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# Stepping up the Fight Against Market Abuse: Challenges in a Complex Financial Marketplace

A focus on disclosure obligations of issuers

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Bruxelles
January 23, 2013

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## Regulation and Directive: what is in

- Proposed Regulation: extensive application to financial instruments (including those admitted to trading, on demand, on MTF); replace and extend MAD 2003/6 (and Level 2 measures)

1. Prohibition of: insider dealing; improperly disclosing inside information; market manipulation
2. Disclosure Requirements (public disclosure of inside info, insiders lists, manager's transactions, ...)
3. ESMA and competent authorities; administrative measures and sanctions

- Proposed Directive on criminal sanctions for insider dealing, unlawful disclosure of inside info and market manipulation (based on 83.2 TFEU; Protocol 21: Ireland in, UK out; 22: DK out)

**EU à la carte!**

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# Directive and regulation: where we are

- Commission proposals (Regulation and Directive) October 20, 2011
- Parliament: ECON report on MAD (October 19, 2012) and on MAR (October 22, 2012);
- Council: General approach on Regulation (December 5, 2012) and on Directive (December 12, 2012);
- Trilogue: January 24, then February

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# MAD 2003/6 Issuers disclosure obligation

Issuer obliged to inform the public as soon as possible of inside information which directly concern them

Possibility to delay such as not to prejudice his legitimate interest, provided that such omission would not be likely to mislead the public (! by definition!?) and he is able to keep confidentiality

Definition or definitions of inside info? “precise” for the market; “precise” for insiders (art. 1 and 2 of level 2 directive 2003/124)

No harmonization in practice (definition of inside info to disclose, moment to delay, no harmonization on rumours) due to the fatal flaw of MAD: (apparent) use of the same notion (inside information) for both.

(Il)Legitimate widespread use of options by MS and interpretations of competent authorities.

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# MAR art. 6

- Critique to MAD 2003/6 by market experts (ESME), academics (Hansen), competent authorities (Consob, CNMV): using the same notion bear the risk of too much market manipulation or too much insider. Flood the market with info. Disincentive to get listed. Legal uncertainty for delay (especially when there also criminal sanctions).
- Commission proposal recognizes, finally, that "inside info can be abused before an issuer is under the obligation to disclose it" (recital 14) and the need of two different definitions of inside information: (artt. 6 and 12): good point but in the wrong way!
- Instead of clarifying the inside info to disclose (and/or timing/delay), it maker the inside info not to abuse even more uncertain adding art. 6.1, e): reasonable investor test without price sensitivity and precision.
- Art. 6.1.e) deleted by Council: ok (not by Parliament which even worsened it: please read it! Can be a sure base of a criminal sanction?)
- Commission recital 14 deleted by Council (but kept by Parliament)

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# MAR Art. 12

- No good news in art. 12: same definition of inside info as in MAD 2003/6
- Commission: (im)possibility of delay left to issuer (but also ex post info to competent authority that issuer was delaying) (12.4); request for delay by issuer if info is of systemic importance, in the public interest to delay and confidentiality is ensured (12.5).
- EP: mixed it up (?). First part 12.4 identical (issuer responsibility to delay); then request for approval by competent authority (!) "according to the criteria of par. 5" (delay possible only for systemic info? Discrimination for SMEs?). Even worse: waiting for the response could be a sanctioned breach! Better never to delay!
- Council (and EP, recital 14g): similar to Commission but adding something obvious (subject to the conditions of 12.3, in case of a protracted process which occur in stages an issuer can delay the disclosure of an inside info related to the process) (but compromise of September 3rd much better: In case of a process which occurs in stages, the inside information relating to this process only has to be made public once the end stage meets the criteria set forth in this Regulation for inside information).
- Spreading news (!): competent authority inform ESMA of the developments! Paradox of systemic information for financial institution: who else to call? (Council, EP recital 25°)

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# MAR and former whereas 29 and 30

- In MAD 2003/6 whereas 29 (Having access to inside information relating to another company and using it in the context of a public takeover bid for the purpose of gaining control of that company or proposing a merger with that company should not in itself be deemed to constitute insider dealing) and 30 (Since the acquisition or disposal of financial instruments necessarily involves a prior decision to acquire or dispose taken by the person who undertakes one or other of these operations, the carrying out of this acquisition or disposal should not be deemed in itself to constitute the use of inside information).
- Commission proposal: cancellation without consultation
- EP: excellent! Put whereas in the Regulation (art. 3, 2a and 2b; and whereas 14a and 14b)
- Council: only whereas 29 (now 14b), confused 7a.3a and 3b.

- Takeover: buy up to 30% threshold no more possible
- TOD: buy up to 5% (new TOD 3%) no more possible?

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# (Un?!)Intended consequences of (existing and) proposed EU rules

- 6.1 (e) risks to paralyze activity, investment and liquidity on the market.
- Frequent reporting of data irrelevant to long-term value creation (Kay Review refers to as 'noise‘).
- Same risks as before: too much manipulation or too much insider. Flood the market with info. Disincentive to get listed. Legal uncertainty for delay.
- Increased risks: now Regulation; same definition in the Directive for criminal sanction. Not all inside info (possible big acquisition) develop in something (if board does not approve). No “private” info possible any more? Effect of Daimler case (ECJ decide in the existing framework (but no explicit mention art. 2, Dir. 124/2003), in a protracted process intermediate step can be inside info (not to be abused or also to be disclosed?). To be an inside info, need “only” (?) of a realistic prospect, not of a high probability. After Daimler, indirect proof that a delay is always misleading
- Improper disclosure of inside info: will it increase divorces?!

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# What to do

Trilogue: don't miss the opportunity to solve problems

- Cancel 6.1(e)
- No "misleading" when delay? "In the case of a protracted process which occurs in stages, intended to bring about or which results in a particular circumstance or a particular event, an issuer may under his own responsibility delay the public disclosure of inside information relating to this process, for the time strictly necessary not to prejudice his legitimate interests and provided that is able to ensure the confidentiality of that information." (new 12.3a)

*Other issuers issues*

- No extension of issuers disclosure obligation (and of TOD) to MTFs (SMEs paradox: price sensitive and not quarterly report?)
- Maintain existing accepted market practices (as EP and Council do)
- Managers transactions: 10.000€ but 4 days and recount from 0 when go over threshold; no ex ante list of closely associated person
- Treatment of rumours?

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