA of decision to delay disclosure

Proposed amendment. With respect to the timing of the notification to the FSMA of the decision to delay the disclosure of inside information under article 17(4) MAR, the proposed Listing Act would take issuers back to the pre-MAR area. Indeed, under the current proposal, the issuer should already inform the competent authority of its intention to delay the disclosure of inside information immediately after the decision to delay disclosure is taken, instead immediately after the information is disclosed to the public. As is the case today, the notification should include a written explanation of how the article 17(4) MAR conditions for deferral of disclosure have been met.

Practical considerations. The Listing Act only aims to ensure prior notification to the competent authority but does not require such authority's approval of the decision to delay disclosure of inside information. If adopted, it will of course become an important monitoring tool for the FSMA.

C. Broadening of scope of article 17(5) MAR

Proposed amendment. Article 17(5) MAR allows an issuer that is a credit institution or a financial institution to delay the public disclosure of inside information in order to preserve the stability of the financial system, provided that certain conditions are met. The Listing Act proposes to amend article 17(5) MAR to broaden its scope of application to issuers that are a parent or

related undertaking of a listed or non-listed credit institution or financial institution.

[3] ESMA – MAR Guidelines: Delay in the disclosure of inside information (October 20, 2016, as last amended on January 5, 2022) (available at: https://www.esma.europa.eu/sites/default/files/library/esma70-156-4966_final_report_on_mar_gls_on_delayed_disclosure_and_interactions_with_prudential_supervision.pdf).

D. Rumors

Proposed amendment. If the disclosure of inside information has been delayed yet the confidentiality can no longer be ensured, issuers are required to disclose the information as soon as possible (article 17(7) MAR). This includes situations where a rumor explicitly relates to inside information. In addition to the requirement that such rumors be sufficiently accurate to indicate that the confidentiality has been breached, the Listing Act proposes to add the condition that such rumors are also "reliable."

III. INSIDER LISTS

The Listing Act may bring a number of radical changes to the current framework of insider lists that will significantly (and not necessarily for the better) impact the recordkeeping and notification practices of issuers.

A. Permanent insider list

Proposed amendment. In order to simplify the current regime, the European Commission is proposing that the regime in force for SME growth market issuers with regard to insider lists be broadened to all issuers. This would entail that issuers will only be required to include in their insider lists persons who, due to the nature of their function or position within the issuer, have regular access to inside information, *i.e.*, permanent insiders only. This would, *e.g.*, include members of administrative, management and supervisory bodies, executives who make managerial decisions affecting the future developments and business prospects of the issuers and administrative staff having regular access to inside information (article 18(1) MAR).

Opt-out. The Listing Act provides that Member States may opt out of the default system as set out above for issuers whose securities have been admitted to trading on a regulated market for the last five years at least,

Focus –
"Permanent" Insiders

There are two inherent weaknesses in the system of permanent insider lists.

First, it assumes that, in case there would effectively be inside information, all persons who, due to the nature of their function or position within the issuer, have regular access to such information, effectively have knowledge of the inside information. It thus ignores that even those who would be considered "permanent insiders" might not even always effectively have access to inside information. As such, the current proposal will, in practice, give rise to a bifurcation between those that have "actual" access to inside information, and are thus subject to the statutory prohibition on insider dealing, and those who – although deemed a "permanent" insider – do not have access to the specific inside information yet may become subject to dealing restrictions per the issuer's dealing code without knowing what the inside information relates to. As such, the regime might be overinclusive.

Second, even if no longer required under MAR, companies should, from a legal and reputational risk management perspective, keep *ad hoc* lists of those people who are aware of specific price sensitive information when it arises and determine a period in which trading would be prohibited, even when the persons in question are not "permanent insiders". When employing the permanent insider regime, companies may ignore such persons and could expose themselves to risks under the MAR. As such, the regime is not only overinclusive but also underinclusive because it fails to capture all persons who might be in the possession of inside or price sensitive information.

and may require that full insider lists be drawn up from time to time, including all persons having access to the relevant inside information (article 18(1b) MAR), as is currently the case.

It will be interesting to see what position the Belgian legislator will take. If they do not elect to opt-out, the switch to permanent insider lists as the norm will entail a number of changes to dealing codes and administrative practices of many listed companies.

Alleviated format. In addition to a proposed change to permanent insider lists, the format for insider lists would also be amended to follow the format for issuers listed on SME growth markets, which requires less information.

B. Third parties

Independent obligation. With regard to third parties, the proposed Listing Act clarifies that outside persons acting on the behalf or for the account of an issuer (such as accountants, lawyers or other advisors) are under an independent obligation to draw up, update and provide to the national competent authority, upon its request, their own insider list (article 18(1a) MAR). However, if the shift to permanent insider lists effectively happens, this would imply that the "issuer's insider list" will no longer contain any reference to such issuer's advisors and that the "advisor's insider list" will be the sole (legally required) trail of such advisor's involvement. On the surface, this may indeed appear to somewhat lower the burden for issuers (as they no longer need to include advisors in the permanent insider list). Nevertheless, issuers will still want to stay in control of the pool of advisors to whom inside information is divulged and, for record-keeping purposes, keep an overview of this (*e.g.*, in the form of a "working party list").

C. ESMA's position

On March 10, 2023, the European Securities and Markets Authority addressed a letter to the European Parliament and Council raising certain concerns with the proposed permanent insider regime.[4] In essence, ESMA fears that permanent insider lists will be a less effective monitoring tool for national competent authorities as the latter will have to carry out their own identification of insiders when investigating potential insider dealing. In addition, as we explained above, ESMA also fears that the issuers' control of the flow of inside information will be weakened and awareness of insiders will be diminished.

D. Practical considerations

In order to best comply with these changes, and if the Belgian State does not opt out, we would suggest to issuers keeping two separate lists: one permanent insider list, in which the permanent insiders as required by the Listing Act are included, and *ad hoc* "project lists" for whenever inside information would arise to stay in control of the information flows, mitigate any risks and avoid any prohibited behaviors under MAR. It would also be good practice to continue to alert the persons who are aware of specific price sensitive information when it arises of their regulatory duties and implications of being in possession of inside information.

IV. MARKET SOUNDING REGIME

Cleary has long defended the position that the market sounding regime set forth in article 11 MAR is an optional safe harbor.[5] This means that it is not a mandatory set of rules and procedures that must be observed in any situation that qualifies as a market sounding. The Listing Act now confirms this position:

[4] ESMA letter regarding concerns with changes to the insider list regime (March 20, 2023) (available at: https://www.esma.europa.eu/press-news/esma-news/esma-raises-concerns-proposed-changes-insider-list-regime).

[5] Cleary Gottlieb Steen & Hamilton LLP, Reply form for the Consultation Paper on MAR review report (available at: https://www.esma.europa.eu/press-news/consultations/consultation-mar-review#responses).

disclosing market participants (DMPs) may choose to comply with the information and record-keeping requirements of the market soundings regime when gauging market interest. If they do so, they will benefit from the statutory safe harbor. However, if they do not, they will still be able to demonstrate that the market sounding was carried out in the course of the normal exercise of a person's employment, profession or duties (*i.e.*, the general exception of article 10(1) MAR), and will thus not be presumed to have committed an unlawful disclosure of inside information.

Focus – Market Soundings

As a reminder, market soundings are communications of information prior to the announcement of a transaction in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it, such as its potential size or pricing, to one or more potential investors by an issuer, a secondary offeror, or a third party acting on behalf of any of such persons. It is an established practice that contributes to efficient capital markets and by known a well-established practice that is typically handled by the compliance teams of investment banks.

V. MANAGERS TRANSACTIONS

The Listing Act also introduces a number of important changes to the regime that applies to persons discharging managerial responsibilities (PDMRs) and the persons closely associated with them (CAPs).

A. Threshold for FSMA notification

Proposed amendment. The threshold to notify national authorities of transactions made by PDMRs and CAPs is raised from the current EUR 5,000 threshold to EUR 20,000. The current limit is deemed too low and leads to disclosures of transactions that are not considered meaningful. National authorities are also allowed to increase that threshold to EUR 50,000 (currently EUR 20,000). The FSMA has not previously made use of this power.

B. Expansion of the scope of exempted transactions during the closed period

Expansion to other financial instruments. Article 19(11) MAR prohibits trading by PDMRs during a period of 30 calendar days before their company's annual and half year financial reporting (the closed period), unless certain stringent conditions are met and the issuer allows such trade. In an effort to promote consistency of rules that apply across asset classes, the exemption relating to employee share schemes (article 19(12)(b)) will now be expanded to include financial instruments other than shares, in line with Commission Delegated Regulation 2016/522. In light of the limited reliance on this exemption by Belgian issuers, it will likely not have a material impact in practice.

Additional exemption. Furthermore, a new exemption is included based on the rationale that the PDMR trading prohibition should only cover transactions or activities that depend on the willful active investment decision and activity of the PDMR, as currently already alluded to by the "active" phrasing of article 19(11) MAR ("*shall not conduct*" vs. "*conducted on their own account*" in article 19(1)(a) MAR). Where the transaction or activity depends on external factors or does not involve such active investment decision, the prohibition should not apply. This exemption covers situations where the transaction relates to an irrevocable arrangement made outside of a closed period or where the activity results from a discretionary asset management mandate executed by an independent third party under a discretionary asset management mandate. Such exempted transactions may also be the consequence of duly authorized corporate actions not implying advantageous treatment for the PDMR. They may as well be the result of the acceptance of inheritances, gifts and donations, or the exercise of options, futures or other derivatives agreed outside the closed period. In sum, all such activities do not, in principle, entail an active investment decision by a PDMR. The prohibition of such transactions throughout the closed period would unduly restrict the freedom of PDMRs, since there is no risk that they will benefit from an informational advantage. This is a welcome clarification and will give the necessary comfort for PDMRs that are in practice frequently confronted with these "passive" trades.

VI. PROPORTIONATE ADMINISTRATIVE PECUNIARY SANCTIONS

Proposed amendment. The Listing Act amends article 30 MAR to make administrative sanctions for infringements of disclosure requirements (articles 17, 18 and 19 MAR) more proportionate to the size of the issuer.

Pursuant to the proposal, pecuniary sanctions for this type of infringements should by default be calculated as a percentage of the total annual turnover of the issuer, and not be based on set absolute amounts.

Focus – Calculation of pecuniary sanctions

The contemplated maximum percentages of the annual turnover for administrative sanctions are:

- → 15% for insider dealing, unlawful disclosure of inside information and market manipulation;
- → 2% for insufficient arrangements, systems and procedures aimed at preventing and detecting (attempts at) insider dealing and market manipulation;
- → 2% for failure to timely disclose inside information;
- → 0.8% for violations of requirements relating to insider lists and notification and disclosure of manager's transactions.

However, where the calculation of pecuniary sanctions is done based on the total annual turnover of the issuer, competent authorities may calculate sanctions based on absolute amounts in exceptional cases. This is relevant for infringements where the competent authority may "*deem that the amount for the administrative sanction based on the total annual turnover would be disproportionately low*" given all the relevant circumstances, including those set out in article 31(1) MAR.

Adapted sanctions for SMEs. For cases where the pecuniary sanctions are calculated based on absolute amounts, the proposal introduces lower absolute amounts of the minimum of the maximum pecuniary sanctions for SMEs, *i.e.*, EUR 1,000,000 for breaches of article 17 MAR and EUR 400,000 for breaches of article 18 or 19 MAR.

As a consequence, Member States would have the possibility to decrease in their national laws the cap on pecuniary sanctions for SMEs for disclosure-related infringements. The proposal does not amend any provisions on sanctions related to other types of infringements.

Relevant circumstances. The Listing Act adds an additional element to the non-limitative list of relevant circumstances the national authorities should, where appropriate, take into account when deciding on sanctions to be applied (article 31(1) MAR), *i.e.*, the duplication of criminal and administrative proceedings and penalties for the same breach.

VII. CROSS MARKET ORDER BOOK SURVEILLANCE MECHANISM

Proposed amendment. To enhance the effectiveness of market supervision, the Listing Acts proposes to introduce a cross market order book surveillance mechanism (CMOBS) (article 25(a) MAR). This will allow the exchange of order book data between competent authorities in a cross-border context and on an ongoing basis. ESMA is tasked with drafting implementing technical standards in this respect.

Focus – MiFIR

In connection with the introduction of the CMOBS mechanism, the proposal amends MiFIR to specify that a competent authority can request order book data on an ongoing basis to a trading venue under its supervision and to empower ESMA to harmonize the format of the template used to store such data.

Participating national authorities. Motivated by concerns of proportionality of use, only competent authorities that supervise markets with high cross-border activity should be obliged to participate in the mechanism. It will be left to the European Commission to determine this level of cross-border dimension in a delegated act.

Scope. CMOBS will at first only concern order book data on shares, bonds and futures, considering the relevance of those financial instruments in terms of both cross-border trading and market manipulation. To make sure that developments in financial markets are taken into account in CMOBS, the European Commission should be empowered to broaden the scope of instruments the order book data of which can be exchanged through that mechanism.

VIII. OTHER AMENDMENTS.

Safe harbor for buy-back programs and stabilization. Article 5 MAR creates a safe harbor for buy-back programs and stabilization actions that comply with the requirement set out in such article. To alleviate the current excessive disclosure burden for issuers with respect to buy-back programs, issuers should report the information only to the national competent authority of the most relevant market in terms of liquidity for their shares and no longer to each competent authority of the market where their shares are listed. In addition, they should be required to disclose to the public only aggregated information, rather than every trade.

Front-running. The definition of inside information with respect to "front running" conducts (article 7(1)(d) MAR) will be amended to ensure that it captures not only persons charged with the execution of orders concerning financial instruments but also other categories of persons that may be aware of a future relevant order. It also aims to ensure that the definition covers the information on orders conveyed by persons other than clients, such as orders known by virtue of management of a proprietary account or a fund.

T&C's of liquidity contracts. The Listing Act intends to amend article 13(12) MAR to remove the requirement for an operator of an SME growth market to approve the terms and conditions of liquidity contracts and replace it with an obligation to only acknowledge in writing to the issuer that it has received such a contract. As the operator of an SME growth market is not a party to the liquidity contract, the requirement to have such contract approved by the operator leads to excessive complexity.

Collaboration platforms. The Listing Act would also add an article 25(b) MAR to allow the creation by ESMA of collaboration platforms, with national competent authorities as well as with public bodies that monitor spot markets, to reinforce the exchange of information in the case of concerns related to market integrity or the good functioning of markets. The proposal also amends article 25 MAR to enable ESMA to initiate the cooperation.

IX. NEXT STEPS.

The Listing Act is currently merely a proposal. As such, the above analysis is subject to possible amendments that may be introduced as part of the legislative process. The European Commission has adopted the proposal, and the European Parliament and the Council of the European Union will now have to deliberate and vote on the text in its current form. The European Commission has also opened a public consultation, which will close at the end of March 2023.

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